



**Nahdy v Omar (Environment & Land Case 237 of 2010)
[2022] KEELC 3987 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3987 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 237 OF 2010**

**M SILA, J
JULY 27, 2022**

BETWEEN

NASSOR MOHAMED NAHDY PLAINTIFF

AND

ABDALLA AHMED OMAR DEFENDANT

RULING

1. The application before me is that dated 23 April 2021 filed by the plaintiff. It seeks the following substantive orders :-
 - i. Spent (certification of urgency)
 - ii. This Honourable Court do order the defendant herein to present proper accounts of the rent he has been collecting in respect of the suit property from April, 2009 to the date of this application.
 - iii. In the alternative to prayer (ii) above, this Honourable court do order that the defendant has collected Kenya shillings 72,500,000/= from April 2009 to April 2021.
 - iv. Costs of this application.
2. The application is opposed.
3. To put matters into context this suit was commenced by the applicant through a plaint filed on 12 July 2010. In the plaint, the applicant pleaded that on the Plot No. 30/XMN, there was a house consisting of two parts, one a shop and the other residential. The house got renovated and was turned into a restaurant and let out. It was eventually let out to the respondent. The respondent wanted to put up a new building in place of the old one but the applicant told him that he is not able to afford the venture. The applicant offered to allow him to do it but subject to a written agreement. It was pleaded inter alia that the respondent proceeded to demolish the old house without the consent of the plaintiff, did



drawings for a new building without his permission, and unlawfully constructed a building on the plot without authority around the year 2009. It was said that he built a single storey building comprising of two restaurants, two shops, one office, a waiting room and one rest room. The applicant pleaded that the respondent has let out the rooms to various tenants and keeps receiving rent to his exclusion and he claimed a constructive or implied trust. In the plaint, he inter alia sought orders for the respondent to pay him the benefits, rents, mesne profits accrued and an order that the respondent is a trespasser. The suit was resisted and was heard and determined by Omollo J, who delivered judgment on 21 September 2020.

4. The court found as follows :-
 - i. That the nature of the relationship between the parties was one of tenancy which was a month to month tenancy.
 - ii. The cost of putting up the building was incurred wholly by the respondent.
 - iii. The applicant was entitled to payment of compensation for the demolished house together with outstanding rent arrears. Equally, the respondent having expended money albeit against the authority of the applicant is in equity entitled to recover such monies. The court rounded off the money expended to Kshs. 9,000,000/= . The same to be recovered less the value of the demolished house (to be agreed and or assessed by the court).
5. The court then made the following orders (slightly paraphrased for brevity) :-
 - a. A declaration is made that the defendant holds the building and the benefits accruing there from in rent and mesne profits in trust for the plaintiff subject to recovery of the sum of Kshs. 9 million by the defendant (less outstanding rents and value of the demolished daub and wattle house).
 - b. An order is issued that the plaintiff shall have possession of the said land and premises and/or eviction of the defendant from the suit premises once after the defendant has fully recovered the amounts expended in putting up the structure as stated in (a) above.
 - c. Each party to meet their respective costs of the suit.
6. It will be observed that in the present application, the applicant wants an order for accounts collected from April 2009 and in default the amount of Kshs. 72, 500,000/= be deemed to be what the respondent has collected from April 2009 to April 2021. The supporting affidavit is sworn by Munir Mohamed Sketty, the applicant, who avers that he has established from the tenants that the rent received is as follows :-
 - a. Tahmeed booking office – Kshs. 150,000/= per month.
 - b. Tahmeed luggage store – Kshs. 50,000/= per month.
 - c. The hotel/restaurant and office – Kshs. 150,000/= per month.
 - d. The store and shop – Kshs. 150,000/= per month.
7. He avers that he wrote a letter to counsel for the respondent dated 8 September 2020 asking for these monies but the respondent has submitted no accounts. He has annexed the said letter.
8. The respondent swore an affidavit opposing the motion. He has averred that in the suit, the applicant did not pray for an account, or for examination or adjustment of accounts, or appointment of a commissioner to examine the use of the new structure. It is also contended that nowhere in the



judgment was there made an order for accounts. It is argued that taking of accounts is a remedy that must be expressly prayed for and granted. It is averred that the applicant has not undertaken a valuation of the demolished daub and wattle house and that the court will need to give directions as he does not know how to value a demolished house. He has denied that he collects the amounts stated by the applicant nor can a figure of Kshs. 150,000/= be attached to the hotel which he built. He stated that he occupies almost the entire hotel building while one part is not in use. He states that he stores building materials like timber and wappers in the hope that if the dispute is resolved one way or the other he can continue with construction of the building. He stated that the only tenant he has pays, a fraction of the amount stated by Mr. Sketty, and he has undertaken to give full discovery if the court finds that an account was decreed in the judgment.

9. I have considered the application alongside the submissions made by counsel.
10. What this calls for is really an interpretation of the judgment. I did not make the judgment, and since Omollo J is no longer in the station, I will do my best to interpret what I see. I have already set out the orders in the judgment above. Under (a) there was a declaration that the respondent holds the building and the benefits accruing therefrom in rent and mesne profits in trust for the plaintiff. My interpretation is that all rent and any mesne profits that the respondent collects is held in trust for the applicant. That to me is a plain interpretation of order (a). It is only that the respondent is entitled to deduct the sum of Kshs. 9,000,000/= from this amount less the value of the demolished daub and wattle house. Order (b) gave the applicant the right of possession but after the respondent has fully recovered his Kshs. 9 million above.
11. To me it is as simple as that. Although there was no specific order for accounts, there is no way you can calculate whether the respondent has recovered the amount of Kshs. 9 million unless you take accounts. I do not therefore agree with the submissions of Mr. S. M. Kimani, learned counsel for the respondent, that there was no decree for taking of accounts. Mr. Kimani referred me to Order 28 Rule 9 and 10, as what may be applicable in the event that the decree is for accounts . Order 28 relates to commissions and references. Mr. Aboubakar, learned counsel for the applicant, on his part, referred me to Order 20 Rule 1, which relates to an order for accounts where there was a prayer in the plaint. Order 20 in my view relates to taking accounts but before judgment and does not apply for our circumstances.
12. My view of the matter is that what is applicable is Order 21 which relates to judgments and decrees.
13. Specifically Order 21 Rules 13 applies. It states as follows :-
 13. Decree for possession and mesne profits [Order 21, rule 13.]
 - (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
 - a. for the possession of the property;
 - b. for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - c. directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - i. the delivery of possession to the decree-holder;
 - ii. the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or



iii. the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under subrule (1)(b) or (1)(c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

14. The decree herein was for both possession of property and for rents and mesne profits. It falls squarely under Order 21 Rule 13 above. The court did pass judgment for possession of the property and also for the rent and mesne profits accrued. What the court did not do was to make specific the amounts. But nothing bars the court from making an order for inquiry subsequently as noted in Order 21 Rule 17 which is drawn as follows :-

17. Special directions as to accounts [Order 21, rule 17.]

The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

15. It can be seen from the above that the order on accounts can be made in the decree or by any subsequent order. Mr. Kimani argued that what we have is a final and not a preliminary decree and that Order 21 Rule 13 cannot apply. I do not agree. It is not a must that the court cites that its judgment is a preliminary judgment and that a final decree will be made after accounts. This can be inferred and that is why under Rule 17, accounts can either be directed in the decree or by any subsequent order.

16. Even if I am wrong in my analysis above, at the end of the day, what you would want is to give full effect to the judgment without giving undue regard to technicalities of procedure. There is judgment for rent and mesne profits. There is no other way of finding out what the rent and mesne profits are without taking accounts.

17. Mr. Kimani also raised issue that the matter is subject to an appeal. I have not been shown any appeal that has been filed save for the notice of appeal. Most importantly, I have not been shown any orders staying proceedings or execution, pending hearing of the intended appeal. I find that this application is properly before court.

18. I find that the applicant is entitled to accounts for the rent and mesne profits from April 2009. The accounts can either be presented by the respondent for scrutiny and/or inquiry can be made. In our instance, the respondent has offered no accounts at all. He is the one who is privy to the exact figures but he has chosen to be cagey with the same. We can as well assume the figures presented by the applicant as being a reflection of what is being received by the respondent. The other alternative is to direct an inquiry. But I really do not see why the respondent should put the respondent through the process of inquiry when he has not even presented any particulars of the tenants or of the rent received in the first instance.

19. Having the above in mind, I direct as follows :-

- i. The respondent has 30 days to present full accounts of the rents and mesne profits of the suit premises from April 2009 to date.
- ii. If the applicant has any dispute on the same, the applicant is at liberty to apply for an inquiry.



- iii. If the respondent does not present any accounts at all within the 30 days given as directed in (i) above, the applicant's quantification of Kshs. 72, 500,000/= as the rent collected up to April 2021 be deemed as the amount of rents and mesne profits so received up to that period, and thereafter the rent received be deemed to be Kshs. 500,000/= per month.
- iv. The amounts after settlement in (i) and (ii) above or if assumed under (iii) above be deemed to be part of the judgment and decree of the court and may be executed.

20. The only issue left is costs. The applicant will have the costs of this application.

DATED AND DELIVERED THIS 27 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.

