



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.2300 OF 2007

HUTU MISTRY.....PLAINTIFF
VERSUS
PORUS PHIROZE MISTRY.....1ST DEFENDANT
MASARI FLATS LTD.....2ND DEFENDANT

R U L I N G

1. On 19th October, 2010, this court delivered a ruling in which it issued *inter alia* an order of interlocutory injunction restraining the 1st defendant Porus Phiroze Mistry by himself, his agents or servants from evicting Hutu Mistry (hereinafter referred to as the plaintiff), from Flat No.4 erected on LR No.209/7124, Nairobi, (hereinafter referred to as the suit property), or otherwise interfering with the plaintiff's possession or trespassing, leasing, mortgaging, selling or transferring the suit property.
2. The defendants have now moved this court under Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking to have the order of interlocutory injunction set aside. The defendants explain that although they were not present at the hearing during the application for the interlocutory injunction, a replying affidavit had been filed, in which the 1st defendant maintained that he is the one who has been in occupation of the suit property since October, 2000. It was therefore pointed out that the court finding that the plaintiff has been in an interrupted possession of the suit property since 1982 was an error. Mr. Goswami who is the advocate for the defendant explains that he did not attend court for the hearing of the application dated 21st November, 2007, because the matter was taken out of the hearing list during the September, 2010 call over.
3. Counsel for the plaintiff on the other hand maintains that the date of the hearing of the application was taken by consent, and that being an application, it did not need confirmation at the call over. It is argued that the defendants are not deserving of the orders sought as they are guilty of inordinate delay.
4. I have considered the application for setting aside the interlocutory order of injunction. It is evident that the 1st defendant did swear a replying affidavit in response to the application dated 21st November, 2007. This replying affidavit was not taken into account when I prepared the ruling delivered on 19th October, 2010. Thus, there is an error on the face of the record. Further, counsel for the defendant has explained why he did not attend court for the hearing of the application dated 21st November, 2007. That sounds plausible because evidence has been exhibited showing that this suit appeared on the call over list, even though what was coming for hearing was an application and not the full hearing of the suit.

5. In the circumstances it is only fair and just that the ruling of 19th October, 2010 and the orders issued be set aside, and that the application dated 21st November, 2007 be heard afresh. The plaintiff/respondent shall have costs of this application. Orders accordingly.

Dated and delivered this 22nd day of June, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Anzalla for the plaintiff
Goswani for the 1st defendant/applicant
B. Kosgei - Court clerk