REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Case 128 of 2004

SILAS OMUFWOKO OKUBASU …….…… PLAINTIFF

-VERSUS-

JOSEPH ALUOCH AGENGA ……..……. DEFENDANT

R U L I N G

Coram:

J. W. Mwera J.

Nyawiri for the Plaintiff/Respondent

Otete for Defendant/Applicant

Raymond CC.

The defendant herein Joseph Agenga filed a notice of motion dated 4.12.2007 seeking orders under Ss. 3A, 7 CPA and O44 r. 1 CPR. When the application came up for hearing Mr. Otete argued only three prayers therein namely:

1. That there be a stay of execution.

2. That this court do review its order of 18/7/2007 and the consequential orders thereto and the same be set aside and;

3. That the applicant be put back into the property in dispute as was the case before 1.12.2007, i.e KSU/MUN/BLOCK 4/342.

The grounds on which this motion was premised included one to the effect that the applicant's advocate failed to appear in court on 6.7.2007 because no hearing notice was served on him. This court being minded to deal with each aspect of the application as was argued, now reverts to the respondent's response to this matter of non – appearance on 6/7/2007.

Mr. Nyawiri was before the court on the said 6.7.2007. He said that before the court gave the disputed orders he satisfied it that the cause had been listed on that day and a hearing notice had been served on Ms. C. B. G. Ouma, Advocates for the applicant. They did not appear to oppose the application

dated 18/7/2006 which was coming for hearing and the orders under review were granted.

On perusal of the court file it is minuted that on 21/6/2007 the plaintiff's application dated 18/7/2006 was fixed for hearing on 6.7.2007. An affidavit of service sworn on 6.7.2007 carried an annexture – a hearing notice to the effect that the application dated 18/7/2006 was indeed fixed for hearing on 6.7.2007. The service of this notice was said to have been effected on 21.6.2007, although Ms. C.B.G. Ouma Advocates' receipt stamp of the same, shows a date of 20.6.2007. No matter that the recipient appended a wrong date of receiving the hearing notice. It remains valid that in fact the applicant's lawyers, were notified of the proceedings of 6.7.2007. They did not show up and one can safely say that due orders were given to the plaintiff and there was no defect in that. It was not correct to say that the applicant's lawyers were not served.

Mr. Otete advanced another point that 6.7.2007 was a Friday, a day as per practice in this registry, reserved for non – contested applications. True, that is the practice at this registry. However the application that came for hearing on that Friday was not opposed and it went through as unopposed. Indeed had Mr. Otete answered the hearing notice by coming to court to inform it that the defendant/applicant was desirous to oppose the application that Mr. Nyawiri had brought, it is not in doubt that Mr. Otete would have had his day. But that was not the case.

The court was also told that the "**application of July 15 2006/July 18 2006"** was the subject of the plaintiff/respondent's application dated 1.9.2004. Perhaps it will help to clarify about the so called "**application of July 15, 2006/July 18, 2006**." There was no such application before the court on 6.7.2007 even as the order extracted and attached to the applicant's certificate of urgency bore such dates. They were in error, because that order related to the proceedings based only on the respondent's application dated 18/7/2006. That other date ought not to have been added.

The court heard Mr. Otete to be saying that following the plaintiff's application dated 1.9.2004 Warsame J, delivered a ruling on 13.5.2005 dismissing it and pronouncing that:

"**--- therefore to give the plaintiff a proprietary rights (sic) in a case where the process is disputed would be an illegality."**

The court was thus asked to find that if at the time that application was argued, there was reluctance to give the plaintiff any rights over the property, then he should not have gotten the orders of 6.7.2007 which in essence gave him the right to occupy the suit premises and in effect get all the prayers in the plaint at an interlocutory stage. For that reason the prayers sought by the defendant/applicant ought to issue because of non – disclosure of the effect of the ruling of 13.5.2005 and therefore the applicant he should have the suit heard on its merits before final determination.

On his part Mr. Nyawiri responded that the ruling of 13.5.2005 followed arguments on the respondent's application dated 1.9.2004. The main prayer in that application brought under Ss. 3A, 63 CPA, O. 39 rr. 1,2 CPR was:

"**2. That the Honourable Court be pleased to order the defendant to grant vacant possession of the property known as Kisumu Municipality/Block 4/342 ----- to the plaintiff."**

That indeed, that prayer was refused but it did not mean that the plaintiff was precluded from filing any other interlocutory applications in the suit. Accordingly he filed the application dated 18/7/2006 under O.6 r. 13 (1) CPR and S. 3A CPA whose main prayer was:

"**. That the Honourable Court be pleased to strike out the defendant's defence and judgment be entered for the plaintiff as prayed in the plaint."**

In this court's view the plaintiff was not precluded from filing the latter application which was heard on 6.7.2007, even as his application of 1.9.2004 had been dismissed. The two applications were brought under different provisions of law seeking different orders even as the end effect is the same – to get into

the premises. With that, this court is not inclined to accept that non – disclosure of the ruling of 13.5.2005 mattered much.

In the nature of the ruling of 6.7.2007, one can say that at an interlocutory stage a suit is brought to an end. That is the effect of the law, not the discretion of the court. The court would rather hear parties in any dispute and render a verdict – any verdict for that matter. Again it is repeated: had the applicant who was served appeared on 6/7/2007, probably the final orders disposing of the suit herein could not have issued, incase his opposition was up held.

Mr. Otete drew the court's attention to a need for a decree being – drawn and an eviction order issued and served. Yes, where eviction orders are sought from the court usually, a notice to show cause precedes the throwing out of the occupant. It is not clear whether that was the position in this suit. However, in its circumstances this court is not minded to grant the orders sought.

The application in question is dismissed with costs.

Orders accordingly. Delivered on 14.4.2008.

J. W. MWERA

JUDGE

JWM/hao