



**Guyo v Maisha Bora Limited & 4 others (Environment & Land Case
149 of 2018) [2022] KEELC 3866 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3866 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 149 OF 2018**

**JO OLOLA, J
JULY 28, 2022**

BETWEEN

HAJILA BAJILA GUYO PLAINTIFF

AND

MAISHA BORA LIMITED 1ST DEFENDANT

WESTERN SUNSHINE COMPANY LIMITED 2ND DEFENDANT

LAND REGISTRAR KILIFI COUNTY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

MICHAEL K. KATANA 5TH DEFENDANT

RULING

1. I have before me two applications for determination. By the 1st application dated February 12, 2021 and filed herein on February 17, 2021 Maisha Bora Limited (the 1st Defendant) prays for orders:
 - (iii) That the Ruling and order of October 13, 2020 delivered by the Honourable Court and all consequential orders be set aside;
 - (iv) That there be such orders made as the Court may deem just in the circumstances; and
 - (v) That the costs be in the cause.
2. The application which is supported by an Affidavit sworn by the 1st Defendant's Managing Director Mehboob Hasham Ahmed is premised on the grounds:
 - (i) That the impugned Ruling arose as a consequence of an application dated January 24, 2020 filed by the Plaintiff;



- (ii) That the matter was mentioned on September 17, 2020 for purposes of directions on taking a date for the hearing of the Plaintiff's application dated January 24, 2020;
 - (iii) That the 1st Defendant's Advocates were served with the said application on 27th January, 2020 with an indication that the same would be heard on March 16, 2020;
 - (iv) That on March 16, 2020, the Chief Justice issued a directive suspending Court sessions due to the global outbreak of Covid 19, as such the matter did not proceed;
 - (v) That on September 17, 2020 when the matter came up for mention, the 1st Defendant's Advocates requested for time to file a response in opposition to the application;
 - (vi) That the Court directed the 1st Defendant to make a formal application to explain why a response to the Plaintiff's application had not been filed;
 - (vii) That pursuant to those directions the 1st Defendant filed an application for leave to file a Replying Affidavit on October 13, 2020;
 - (viii) That in any event the (1st) Defendant has a very good defence with strong chances of success in that:-
 - (a) The Plaintiffs have deliberately misled the Court in obtaining the orders given;
 - (b) The 1st Defendant has been in continuous occupation of the suit premises;
 - (c) The 1st Defendant is the registered owner of the suit premises;
 - (d) The Plaintiff's application is res judicata.
 - (ix) That the Court has unfettered discretion to grant the orders sought to meet the ends of justice; and
 - (x) That it is thus in the interest of justice that the present application be allowed.
3. The Plaintiff Hajila Bajila Guyo is opposed to the application. In her Replying Affidavit sworn on April 8, 2021 as filed herein on April 12, 2021, the Plaintiff avers that the 1st Defendant's application is bad in law, misconceived and an abuse of the Court process. The Plaintiff avers this matter was fixed for mention on 17th September, 2020 by the Court and that the 1st Defendant was served with notice thereof on July 6, 2020.
 4. The Plaintiff avers that neither the 1st Defendant nor his Advocates were present when the matter was mentioned virtually and the same was fixed for the hearing of the Plaintiff's application on October 13, 2020. The notice was served upon the 1st Defendant's Advocate who appeared virtually on the October 13, 2020 but failed to convince the Court why they had not filed a response to the application for a period of 10 months.
 5. By the 2nd application dated 19th February 2021, the 1st Defendant prays for a temporary order of injunction to restrain the Plaintiff from alienating, transferring, leasing, selling or in any other manner disposing of the parcels of land known as Chembe/Kibabamshe/397 and 440 registered in the 1st Defendant's name pending the hearing and determination of the suit.
 6. The 2nd application is similarly supported by an affidavit sworn by the 1st Defendant's Managing Director Mehboob Hasham Ahmed and is premised on the grounds:



- (i) That the 1st Defendant is the registered proprietor of the two parcels of land having purchased the same from the 2nd Defendant in the year 2009;
 - (ii) That sometime in the year 2015, the Plaintiff wrote to the 1st Defendant demanding inter alia that the 1st Defendant surrenders the Title Deeds for the two properties for cancellation relying on an earlier consent order issued in JR Misc. Application No. 31 of 2008;
 - (iii) That in July 2017, the 1st Defendant filed ELC Petition No. 9 of 2015 and the Court in its Judgment delivered on April 19, 2018 issued conservatory orders restraining the Land Registrar, Kilifi from cancelling the 1st Defendant's titles;
 - (iv) That on 13th October 2020, the Plaintiffs obtained adverse ex-parte orders to take possession of the suit properties;
 - (v) That the Plaintiff has proceeded to advertise the properties for sale while the case is still on-going and a determination is yet to be made as to the true ownership of the suit properties; and
 - (vi) That unless this Court issues an order of injunction stopping the impending sale, the case shall be rendered nugatory and the 1st Defendant is likely to suffer irreparable loss and damages which may not be adequately compensated by an award of damages.
7. The 1st Defendant's 2nd application is similarly opposed by the Plaintiff. In her Replying Affidavit equally sworn on April 8, 2021 and filed herein on April 12, 2021, the Plaintiff avers that the 2nd application is fatally defective and that the same ought to be dismissed with costs.
8. The Plaintiff avers that the title deed annexed to the 1st Defendant's application was obtained through fraud as the 1st Defendant has never been the proprietor of the suit properties.
9. The Plaintiff avers that the conditions of the Judgment delivered on April 19, 2018 were complied with by the Plaintiff and that the 1st Defendant participated fully in the hearing of the Plaintiff's application dated 13th July, 2018. The Plaintiff denies sanctioning the sale of the properties as alleged or at all.
10. I have carefully perused and considered the two applications as filed by the 1st Defendant as well as the respective responses thereto by the Plaintiff. I have similarly perused and considered the rival submissions and authorities as placed before me by the Learned Advocates representing the parties herein.
11. By the 1st application herein, the 1st Defendant urged the Court to set aside the Ruling and the order issued herein on October 13, 2020. That Ruling arose from an application dated January 24, 2020 wherein the Plaintiff had sought orders inter alia:
- (i) That this Honourable Court do grant leave to the Plaintiff to forthwith enter upon and repossess the suit premises being Chembe/Kibabamshe/397 and 440;
 - (ii) That the Plaintiff be allowed to erect her own gate from the main road and thereafter close the two gates on the right and the left of the plots which gates were erected by a trespasser by the name Giorgio Cefis forthwith;
 - (iii) That the Plaintiff be allowed to evict one Jackson and Titus who were placed on the two plots by Giorgio Cefis forthwith; and
 - (iv) That the costs and expenses occasioned by an incidental to the Plaintiff's entry and repossession of the suit premises be borne by the Plaintiff.



12. The said application was fixed for hearing on March 16, 2020. It was not disputed that the 1st Defendant was served with the application on January 27, 2020. However by the time the application came for hearing, the Honourable the Chief Justice had ordered a closure of the Courts following the outbreak of the Covid – 19 global pandemic.
13. As it turned out, the Courts gradually opened up with many cases proceeding virtually. In this respect and in a bid to restart the hearing of the said application, this Court on its own motion issued notices to the parties herein to appear before it virtually on 17th September, 2020 with a view to give directions on the hearing and disposal of the Plaintiff's said application.
14. A perusal of the record herein reveals that both the Plaintiff and the 1st Defendant were represented by their Advocates during the virtual session. As it turned out, despite service of the Plaintiff's application on January 27, 2020, none of the Defendants had responded to the application. The 1st Defendant then requested for 14 days to respond to the application and the same was fixed for hearing on October 13, 2020.
15. While the recorded proceedings do not reflect any orders made to require the 1st Defendant to seek leave to respond to the Plaintiff's application, I note from the material placed before me that both parties are in concurrence that the 1st Defendant was required by this Court to put in a formal application to explain the delay in response and to formally seek leave to respond.
16. I also note from the record that before the Plaintiff's application came up for hearing on 13th October 2020, the 1st Defendant had indeed filed a formal application on October 6, 2020 seeking the leave of the Court to respond to the Plaintiff's application and attaching thereto a draft Replying Affidavit to the Plaintiff's application.
17. As it turned out the 1st Defendant's application dated October 6, 2020 was not considered before the orders of 13th October, 2020 were issued. As it were, this Court has a wide discretion to set aside its own orders. As was stated in *Patel v EA Cargo Handling Services Limited* (1974) EA 75:

“There are no limits or restrictions on the Judge's discretion except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules. The principle obviously is that unless and until the Court has pronounced Judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power

where that was obtained only by a failure to follow any rule of procedure.”
18. Having looked at the circumstances herein I am persuaded that there is need to set aside the orders issued herein on October 13, 2020 in order to allow the 1st Defendant to prosecute its application dated and filed herein on October 6, 2020. It follows therefore that I find merit in the 1st application by the 1st Defendant and I allow the same.
19. By the 2nd application, the 1st Defendant prays for a temporary order of injunction to restrain the Plaintiff from alienating, transferring, leasing or selling the suit properties. Those prayers were in my view prompted by the fact that as a result of the orders issued on 13th October, 2020, the suit properties had been effectively placed in the hands of the Plaintiff.
20. Having reviewed and set aside the orders of October 13, 2020 as above, I did not consider it appropriate to deal with the merits of the said application and/or to grant any orders thereon.



21. The costs of the two applications shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28TH DAY OF JULY, 2022.

In the presence of:

No appearance for the Applicants

No appearance for the Respondents

Court assistant - Kendi

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J. O. Olola

JUDGE

