



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 2012 OF 1999

SIMON KIMONDO
MUBEA.....PLAINTIFF

VERSUS

RITA S.
WAUDO.....DEFENDANT

RULING

Coram: Mwera J.

In person for Plaintiff

Onindo for Defendant

Court clerk Njoroge

The defendant moved this court on 14.6.11 under Order 2 rule 15 (1) (d), Order 45 (1) [?] of Civil Procedure Rules, and sections 3A, 80 of Civil Procedure Act:

- i) that the plaint herein be struck out;
- ii) that the suit be dismissed and judgement entered for her;
- iii) that orders of 26.1.10 directing formal proof herein be reviewed and set aside along with all consequential orders;

- iv) that the current formal proof proceedings be reviewed and set aside; and
- v) that the order of 24.1.11 setting down the suit for hearing on 28.3.11 be reviewed and set aside.

The 3 grounds on which the above prayers were based were to the effect that the property title LR 209/13539/20 claimed by the plaintiff has been revoked. So continuing with the formal proof of the claim is an abuse of the court process. Accordingly, if those proceedings resume on 28/3/11, all will be an exercise in futility.

The defendant swore the supporting affidavit in that she was currently in occupation of House No. 58/3, Gura Groove, Joseph Kangethe Road, Nairobi. By that occupation, the defendant has been a tenant of the City Council of Nairobi since 1973, paying rents up to January 2011. She also pays other utility bills. The plaintiff brought this suit claiming to be the registered owner of land parcel LR No. 209/13539/20 on which the said house stands. The suit prays for orders that the defendant be ejected from the premises, she pays mesne profits together with costs and interest. That formal proof has commenced and the plaintiff has tendered evidence including documents and a lease dated 16.4.99 over the subject property. But that title has since been revoked by the government under the Government Lands Act in the special issue of the Kenya gazette No. 124 of 26.11.10 (ann. RSW4). Despite having that knowledge the plaintiff nonetheless insisted that the hearing of the suit do resume on 28.3.11. That should be futile in the circumstances of the revocation and therefore an abuse of the process of court. That indeed her lawyers had sought confirmation from the Registrar of Titles (ann. RS W5), that the title to the suit property had been cancelled.

In the replying affidavit the plaintiff maintained that he was the registered proprietor of the plot on which the defendant resides, having acquired it from the City Council of Nairobi by the lease of 16.04.99. On procuring the lease, the plaintiff's lawyers notified the defendant on 13.9.99 that she should pay rent to him or vacate the house. She did neither. The defendant cannot claim to be a tenant of City Hall. That the alleged revocation of the title of the suit property was in fact stayed by this court on 23.03.11 in JR ELC MISC APP. No. 30/2011. A copy in that cause was sent to the defendant's advocates on 30.03.11. That the plaintiff had sought orders of *certiorari* to quash the registrar's decision to revoke the title and *mandamus* to issue a fresh gazette notice to revoke the revoking Gazette Notice No. 15580 of 26.11.10. There were other prayers not relevant here but suffice it to add that the leave to enable the plaintiff to pursue the judicial review orders (above), was ordered to operate as a stay. Accordingly, the applicant is not justified to ask this court to strike out this suit. Her defence was struck out and the consequent appeal was dismissed. The applicant's moves including this application, are only meant to frustrate the plaintiff/respondent in pursuit of his rights to the suit property.

Both sides appeared to repeat, if not expand, on what had been stated in their respective affidavits, when they were asked to submit, except the defendant's citing authorities. The court had sight of all these.

In this court's view a review to set aside orders of Rawal J to set down the suit for formal proof and this court starting on the same will hardly be of benefit to the applicant. The formal proof order followed the striking out of the defence and the unsuccessful appeal that was provoked. So if orders to set down the cause for formal proof and ordering the resumed proceedings in that regard are reviewed, of what benefit will that be to the defendant? This court sees none.

What is clear is that the title on which the house the defendant occupies, which title is claimed by the plaintiff, was at one time revoked by the Registrar of Titles. Then in subsequent judicial proceedings the plaintiff got orders to stay the revocation for the time being, until that cause is finally determined. That cause is still pending. What this court considers prudent to do now is to put these formal proof proceedings on hold until J.R. ELC MISC APP. No. 30/2011 is determined. The result thereof will clear the way as to whether the plaintiff's lease is valid or the property has reverted to the City Council (read, the Government). Only then will it make sense as to expending of time and money to determine finally, this cause. This court could as well proceed with formal proof but in the event that the judicial review application is dismissed, the decision of the court will have been in vain. However, if it succeeds then the plaintiff will have enjoyed double benefit. But be that as it may. It is not useful to delve into conjecture of

the outcome of the cause pending for judicial review. May all be patient to await its outcome and then proceed to the final end of these proceedings.

Orders accordingly.

Costs will be in the cause.

Delivered on 7.7.11.

J. W. MWERA

JUDGE