REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Application 104 of 1999

GIDEON NASSIM KITI ……………………………….. PLAINTIFF

VERSUS

AISHA ALI MOHAMED ………………………..….. 1ST DEFENDANT

PAULINE KWINGA ……………………….……… .. 2ND DEFENDANT

AND

FAIZA OSCAR MEULI ………………... … 1ST INTERESTED PARTY

OMAR MOHAMUD MOHAMED FARAH .. 2ND INTERESTED PARTY

RULING

The plaintiff came before the Court by Notice of Motion dated 17th December, 2008 and brought under Order XXI, rules 18 and 22 of the Civil Procedure Rules, and ss. 3A and 94 of the Civil Procedure Act.

The substantive prayer of the applicant was that the eviction order and/or warrant of execution given on 4th December, 2008 be vacated and/or set aside. This prayer was founded on the general grounds that:

(i) more than one year has elapsed since Judgment and/or decree was given on 25th May, 2007;

(ii) taxation of costs has not been effected and no requisite leave to proceed before taxation has been sought or granted;

(iii) it is mandatory that a notice to show cause is given – on why execution should not issue;

(iv) failure to give notice to show cause will subject the applicant to irreparable loss and damage;

(v) the decree as drawn is inconsistent with the Judgment of the Court as delivered on 25th May, 2007;

(vi) the defendant intends to demolish the plaintiff's matrimonial home and other substantially valuable structures, in furtherance of effecting eviction and securing vacant possession.

The evidence is in the supporting affidavit of the plaintiff, ***Gideon Nassim Kiti***. The deponent states that the judgment in the cause was delivered on ***25th May, 2007***, and thereafter he filed a Notice of Appeal. Since the deponent's advocates then advised him to consider an amicable settlement, the negotiation process was initiated with the defendant's advocates; and in the meantime, the deponent filed an application for stay of execution: and this application, to-date, has yet to be heard and determined. The deponent avers that it is now information on the Court record, that negotiations towards a settlement are in progress.

The deponent apprehends that the defendants have lost interest in the search for a settlement and would rather extract their gains outside the framework of regular procedure.

The deponent avers that he has been in possession of the disputed land since 1981 and he has constructed thereon a permanent matrimonial home and other structures of substantial value – in excess of Kshs.2.2. million.

The applicant depones that the defendant has recently shown certain gestures which suggest she is no longer interested in arriving at a settlement with the applicant: with her agents, the defendant has been surveying the disputed land, on such occasions being accompanied by police officers from Kijipwa Police Station, as well as the Court bailiff; this, the applicant suspects, is a prelude to engaging in eviction and demolition. The deponent depones that, on 9th December, 2008 at 9.30 am, police officers from Kijipwa Police Station aforementioned drove around the disputed premises, in convoy with a bulldozer, and threatened to commence demolition.

The deponent avers that all his eleven children, most of them being minors of school-going age, were born and brought up on the disputed land, and they are liable to be adversely disrupted if the defendant carries out her threat.

The 2nd interested party swore a replying affidavit dated 17th April, 2009. He believes to be true the information which he has received from his advocates, "that the plaintiff's application is frivolous, vexatious, scandalous and bad in law" and is only "aimed at obtaining orders through the back door". The deponent states that he has "never engaged the police in any manner in this matter" and he has never "taken any bulldozers to demolish and/or evict the plaintiff from [his] plot"; the deponent is still awaiting "the plaintiff's appeal to be heard and determined" before he takes further action. The deponent depones that he is in support of “any efforts that the 1st defendant undertakes to evict the plaintiff from the suit premises”. The deponent avers that he believes the account given by his advocates, that “the plaintiff stands to suffer no loss if this application is dismissed, as the Court has already held that he has no [basis] to be on the suit plot and his continuous stay is not only hurting [the deponent] … but the plaintiff is continuing to destroy the suit plot, thus diminishing its resale value”.

This matter was canvassed before me on 5th November, 2009, with the plaintiff/applicant represented by learned counsel, ***Mr. Kinyanjui*** and ***Mr. Gikandi***; 1st defendant represented by ***Mr. Wameyo***; and 2nd defendant represented by ***Mr. Lijoodi***.

Learned counsel ***Mr. Gikandi*** attached much significance to the fact that after the plaintiff filed the claim, none of the defendants and none of the interested parties filed a counterclaim: and the case was heard, and the plaintiff’s claim dismissed. But counsel urged that the matter had been disposed of without examining any question regarding ***ownership*** of the suit property. Counsel submitted that just as judgment did not favour the plaintiff or the interested parties, there was no basis for a ***decree in favour of the defendants***; and since the defendant had no counterclaim, counsel submitted, it was “not tenable in point of law for the defendant to now purport to draw a decree and have the decree certified by the Court”; and consequently, that the defendant should then use the decree to “dispossess the plaintiff”. Counsel urged that the record showed two contradictory decrees, and that no decree to support a warrant of eviction, and which showed that the suit property belonged to the defendants or the interested parties, had been drawn. ***Mr. Gikandi*** urged that there was on the record only an irregular decree, and that “a person with no decree in its favour [was] trying to evict another party”.

Counsel also contended that what was being enforced as a decree had not been executed 12 months since the judgment, and that, by Order XXI, rule 18 of the Civil Procedure Rules, notice had to be served, to show cause, upon the judgment-debtor.

Learned counsel ***Mr. Wameyo*** related the plaintiff’s application to the plaintiff’s Originating Summons suit, Misc. Application No. 44 of 1999 (O.S.) and urged that the instant application lacked merits.

In the said suit, the plaintiff had sought a vesting order in respect of Plot Nos. MN/III/567, 568 and 569 located at Kikambala in Kilifi District; these plots were sub-divisions of plot L.R. No. 284/III/MN. The basis of the claim was that the plaintiff had been in physical possession of the claimed plots since 1981 and that he has established on those plots a permanent home. The plaintiff was also relying on the outcomes of litigation over the years between himself and parties to the Originating Summons suit – outcomes which had not at any stage, conferred the proprietary rights upon him. On 25th May, 2007***Mr. Justice Maraga*** gave judgment, in which the following passage occurs:

> ***"No judgment has been given or order made in this case in favour of the plaintiff requiring the title to the suit pieces of land to be conferred upon or invested in him. The plaintiff is also not claiming any relief from the estate of any deceased person or under any trust. So section 48 of the Trustees Act and Order 36, rules 1 and 5A under which this matter is brought are totally inapplicable. [Counsel said] he was under instructions to proceed with the matter as it stood and actually prosecuted it as though it was a claim for title under adverse possession. From the evidence on record it is clear to me that even if this was any such claim the same would not have succeeded. The plaintiff did not prove that he has been in adverse possession for 12 years and over. Before 1995 all the suit pieces of land belonged to the defendant and she had title deeds to them. In 1995 she legally transferred Plot Nos. 2060 and 2061 to the second interested party and retained the others. The plaintiff has no legal interest in any of them and he should stop interfering with the defendant's and second interested party's quiet possession of them.***
>
> ***"For these reasons I find no merit in the Originating Summons and I therefore dismiss it with costs to the defendant and the second interested party".***

Mr. Wameyo for 1st defendant submitted that the court's judgment aforesaid had been followed by an extracted decree issued by the Deputy Registrar of the High Court, and dated 25th June, 2007 and the same stated as follows:

> ***"THAT this Originating Summons be and is hereby dismissed with costs to the defendant and the second interested party.***
>
> ***"THAT the plaintiff has no legal interest in any of the suit premises.***
>
> ***"THAT the plaintiff do forthwith stop interfering with the defendant's and 2nd interested party's quiet possession of the suit premises".***

Learned counsel submitted that a judgment so clear on its terms and on the terms of the issued decree, could not be challenged except on appeal; but in the present application, it was urged, what was being sought "would amount to[a] setting aside of the orders of this Court".

Learned counsel noted that the Court had been moved by ***Notice of Motion dated 5th July, 2007 to effect eviction orders against the plaintiff*** – and this was within the same year that judgment had been given as required by Order XXI, rule 18 of the Civil Procedure rules. Counsel submitted that the Court's judgment and decree could not have been made in vain; and hence it should be concluded that the plaintiff had moved the Court purely with the object of frustrating the process of execution of the Court's decree, and that the plaintiff was not coming to Court with clean hands.

Counsel urged that the application lacked ***bona fides***, in particular, as the plaintiff had filed a ***notice of appeal*** as well as an ***application for stay of execution*** pending the hearing of the appeal – but neither has been prosecuted. The application, in these circumstances, counsel urged, was an abuse of Court process.

Learned counsel, ***Mr. Lijoodi*** for 2nd defendant adopted ***Mr. Wameyo's*** submissions, and urged that the decree in Misc. Application No. 44 of 1999 (O.S.) was for execution – and that left the applicant herein with no rights to be enforced outside the framework of an appeal.

Learned counsel ***Mr. Gikandi***, for the applicant, placed the construction on the Court's decree in Misc. Application No. 44 of 1999 (O.S.) that: "the Court hears evidence and says the plaintiff is not the owner, but this cannot mean the defendant is the owner – because the defendant had no counterclaim; the Judge never awarded judgment in favour of the defendant, but the defendant is stealing a judgment".

In ***Misc. Application No. 44 of 1999 (O.S.)*** which was a case brought by the applicant herein, not only did the finding turn against the applicant, but he was ordered to pay costs to the defendant and the 2nd interested party. The Court in that case declared the plaintiff to be devoid of any legal interest in the suit premises; and the Court ordered the plaintiff to "forthwith stop interfering with the defendant's and the 2nd interested party's quiet possession of the suit premises". The Court does not make orders in vain; and the said orders, in my opinion, settled ***one point***: the applicant herein had no legal interest of any sort in the suit premises; he had no title to the same; he could not claim the same under any trust concept or under adverse possession; and superior rights to the suit premises inhered in the defendant and 2nd interested party.

Such are final determinations which bear clear practical meaning – and the Court is not to be expected to engage in an abstract scenario of dispute settlement. The applicant's options were thereafter reduced to one, ***lodging an appeal***. That remains the applicant's only recourse – if it is still open.

The Court's perception of the standing of the litigants after hearing Misc. Application No. 44 of 1999 (O.S.), and the question whether the applicant still had any rights of ownership in the suit parcels of land, are substantive questions of law and of judicial opinion, in respect of which any contest must be by way of ***appeal***.

The application by Notice of Motion of 17th December, 2008 thus fails, and its costs to the respondents shall be borne by the applicant.

Orders accordingly.

DATED and ***DELIVERED*** at ***MOMBASA*** this 17th day of December, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ibrahim

For Plaintiff/Applicant: Mr. Gikandi, Mr. Kinyanjui

For 1st Defendant/Respondent: Mr. Wameyo

For 2nd Defendant/Respondent: Mr. Lijoodi