REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT

CIVIL SUIT 4079 OF 1993

ZACHARIA NG'ANG'A MURAGE…….....……..….PLAINTIFF

VERSUS

ESTHER NYAGICHUHI …….....……...…1ST DEFENDANT

GEORGE MODICAE OKOTH ADERO….....2ND DEFENDANT/APPLICANT

RULING

1. Application, Prayers, Depositions

The 2nd defendant's application by Chamber Summons, dated and filed on 27th August, 2004 was brought under Order IXB of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap.21). The outstanding substantive prayers in the application are as follows:

(a) that, the ***ex parte*** order made by the ***Honourable Mr. Justice Kuloba*** on 29th August, 2002 be varied, or set aside unconditionally;

(b) that, the order for maintenance of the status quo made on 31st May, 1995 be vacated unconditionally;

(c) that, judgement be entered for the 2nd defendant, in the terms of his statement of defence.

The grounds upon which the application is premised are, firstly, that the defendants are advanced in age, and cannot very well keep waiting for the plaintiff to complete his studies abroad and then come at leisure, to prosecute his suit against them – something that the Court had approved in its orders of 21st August, 2002. Secondly, so long as the plaintiff's suit remained pending, the 2nd defendant would continue to lose rent income in respect of the suit premises. Thirdly, the longer the suit remained pending, the more unlikely it was that the plaintiff would one day be able to refund the monies he has continued to collect from the 2nd defendant's premises since 1993. Fourthly, there was no good cause why the suit could not be heard and determined even as the plaintiff pursued his studies abroad. Fifthly, the four-year stay of proceedings lacked a basis in law.

The application was supported by the affidavit of the second defendant, sworn on 30th August, 2004. The depositions in this affidavit were as follows. He avers that the suit herein was filed on 19th August, 1993 and since then there have been numbers of interlocutory applications which have been disposed of. He deposes that the plaintiff has shown a reluctance to prosecute his case, particularly since 1998. When the

case came up for hearing before ***Mr. Justice Kuloba*** on 5th March, 2001 it did not proceed because the plaintiff's advocates applied for adjournment. The learned Judge on that occasion ordered the plaintiff to fix the case for hearing within 90 days from then. When it was fixed for hearing on 30th July, 2001 it could not proceed, as the plaintiff's advocate, again, applied for adjournment. On each occasion of scheduled hearing, the deponent had faithfully travelled from his home in Siaya, in the West of the country, in order to be in Court at the appointed time – and this, he states, has caused him considerable expense. He avers that he is advanced in age and has entertained the hope that he can get justice in this case, and hopefully enjoy the fruits of judgement, while he is still alive. He depones that on *19th July, 2002* the parties had by consent fixed hearing date for *9th October, 2002* but it then turned out that the plaintiff had been planning to leave for further studies abroad by *29th August, 2002*. The deponent avers that, as at the date of swearing the affidavit, on 30th August, 2004 the plaintiff had without justification collected as much as Kshs.2,816,000/= as rent from the suit premises.

To the 2nd defendant's application, the plaintiff filed grounds of opposition dated 8th February, 2005. The points of objection are as follows:

(i) that, orders had been made on the main issues in the case by the ***Honourable Mr. Justice Bosire*** (as he then was) on 31st July, 1995 and by the ***Honourable Mr. Justice Kuloba*** (as he then was) on 29th August, 2002; and the 2nd defendant has not shown cause why those orders should now be set aside, or varied, or vacated;

(ii) that, it is still necessary to maintain the said orders, in the interest of justice;

(iii) that, the suit is not for a specific liquidated sum, and thus judgement cannot be entered without evidence being presented;

(iv) that, the order of ***Mr. Justice Kuloba*** allowing the plaintiff to pursue studies abroad for four years cannot be set aside or varied before the plaintiff completes his studies;

(v) that, the orders of ***Mr. Justice Kuloba*** should not be set aside because the plaintiff might not afford the cost of travelling back to Kenya before the completion of his studies;

(vi) that the application is lacking in merit.

2. Submissions

On the occasion of hearing the application, on 9th February, 2005 ***Mr. Agina*** appeared for the defendants, while ***Mr. Wambugu Wamae*** appeared for the plaintiff.

Mr. Agina submitted that there was no reason why the case could not be heard and determined, especially considering that the plaintiff remained out of the country even as he continued to collect rents from the suit premises. The suit is some 12 years old, counsel remarked, but would remain undisposed-of so long as the ***Honourable Justice Kuloba's*** orders were maintained, that the suit may not proceed while the plaintiff was undertaking studies abroad.

Mr. Wamae was of the view that the order made by ***Mr. Justice Kuloba*** on 29th August, 2002 was justified, because the 1st defendant had failed to appear before the ***Honourable Mr. Justice Khamoni*** on 27th August, 2002 when the date 28th August, 2002 was taken; and on the latter date the advocate for the 1st and the 2nd defendants was not in Court. Consequently, ***Mr. Wamae*** submitted, the applicant could not claim that the order was perverse, at this stage, which order was due to expire on ***28th August, 2006***. Counsel added, for good measure, that the applicant had not appealed against the order made by ***Mr. Justice Kuloba*** on 29th August, 2002. Counsel urged that there could be no variation of ***Justice Kuloba's orders***, and varying the same would not be in the interests of justice, considering, besides, that on 31st

July, 1995 ***Mr. Justice Bosire*** had ordered that status quo be maintained. In counsel's view it was not in the interests of justice that such orders of the Court be varied in any respect. He contended that the applicant's argument was lacking on merits.

In ***Mr. Agina's*** further submission, it was unjust to allow the orders of ***Kuloba, J*** to stand, especially as there was no evidence that the plaintiff would be completing his studies and then promptly returning home. ***Mr. Agina*** submitted that it was not tenable that orders made ***ex parte***, such as the one made by ***Mr. Justice Kuloba,*** could remain in operation for as much as four years. He was of the view that it was unusual that the plaintiff, who was not at all prosecuting his suit, could so easily obtain a four-year stay of proceedings to enable him to go for studies abroad. Counsel submitted that in the interests of justice, the suit should be struck out.

3. Analysis, Orders

There are two aspects of the suit and the application which should, I think, be carefully considered before a ruling is made. Firstly, *was it tenable in law that, without a clear account recorded in the proceedings*, a plaintiff *who was under duty to litigate his claim, could suddenly become the beneficiary of orders allowing him to go and live abroad, while his suit was indefinitely stayed, notwithstanding the burdens that were thereby left weighing down on the defendants*?

Secondly, *are the issues in the suit so clear that they can be disposed of at the interlocutory level, by simply dismissing the plaintiff's claim and handing over judgement-credit to the 2nd defendant?*

The two questions, ultimately, should, I think, be weighed against each other, and a decision should then be taken on which one of them carries the day. Whichever one it is, should then be answered on its own terms, and in this way the instant application will be disposed of, I think, in a judicious manner. That is how I propose to arrive at my final orders.

On ***29th August, 2002*** on a date scheduled for the hearing of the plaintiff's case, ***Mr. Wamae*** appeared for the plaintiff, but there was no appearance for the 1st or 2nd defendant. The proceedings on that occasion appear on barely half a page of hand-writing, and read as follows:

"***Mr. Wamae:*** True, service of hearing notice is inadequate. Take it out; and, as the plaintiff is leaving the jurisdiction tomorrow for a period of four years, stay suit for that period, and take the case out of the list of ***9th October, 2002*** to enable the plaintiff to fix it afresh after he returns."

There was no further comment, and only the order of the learned Judge followed, in these terms:

"**For the reason [given] by counsel above, the suit is taken out of the hearing [list] and is stayed for four years from today unless earlier fixed for hearing by the plaintiff before that period."**

The applicant has sought the variation or setting aside of that order. The principle carried in the applicant's argument is that the order conferred upon the plaintiff the privilege of travelling abroad and residing there virtually indefinitely, leaving the weight of the motions of suit hanging over the defendants, even as they are left with no hope at all that possible outcomes of the suit might inure to them. Quite clearly the scenario is an *oppressive and inequitable* one which the judicial process ought not to countenance, quite apart from the fact that it amounts to an engagement of the Court's process in vain, and a subjection of the Courts management of its working calendar to the whims of a plaintiff. This would be contrary to the most basic principles of case management, to judicial policy, and to the public interest. I have no doubts at all that there are valid and proper grounds for setting aside the orders of 29th August, 2002, not at all in exercise of any appeal-like competence, but by way of rectification of a perverse condition that injures the integrity of the judicial process.

That position is to be weighed against the fact-scenario in the suit, and the implications therefor, for allowing the 2nd defendant's prayers.

In the recorded proceedings, there is a ruling given by the ***Honourable Mr. Justice Bosire***, on 31st July, 1995. Although that ruling was a limited one, in respect of an interlocutory application such as the present one, it did touch on very important matters of fact, and notwithstanding the constricted framework of such an application, the findings of the learned Judge therein may rightly be considered to represent ***prima facie*** positions. Let me set out a number of the passages in that ruling:

(i) "This suit concerns property known as plot No. 50, Mathare, L.R. No. 209/7963/274, situated in Nairobi. The owner is the 1st defendant/respondent in this suit.

"The material before me shows that the 1st defendant first sold the property to the plaintiff sometime in 1974 and possession of the same passed to the plaintiff. Subsequently, in 1993, the 1st defendant *resold the same property* to the 2nd defendant's son."

(ii) "The applicant has shown he has a *prima facie* case, and so has the plaintiff. They have competing claims. The person who is entitled to the property as between them *will be determined at the trial of this action."*

(iii) "The issue which presents itself is with regard to rents accruing from the premises on the suit property. There is evidence before me which is uncontroverted that the tenants in the premises have been paying rents to the plaintiff. It has not been indicated for how long they have been paying rents to the plaintiff. What is clear, however, is that the plaintiff says *he constructed the buildings at his own expense and has not been contradicted on that.* Nor has he been contradicted [on the averment] that he has been paying rates out in the name of the 1st defendant."

(iv) "In the above circumstances the balance of convenience favours the maintenance of the status quo. The applicant may be compensated in damages should he ultimately succeed."

So, who is the owner of the suit premises? Did the 1st defendant validly sell to the plaintiff? Was there a proper transfer? How could she then have again sold the suit premises to the 2nd defendant? Does the 2nd defendant have any document of title? Why is it that the plaintiff is the one who pays rates? And why does he pay the rates in the name of the *1st defendant*? How did the plaintiff come to be the one to whom rents are paid? And for how long has he enjoyed that status?

These questions can only be answered in *normal trial* — and not in an interlocutory application. It is the finding of proper answers to those questions that would deliver justice to all the parties in this case.

So, should the Court allow the 2nd defendant's application, so that he wins advantages against the plaintiff when no trial has taken place to resolve those fundamental questions?

Although the 2nd defendant would probably say *"yes"*, to allow it would be unjust, if it were not for the fact that the other most interested party, namely the plaintiff, is clearly the one delaying and perhaps, preventing the trial. Why would the plaintiff attempt to stall the trial process? It is the answer to that question that will decide if the 2nd defendant can be a winner in this instance.

The concern for ends of justice in this case dictates that I should create a *last opportunity* for the hearing of the main suit. If the plaintiff will stall on the satisfaction of this direction, then it will be the occasion to award judgement to the defendants; and in that case it will not lie in the mouth of the plaintiff to allege injustice.

Therefore I will make the following orders in relation to the 2nd defendant/applicant's Chamber Summons application of 27th August, 2004:

1. The *ex parte* order of 29th August, 2002 is hereby set aside unconditionally.

2. The order for maintenance of the status quo made on 31st May, 1995 is hereby upheld.

3. The applicant's prayer that judgement be entered for the 2nd defendant in the terms of his statement of defence, is refused.

4. The plaintiff shall forthwith, and in any case *within 21 days of the date hereof,* set down his suit filed by plaint on 19th August, 1993 for hearing, and a hearing date shall be given on the basis of priority.

5. Failing compliance with Order No. 4 herein, the defendants or either of them may make a suitable application in Court, and may also move the Court in any manner provided for by law to hear and dispose of the plaintiff's suit without delay.

6. The costs of this application shall be borne by the plaintiff in any event.

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the 2nd Defendant/Applicant: Mr. Agina, instructed by M/s. Agina & Associates Advocates

For the Plaintiff/Respondent: Mr. Wambugu Wamae, instructed by M/s. P.M. Wamae & Co. Advocates.