



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 89 of 2008

JOHANNA ZOUARI GEISSBULHERPLAINTIFF

VERSUS

VIOLI FEDERIGO

LUIGI FREGULIADEFENDANTS

RULING

1. Before me is the application filed on 18th June, 2012 by the 2nd defendant, which is expressed to be brought under Order 2 rule 15 (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, and seeking a combination of orders.
2. Primarily it seeks to have the orders “subsisting prior to 5th June, 2012” be maintained and that the plaintiff be ordered to vacate the suit property namely plot No. 966 Watamu pending the hearing of the application of 4th June, 2012, which, effectively put her back in possession. The application also seeks to have the plaintiff's advocate Mr. Okuto punished for contempt of court.
3. Before the application could be heard, Mr. Okuto successfully applied to have the 2nd defendant cross-examined on the affidavit in support of the application. The cross-examination took place on 22nd October, 2012. Meanwhile the parties had filed written submissions in respect of the application dated 18th June, 2012.
4. I have now gone through the record of this file, looked at the affidavits filed in respect of the instant application as well as the respective written submissions. I have also perused the application dated 5th June, 2012. Interim orders issued thereto precipitated the instant application.
5. The application of 5th June, 2012 in turn was precipitated by the 2nd defendant's application filed on 10th April, 2012 which was heard exparte on 30th May, 2012. At the time the plaintiff had given evidence and closed her case.
6. It is apparent from the foregoing that the dispute between the plaintiff and the defendants is with respect to the premises described as plot 966 Watamu paradise, which the plaintiff purports to have purchased from the 1st defendant, who thereafter allegedly unlawfully sold it to the 2nd defendant. The 1st defendant for his part asserts that the plaintiff breached the sale agreement and that he was entitled to transfer the same to the 2nd defendant, which he did.

The 1st defendant agrees.

7. Hence the effect of this court's exparte order of 30th May, 2012 was an eviction of the plaintiff,

from the suit property, later ordered stayed by the court, but effectively reversed through the eviction of the 2nd defendant and reinstatement of the plaintiff into the suit property. This has clearly irked the 2nd defendant who has argued that the court's latter orders of 4th June, 2012 misconstrued.

8. The position at the moment is that the plaintiff is in possession of the suit property – the position obtaining at the time of filing suit. Hence in my considered view, dealing with the application dated 18th June, 2012 in isolation may not yield an efficient solution to this conundrum. The court would be loathe to pronounce any further orders that would give rise to more confusion and grief to the parties, besides exposing the court's dignity to ridicule.

9. In the circumstances, and by virtue of the provisions of Section 1A and 1B of the Civil Procedure Act I do direct that an early date be taken for oral hearing in respect of both the application filed on 4th June, 2012 and that dated 18th June, 2012 (in addition to the written submissions, earlier received) so that a consolidated ruling may be given, thereby paving way to pave way for a just determination of the issues therein. Meanwhile, the present status quo will be maintained i.e plaintiff in possession.

10. The Notice of Motion dated 18th June, 2012 carries prayers that do not seem compatible with the provisions of law cited. Let the advocate for the 2nd defendant consider making appropriate amendments in that regard.

Costs in the cause.

Delivered and signed at Malindi this **28th November, 2012** in the presence of Mr. Okuto for the plaintiff, Mr. Shujaa holding brief for Mr. Wambua for the 2nd defendant, 1st defendant absent.

Court clerk – Evans

C. W. Meoli

JUDGE

FURTHER ORDER

By consent application filed on 4th June, 2012 and 18th June, 2012 be heard together on 11th December, 2012 at 9.00am.

C. W. Meoli

JUDGE