



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND CASE 361 OF 2011

PATRICK WEKESA MACHICHIPLAINTIFF

VERSUS

RUTH NASAMBU WANYONYI.....1ST DEFENDANT

JOHNSON MUNYWELE KITETU.....2ND DEFENDANT

JAMES MUREITHI T/A EVASIJAME AUCTIONEERS..... 3RD DEFENDANT

RULING

Before me are two applications filed by the 1st and 2nd Defendants /applicants. The 2nd Defendant/ 1st applicant has filed a Notice of Motion dated 9/8/2011 brought under Order 45(1), 2(1) Order 40 Rule 7 and Order 51 rule 1 of the Civil Procedure Rules, Section 3A, of the Civil Procedure Act Cap 21, Laws of Kenya and all other enabling provisions of the law, seeking the following orders;-

i. That there be stay of Execution of the Order of the Court granted on the 27th July 2011 and issued on the 28th of July 2011 restrained the defendants, their servants, agent or any person claiming through them from evicting the applicant from the parcel known as Plot No. A. 327 Matopeni, Kayole (suit property) or from otherwise interfering with the applicant's quiet possession of the same, or alienating, transferring, disposing and/or dealing with the suit land in any manner adverse to the proprietary interest of the applicant pending the hearing and determination of this suit.

ii. That this Court be pleased to review the ruling and subsequent orders of the 27th of July, 2011 and issued on the 28th of July 2011.

iii. That this Court does discharge, vary and/or set aside the orders of temporary injunction granted on the 27th July and issued on the 28th of July 2011.

iv. That cost of this application be provided for.

The application is based on the following grounds;

i. That the Court gave orders on the 27th July 2011 by Honourable Justice Mbogholi Msagha restraining the defendants herein from evicting the applicant from the parcel known as PLOT No. 327 MATOPENI, KAYOLE (suit Property) or from otherwise interfering with the applicant's quiet possession of the same, or alienating, transferring, disposing and/or dealing with the suit land in any

manner adverse to the proprietary interest of the applicant pending the hearing and determination of this suit.

ii. That the 1st defendant/applicant herein is aggrieved by the said orders issued on the 27th of July 2011 and now seeks to have the same discharged, varied and/or set aside.

iii. That the 2nd defendant/applicant is aggrieved by the said orders for reasons that the plaintiff has on the basis of the said orders claimed possession of the 2nd defendant/applicant legally acquired property.

iv. That the 2nd defendant was at all material times the legal owner of the plot no. A 327 having acquired the same from the 1st defendant and possessing letters of allotment on the same without any knowledge of the plaintiff's proprietary interest other than that he was a tenant on the said property hence the 2nd defendant claims he was an innocent purchaser for value.

v. That at all material times the plaintiff herein was a tenant to the 2nd defendant in the suit premises but the plaintiff has now through the orders of the Court of the 27th of July 2011 obtained proprietary rights on the premises as a legal owner of the same claiming the same to be a matrimonial property as between himself and the 1st defendant.

vi. In order to obtain the said ruling and orders issued the 28th of April 2011 the plaintiff/respondent misrepresented fact and failed to disclose material facts that were within his knowledge all the while thus is a party undeserving of the orders sought.

vii. That on the 27th of July 2011 when the orders of injunction were confirmed, the matter was not listed for hearing on the said day.

viii. That the said orders were obtained on the grounds that the plaintiff has served the application on the defendants which was a blatant misrepresentation as the 2nd defendant learnt of the interim orders granted on the 22nd of July 2011 from the 3rd defendant, by which time the orders had already been overtaken by events.

ix. That at the time of being granted with the said orders the plaintiff was not in possession of the premises as orders of levying of distress against him had already been issued in another cause being cause Misc. No. 460 of 2011 which Misc Cause, the plaintiff did not bring to the attention of this Court.

x. That at the time of issuing of the orders of the Court, the same had already been overtaken by events as they were issued when the orders of levy of distress had already been executed and sale of the plaintiff's household goods had already taken place on the 23rd of July 2011 while the order was served on the Auctioneers on the 25th of July 2011.

xi. That the plaintiff is now using the said orders to regain access into the said premises yet they are not mandatory orders but restraining orders which orders have already been overtaken by events and indeed there was already another tenant on the premises whom the plaintiff has now on the basis of the said orders evicted from the premises.

xii. That the plaintiff /respondent is such a litigant who is undeserving of the orders granted as is a litigant who came to Court with unclean hands, by way of material non-disclosure and/or by misleading the Court and was only intended at circumventing the court process to regain access into the premises which he had already been evicted from in a legal exercise of right of distress by the 2nd defendant.

xiii. That it is in the interest of justice if the Court does proceed to discharge the order granted on the 27th of July 2011 as the plaintiff is a person undeserving of the orders sought hence continues to make a mockery of this honorable Court.

This application is supported by the supporting affidavit of Johnson Munywela Kiteru dated 9th August 2011 plus a supplementary affidavit sworn by Johnson Munywela Kiteru dated 5/9/2011.

The 2nd application is filed by the 1st defendant/ 2nd applicant. It is the Notice of Motion dated 25/8/11 brought under order 40 Rule 7, Order 51 rule 15 of the Civil Procedure Rules read together with Articles 50(1) and 159(2) (a) and (e) of the Constitution of Kenya, seeking the following orders;

- i. That the ex-parte order dated 27th July, 2011 be set aside
- ii. That the costs of this application be borne by the plaintiff/respondent

The application is based on the following grounds that;

- i. The 1st defendant/applicant was not served as falsely and fraudulently alleged in the affidavit of service by Japheth Okong'o sworn and filed on 27.7.2011.
- ii. This Honourable Court is constitutional obligated to ensure that the right to a fair hearing is meaningfully realized at all times even at the level of case management.

This application is supported by the supporting affidavit of Ruth Nasambu Wanyonyi dated the 25th of August 2011.

The application was opposed by the plaintiff /respondent. He filed a replying affidavit dated 30th August 2011 in response to the 2nd defendant's application and a replying affidavit dated the 30th of September 2011 in response to the 1st defendant's application.

The background to this application is as follows; on the 20th July 2011 the plaintiff/ applicant filed an Originating Summons together with a Notice of Motion dated the 20/7/2011. The matter was heard under certificate of urgency and the plaintiff was granted "a temporary injunction restraining the 1st, 2nd and 3rd defendants their employees, servants, agents or any person claiming through them from evicting the applicant from parcel known as PLOT No. 327 Matopeni Kayole (suit property) or from otherwise interfering with the applicants quiet possession of the same, or alienating, transferring, disposing and/or dealing with the suit land in any manner adverse to the proprietary interest of the plaintiff for 14 days."

This temporary order was granted to the applicant on the 20th July 2011. The matter was fixed for interpartes hearing on the 27th July 2011. On the 27th July 2011 the matter was not listed on the cause list. The matter was placed before Justice Mboghli who noted that it was not on the cause list. Counsel for the applicant addressed the Judge on the 27.7.2011. Counsel told the Court that the application was served, that several events had taken place, the 2nd defendant had placed guards on the premises and they were asking for prayer no. 3 of the application dated the 20/7/11 and also that the order given in the interim on the 20.7.2011 be extended and that some of the goods belonged to a third party.

Justice Mboghli then gave the order that has made the 1st and 2nd defendants' file the 2 applications under consideration. The order given was that;

"There is a return of service. Even if the matter was not listed today the defendants ought to have filed a reply or to appear. The prayers in the motion are now warranted. Accordingly prayers 1, 2 and 3 of the Notice of Motion are now allowed. The Court Bailiff shall ensure compliance but may seek assistance from the O.C. S Kayole Police Station.

The 1st defendant / 1st applicant averred in her affidavit that she was not served with the pleadings herein as deponed in the affidavit of service sworn by Japheth Okong'o dated the 27th of July 2011. That she

works for Runji & Partners Consulting Engineers & Planners Limited and she was on duty on 25.7.2011 but was not served with any document. That on 1.8.2011 she inquired from the guard (the same one who was on duty on 25.7.2011) about the alleged service and he told her there was no such visit by the process-serve at the office.

The 2nd defendant has detailed his case in the grounds already stated in this ruling which I need not repeat. He states that he was not served as alleged by the plaintiff as he does not reside in the plot indicated nor does he stay with his purported wife as they have long separated. That he is a good purchaser for value without notice having conducted his due diligence on the property and identified the vendor being the 1st defendant as the allottee of the property by the City Council of Nairobi. That after the purchase he was issued with an allotment card from the Kayole Matopeni Squatters & Police settlement scheme and have further obtained approval of the Town Planning Development Committee and he is now the bonafide allottee of the said parcel of land. That he is advised by his advocates on record that the plaintiff's suit in its entirety has been overtaken by events and the same ought to be dismissed as the same was instituted while the property had already ceased being matrimonial property. That he is a good purchaser for value of the said property while at all material times he knew the plaintiff to be a tenant on the said parcel of land and not the owner or beneficiary.

The plaintiff /respondent opposed the 2 applications. In brief this is what he depones the orders issued on the 27.7.2011 were not obtained fraudulently and that there was no misrepresentation or use of falsehood as alleged, that the place mentioned in that the 2nd defendant resides as Umoja Plot no. 249 and not 149 is a typographical error and that his wife was served. That the 2nd defendant's advocate did not serve his counsel with his notice of appearance neither did Counsel for the 2nd defendant appear in open Court when the matter was called for inter partes hearing. That he has not been a tenant at the suit premises as the same has been his matrimonial home. That the suit premises does not belong to the 2nd defendant and that the break in orders that were obtained were obtained fraudulently, they broke into his house and carried away his goods whilst he was away. That he is not aware of any proceedings in the Rent Restriction Tribunal. The rest of his affidavit details what he avers is a relationship between the 1st defendant and the 2nd defendant. On the 1st defendant's affidavit the plaintiff's response is that he directed one Mr. Japheth Okongo the Court process server to proceed to the offices of the Runji & Partners where the 1st defendant works and that he is advised by his lawyer that the 1st defendant was properly served and an affidavit of service was filed.

Counsels for the parties made oral submissions in Court. Counsel reiterated what is the affidavits. In addition the 1st defendant's Counsel relied on case of Mobile ***Kitale service Station vs. Mobile Oil Kenya Limited and another HCC No. 255 of 19999(2004klr)*** where Justice Warsame held that "*an interlocutory injunction being an equitable remedy would be taken away (discharged) where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.*"

The applicants are seeking orders of stay of execution of the Court order granted on the 27th July 2011, a review of the ruling and the subsequent orders of 27.7.2011 and issued on the 28.7.2011. They also seek to have the said orders Court discharged, varied and or set aside and also that costs be provided for. I have carefully considered the affidavits filed together with the annexures, the oral submissions made and the case cited. The applicants main contention is that the order granted on the 27.7.2011 was granted exparte and that they were not given a chance to be heard. It is not in dispute that the matter was not listed on the date it was to be heard interpatates on the 27th of July 2012. As correctly submitted by Counsel for the applicants a party has a right as provided under article 50 (1) of the Constitution which states that;

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The applicants were not given a chance to be heard as they were not present on the date the matter was

heard by Justice Mbogholi. They both state that they were not served. The affidavit of service on the service upon the 1st and 2nd defendants states that the he left the bundle of documents with the guard to pass to Ruth Naasambu, this the 1st defendant denies in her affidavit. This process server was not called for cross-examination nor did the plaintiff/respondent file an affidavit sworn by the process server to rebut what the 1st and 2nd defendant averred about his service upon them. The 2nd defendant too denies he was served and states that he does not stay with his wife and has demonstrated that they have a court matter which is pending. Under order 40 rules 7, an order of injunction may be discharged, or varied, or set aside by the Court on application made thereto by any party dissatisfied with such an order. From the affidavits filed by the applicants they have demonstrated that they are dissatisfied with the Court order, they were not heard when the matter was heard by the Judge on a day the matter was not listed, the 1st applicant have raised the issue of ownership that needs to be determined, the 2nd defendant too has raised the issue that he is a bona fide purchaser for value. The applicants need to be heard on these issues. In my view and in the interest of justice bearing in mind the provisions of article 50 of the Constitution it is in order to set aside the order that was granted on the 27th July 2011. I find no need to review the ruling as requested nor issue a stay of execution of the orders. I therefore set aside the order granted on the 27.7.2011. The application dated the 20th July 2011 shall be heard inter-partes. The parties shall take a date for the inter partes hearing of the application within 30 days from the date of this ruling. To preserve the suit premise the status quo shall be maintained as it is now, none of the parties shall do anything that would prejudice or be detrimental to the suit premises, until the Court gives any further orders. Costs shall be in the cause.

Dated, signed and delivered this 18th Day of September 2012.

R. OUGO

JUDGE

In the Presence of:-

..... For the 1st defendant /1st Applicant

..... For the 2nd defendant/2nd Applicant

..... For the 1st plaintiff/Respondent

.....For the 3rd Defendant

..... Court Clerk