REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 620 of 2005

SHERATON APARTMENTS LIMITED…….....1ST PLAINTIFF

ELDAMA RAVINE VIEW POINT ESTATES LTD….....2ND PLAINTIFF

IMPREX WHOLESALERS LIMITED…….....……3RD PLAINTIFF

HALAI DEVELOPERS LIMITED…….....……...4TH PLAINTIFF

MARY JACINTA NJERI…….....……..5TH PLAINTIFF

VERSUS

MIRIAM WANJIRU ……...……..1ST DEFENDANT

CECILIA WAHU……...……2ND DEFENDANT

EVANS ENEKEA……...……3RD DEFENDANT

JOSEPH MUEMA……...4TH DEFENDANT

VIRGINIA NJERI……..……...5TH DEFENDANT

RULING

The application dated and filed in this Court on 24th October 2005 seeks three main orders from this Court; namely an order of temporary stay of the orders made by this same Court on 20th and issued on 21st June 2005; a review of this Court order made on 20th and issued on 21st June 2005 and that the defendants be granted unconditional leave to appear and oppose the plaintiff's application dated 23rd May 2005.

The application was based on the grounds specified on the body thereof; namely that the defendants were not aware of the pendency of the Plaintiffs application and could not therefore attend Court on the hearing dates; that the application for service by advertisement was made in bad faith as the plaintiffs were aware that the defendants being poor people living in a slum area, were most unlikely to have access to a newspaper and would thus never get to see the advertisement; that the defendants never saw the advertisement and therefore they were not served as is required under Provisions of ***Order V*** and that the defendants will be subjected to untold suffering if these orders are not issued as they are under a constant threat of eviction from their homes unless the orders are set aside and the defendants given a hearing and

that there is sufficient cause for this application for review to be allowed.

The 5th defendant ***Virginia Njeri*** swore an affidavit to support this application and said she had authority of the 2nd defendant to swear the same.

According to her she is aware of the matters in issue in the application and that the 1st defendant ***Miriam Wanjiru*** passed away in the year 2003.

That the 4th defendant was not known to her and does not know if such person exists.

She states that she has lived in the area which she calls a settlement since 1992 and that the 2nd defendant has lived there since 1964.

That in her belief, the land she has settled on belongs to the Government.

That on the midnight of 23rd September 2005 she saw City Council *askaris* accompanied by Administration Police Officers come to the land to demolish houses.

That by the time the City Council bulldozer broke down it had demolished about four hundred (400) homes in the settlement.

That later she learned that the settlement had been subdivided into several plots and alienated to private individuals as early as 1981.

That she had not been served with the application subject to this ruling otherwise she would not have sat back for these adverse orders to be made in her absence.

That the area has many residents and that the defendants do not represent their interest.

The 1st plaintiff through its General Manager – one ***Edward Mutsami*** filed a replying affidavit to the application.

He stated that he is well conversant with facts of the case. That the application is on the whole misconceived, totally defective and cannot lie.

That the deponent to the supporting affidavit has no authority to make this application on behalf of the three (3) defendants.

That the applicant has no *locus standi* to make the application in respect of the suit property when she has no proprietary interest therein.

According to the deponent the suit property belongs to the plaintiffs over which they have been issued with certificates of title and that the 2nd and 5th defendants are trespassers thereon.

That the plaintiffs filed this case when the defendants resisted all attempts to get them and other trespassers out of the land.

That notice of the suit/application was served by substituted service with leave of the Court and was heard on merit and granted by ***Honourable Justice Ransley.***

That the order has not been challenged on appeal and that it still stands – hence the present application is misplaced and bad in law.

According to the deponent if the applicants are dissatisfied by the order of 3rd June 2005 the best way out

is for them to appeal against it.

That the defendants admit the land they were staying on is not theirs, hence they were trespassers, that they had received numerous notices from the plaintiffs to move out of the suit premises and that their claim of lack of notice was not genuine but an attempt to solicit the Court's sympathy over a cause that they have no claim over.

The deponent does not believe the 1st defendant is dead and that the 5th defendant has no *locus standi* to argue for the said 1st defendant unless she is her legal representative; and that no factual or legal basis has been laid to warrant any orders for review and neither are legal requirements necessary to warrant a review of the Court's order being fulfilled.

The matter was heard in Court on 27th June 2007 when counsel for the parties submitted before me on this application.

Mr. Khayega presented the application for the applicant while ***Mr. Wamwayi*** opposed it for the respondent.

Khayega urged that an order for review can be granted for sufficient cause being shown under ***Order XLIV*** of the Civil Procedure Rules and referred the Court to the grounds on the face of the application and the supporting affidavit.

That the defendants were not served with the application personally hence were not able to attend the Court to oppose it.

That though there was service by substituted service there was no record that there was a Court Order for this substituted service or formal application for this order.

That the defendants are slum dwellers and service by substituted method is bad in that these defendants never came to know of the case dated 23rd May 2005, and this is why they were only woken-up by City Council *askaris* demolishing their houses on the midnight of 23rd September 2005. On the strength of the Court order made in the applicants absence.

Counsel said sufficient cause had been made out, though orders granted on interlocutory basis they were converted into final orders which means the applicants may never be heard as they have never been served with the suit itself.

He prayed that orders be made in terms of the application dated 24th October 2005.

Mr. Wamwayi opposed the application and said there are no provisions for an application for temporary stay and that no sufficient reason has been shown for issue of an order for review.

That there is no application to challenge the order of 3rd June 2005 and that there can be no complaint about that order because an application was made for it.

The complaint that the defendants do not read newspapers was not good reason for review.

That the 5th defendant had no authority to swear the affidavit on behalf of the other defendants.

That the plaintiffs had title to the suit land and that the 5th defendant has not shown any challenge to this title and there is no evidence of any illegal acquisition of such title.

He prayed that the application be dismissed.

I have heard these submissions and have this to say. First, though ***Order V Rule 17*** of the Civil Procedure Rules provides for mode of application and service by substituted-service; I only see ***Justice Ransley's*** order for this mode of service dated 3rd June 2005 but I see no application for it.

In fact before this mode of service is resorted to, the party applying for it must show the Court that service cannot be effected personally or through the ordinary means provided for under the rules.

If I am not wrong, I have always believed substituted service is resorted to if the party to be served cannot be so served in accordance with any of the preceding rules of ***Order V*** aforesaid.

There is no record of any application or reason why the order of 3rd June 2005 was made and yet there must be reason for it on the record save for paragraph 3 of the Chamber Summons of 22nd May 2005 which should have been treated with caution.

Secondly, the order the plaintiffs were granted on 20th June 2005 was largely of an interlocutory nature, although in the application made for it in paragraph 7 thereof, the defendants were also to be ordered to vacate the suit plot, thus converting this order into a mandatory one.

No wonder then that after the plaintiffs obtained what was meant to be an interim order, they set out to execute it with the assistance of the Nairobi City Council personnel and Administration Police Officers to demolish the houses of the defendants amongst others in the middle of the night even before the said defendants were properly served with the Court documents because it is not clear if what was advertised in the Daily Nation was the suit or the application.

I have not seen any copy of what was advertised on record.

On the other hand, the defendants are amongst the many occupants who say they occupy the area known as Deep Sea Informal Settlement Scheme – one of the slum areas in Nairobi.

The plaintiffs who have since been allocated titles to own these plots must know the area well. There is no record to show that a Process Server ever visited the area in an attempt to serve the defendants and/or he was unable to do so and for whatever reason!

How did the plaintiffs arrive at a decision to serve these slum dwellers through advertisement in the Daily Nation, if not to bar these rural folk from accessing justice in this matter?

From my own observation, this exercise of getting an order to serve the defendant by substituted service in the first place was a big farce if not a complete abuse of the Court process.

I do not even understand how and on what basis the five (5) defendants were picked to represent all those occupying the suit plot? See paragraph 2 of the Plaint! This is not supported by the law.

I am not really concerned with the prayer for temporary stay in the application as I am aware the main order sought herein is for review under ***Order XLIV*** of the Civil Procedure Rules.

The conditions for granting an order for review are specified in the order. They are a new and important matter or evidence which after the exercise of due diligence was not in the applicants' knowledge at the time the decree was passed or order made, an apparent error or mistake on the face of the record or for any other sufficient reason.

Counsel for the applicant did not mention first the two main conditions but given my overall observations of this matter and the defects uncovered and mainly that everything has been done by the plaintiffs to prevent the applicants being heard in the case, this is good and sufficient reason to grant this application so that the defendants get an opportunity to be heard on this matter. ***Order LIV Rule 1*** of the Civil Procedure Rules is clear hence the case of ***Abisa Balinda v. Fredrick Kangwamu & Another [1963] E.A.***

557 cited to me has no application.

I need not remind the Plaintiffs that an interim injunction has the effect of maintaining the status quo and that since the defendants were staying on the suit plots they were supposed to be left to stay thereon until the hearing and determination of the main case so long as they did not dispose of the said plots and not to be treated as it happened on the night of 23rd September 2005.

I should also advise lawyers to desist in misleading the Court into making order to involve the Police or City Council of Nairobi in exercises which might later on be declared illegal as the one subject to this application certainly was, and lead them into trouble.

I allow this application and direct the plaintiffs to serve this application to the defendants through their lawyer who is now known, so that the same can be heard on merit. Costs of the application will be paid to the applicants.

Delivered, dated and ***signed*** at Nairobi this 19th day of July 2007

D. K. S. AGANYANYA

JUDGE