



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 217 OF 2004

SAMIR MOHAMED ABDOPLAINTIFF/APPLICANT

JAMAL MOHAMED ABDU.....PLAINTIFF/APPLICANT

MARIAM MOHAMED ABDOPLAINTIFF/APPLICANT

VERSUS

ABDIKADIR SHEIKH NUR.....DEFENDANT-RESPONDENT

RULING

The applicant's Chamber Summons application dated 10th January, 2005 and filed on 14th January, 2005 was brought under Order VI, rules 13(1)(b), (c), (d), and 16 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21). It carried four substantive prayers:

- (i) that, the plaintiffs' suit and all their pleadings be struck out;
- (ii) that, consequently, the plaintiffs' suit be dismissed with costs on the higher scale to the defendant who is the applicant herein;
- (iii) that, the applicant's earlier Chamber Summons of 19th March, 2004 which had not been formally prosecuted, be consolidated with the instant application to be heard wholly, or in respect of the prayers therein that had not been fully dealt with;
- (iv) that, the costs of and incidental to the instant application be provided for and paid by the plaintiffs in the main suit.

The Application is founded on a multiplicity of grounds. These may be set out in summarised form.

- (a) the plaintiffs had obtained *ex parte* orders on 8th March, 2004;
- (b) the plaintiffs had failed to serve the defendant with plaint, summons to enter appearance, and their application of 26th February, 2004 which led to the said *ex parte* orders;
- (c) the plaintiffs and their advocates had failed to serve the defendant with hearing notice for 8th March, 2004 (when the *ex parte* orders were issued);
- (d) the plaintiffs had caused false affidavits of service to be sworn in respect of the summons to enter appearance and the hearing notice of 8th March, 2004;

(e) on 19th March, 2004 the defendant filed Chamber Summons and obtained orders of stay of execution of the Court orders of 8th March, 2004;

(f) when the defendant's application of 19th March, 2004 came up for hearing on 7th July, 2004 the impugned *ex parte* orders of 8th March, 2004 were set aside;

(g) the plaintiffs have not applied for the reinstatement of the impugned orders of 8th March, 2004, or for the revision or setting aside of the orders of 7th July, 2004;

(h) but the plaintiffs have instead moved on another trajectory: causing to be registered against title L.R. No. 36/VII/288 the already vacated Court Order dated 8th March, 2004 — notwithstanding that they are aware that the same has been set aside; and the plaintiffs have continued to maintain the said registration against the title despite complaints by the plaintiff;

(i) the premise of the suit was dictated by the object of securing the *ex parte* orders of 8th March, 2004 to register against the title to the suit property, and its intent is fraudulent;

(j) the plaintiffs have been unable to prosecute their application of 26th February, 2004 which they had used to secure the orders since vacated, of 8th March, 2004;

(k) the whole suit was scandalous, frivolous and vexatious;

(l) all actions by the plaintiffs since filing their suit are designed to prejudice, embarrass and delay fair trial of their own suit;

(m) the suit disclosed no reasonable or indeed any cause of action against the defendant, as shown in the defendant's application of 19th March, 2004;

(n) the suit is an abuse of the due process of the Court.

Evidence in support of the defendant's Chamber Summons of 10th January, 2005 is in the very detailed depositions of the defendant, **Abdikadir Sheikh Nur**, sworn on even date.

The deponent avers that the plaintiff's application of 26th February, 2004 which resulted in the *ex parte* orders of 8th March, 2004 was not served upon him, and he had not been given service of the hearing date. He avers that his Chamber Summons application of 19th March, 2004 was by consent, placed before **Lady Justice Aluoch** on 7th July, 2004; but on that occasion the respondents herein were not represented, and the learned Judge set aside her earlier orders of 8th March, 2004.

It is deposed that the respondents have caused the vacated order of 8th March, 2004 to be registered against title L.R. No. 36/VII/288 and have maintained that registration to-date. He avers that he is a tenant of the respondents in L.R. No. 36/VII/288 and the issue of his tenancy, the rent payments and the terms of tenancy are the subject-matter of disputes in several cases pending in the High Court, to wit:

(i) HCCC No. 92 of 2001;

(ii) HCCC No. 987 of 2004;

(iii) HCCC No. 896 of 2004;

(iv) Court of Appeal Misc. Civil Application No. Nai 27 of 2004.

He deposes that while being well aware of the above pending cases, the respondents had made no

disclosure of the same to the Court when they obtained *ex parte* orders on 8th March, 2004.

The deponent avers that the plaintiffs have shrouded in confusion their state of representation in the instant matter, necessitating service upon several advocates and on they themselves. It is deposed that the plaintiffs' affidavits of service have not been truthful. It is averred that the plaintiffs had failed to serve plaintiff and summons to enter appearance upon the defendant, especially in HCCC No. 92 of 2001, but they filed a false affidavit of service.

The deponent avers that the intended mischief in the conduct of the plaintiffs, is to deprive him of a lease registered in his name, in respect of L.R. No. 36/VII/288.

The deponent prays that his depositions be taken together with earlier depositions attached to his Chamber Summons of 19th March, 2004 which had been the subject of certain *ex parte* orders issued by **Justice Aluoch** on 7th July, 2004.

From the submissions of the applicant's counsel, **Mr. Adala**, and from my reading of the applicant's applications and depositions, it is apparent that the respondents' reasons for not setting down their application of 26th February, 2004 (which led to the now vacated *ex parte* orders of 8th March, 2004) for hearing, are by no means transparent. This may be taken to shed light on the context in which even the present applicant's Chamber Summons of 19th March, 2004 was not heard after **Lady Justice Aluoch** gave the said orders of 7th July, 2004 vacating the *ex parte* orders of 8th March, 2004. **Mr. Adala** urged that the applicant's two applications be consolidated and heard together. I think this was a quite reasonable request, given the problematic, special circumstances attending the claims between the parties in this case and in related cases. Only such a consolidation would, in my view, set this process of litigation on a path that may lead towards finality.

Therefore, in exercise of the Court's discretion under s.3A of the Civil Procedure Act (Cap. 21), I have decided to consider the two applications together.

The prayers in the applicant's Chamber Summons of 19th March, 2004 were as follows:

- (a) that, the Court do issue an inhibition, prohibitory order or a restriction prohibiting the respondents herein, their agents and associates, those deriving title from them and all others, including the Commissioner of Lands, the Chief Land Registrar and/or the Registrar of Titles, from transferring, charging, leasing, selling or in dealing with title L.R. No. 36/VII/288, Title No. Vol. N. 37/436 (File No. 11781) — in any manner inconsistent with the rights of the applicant/lessee, or from registering any instrument, order or document removing the caveat lodged by the applicant herein against the above title pending the hearing and disposal of the suit;
- (b) that, an order be made for consolidation of this suit with Nairobi HCCC No. 92 of 2001 for hearing and determination;
- (c) that, an order be made that this file be kept under lock and key as a strong room file.

The 3rd respondent had, on behalf of the other respondents, filed a replying affidavit of even date, on 5th April, 2004, to the applicant's Chamber Summons of 19th March, 2004. This affidavit is made up essentially of denials of the averments in the supporting affidavit.

To the applicant's application of 10th January, 2005 the respondents filed their grounds of opposition dated 14th April, 2005. The grounds tend to be lengthy, and are of a general nature. Two of them are interesting:

- (i) "The instant application and the one....dated 19th March, 2004 are overtaken by events as the orders given by this Honourable Court on 8th of March, 2004 which were lawfully and regularly

given, have already been effected.”

(ii) “The defendant’s purported application to...stay execution of the orders of 8th March, 2004 is inordinately delayed and an afterthought...”

Those are curious assertions; for, before me is an order made on 7th July, 2004 by **Lady Justice Aluoch**, and duly issued by the Deputy Registrar on 12th July, 2004. It reads as follows:

“Upon reading the application presented to this Court on 26th February, 2004 by counsel for the applicant under section 57(5), (10) and (2) of the Registration of Titles Act (Cap. 281, Laws of Kenya); and upon reading the affidavit of; and upon hearing counsel for the defendant/applicant in the absence of the respondent; it is ORDERED —

1. THAT, the orders of the Court made on 8th of March, 2004 be and are hereby set aside.”

This must mean that the grounds of opposition filed by the respondent herein have *no legal basis*; for they are constructed around an order of the Court which had been vacated. Learned counsel for the applicant, **Mr. Adala** stated that the said order of 7th July, 2004 had been duly served on the respondents — and so they must be deemed to know its content.

The point in the defendant’s instant applications is that since the setting aside of the *ex parte* order of 8th March, 2004 by **Aluoch, J** on 7th July, 2004 the respondents have not sought any review of the later orders, nor have they appealed, and yet they have used an already - vacated order, apparently in bad faith, to cause certain instruments to be registered at the Lands Office, against the title to the suit property. Counsel submitted, quite rightly in my view, that such action on the part of the respondents is an abuse of the powers of the Court. The fact that the respondents have indeed deluded the Lands Office to register instruments against the suit property on the basis of non-existent Court orders, has not been denied by the respondents.

Hearing was adjourned on 18th April, 2005 in the presence of counsel for both sides, and a further hearing date, 5th May, 2005 was given in Court. On that day, however, and without excuse, counsel for the respondent, **Mr. Gathaara**, was absent.

Mr. Adala for the applicant urged that the respondent’s suit and attendant application be struck out for being scandalous, frivolous and vexatious. Whereas the supporting affidavit filed by the applicant on 14th January, 2005 was a detailed, 32-paragraph document with serious depositions, the plaintiff/respondent had chosen to elude the averments by filing only *grounds of opposition*. In the perception of learned counsel, “this means they had nothing on fact, and the averments remain uncontested.” **Mr. Adala** viewed the claims in the grounds of opposition as “pure hot air”. For my part, I have earlier described those grounds of opposition in these terms:

“Those are curious assertions; for, before me is an order made on 7th July, 2004...

“This must mean that the grounds of opposition filed by the respondent herein have no legal basis; for they are constructed around an order of the Court which had been vacated.”

Counsel impugned the fifth ground in the respondent’s grounds of opposition of 14th April, 2005. This ground reads:

“The plaintiffs served summons on the defendant herein in the normal manner and further served the defendant’s counsel. It was the defendant’s and his counsel’s duty to file appearance and defence which they failed to do, and notwithstanding such error of omission they have yet again failed to prosecute to conclusion their application dated 19th March, 2004.”

Mr. Adala doubted the claim in the grounds of opposition that the respondent had duly served summons, as no summons could have been issued in particular in respect of the respondent's *application* of 26th February, 2004 which led to the *ex parte* orders of 8th March, 2004. Those orders were later vacated on 7th July, 2004 and the respondents, while not challenging the new orders of 7th July, 2004 have proceeded on the basis of the vacated orders, to delude the Lands Office to register instruments in their favour, against the suit property.

It is significant that after I had, on 5th May, 2005 set a date for delivering my ruling, counsel for the respondents came before me (with counsel for the applicant present) on 3rd June, 2005 to say: "I have pleaded with my learned friend to agree to even written submissions from me, before the ruling is given." **Mr. Adala** graciously indicated that he would have no objection to **Mr. Gathaara** addressing the Court, before the ruling was delivered. On that indication I allowed **Mr. Gathaara** to make his submissions on 9th June, 2005.

Learned counsel objected to the defendant's Chamber Summons of 10th January, 2005 for being "filed on top of another Chamber Summons in the same suit, dated 19th March, 2004." He urged that since the said application of 19th March, 2004 had not yet been heard completely, the applicant was guilty of inundating the file with the same applications, and "then claiming consolidation of a whole range of unprosecuted applications," something he urged was "not permissible." He submitted that the defendant/applicant's Chamber Summons of 10th January, 2005 was an abuse of the Court process.

On the applicant's prayer that the main suit be struck out, **Mr. Gathaara** urged that this would be a draconian order regarding prime property, and would be undesirable. In counsel's words: "This Court, from its practice and procedure, has held that such issues be argued, proved and tested by *viva voce* evidence. Summary foreclosing of a litigant is a discretion to be exercised only in very obvious circumstances." Counsel's final words were as follows:

"The application should not be granted; it should be struck out in its entirety; the applicant should be ordered to prosecute the earlier application, or prosecute the main suit, by calling the parties in Court."

That is a strange proposition; for the suit herein, which **Mr. Gathaara** is asking the applicant to prosecute, is in fact the plaintiffs/respondents' suit. I take the plea to mean that the respondents have no intention to prosecute their suit. They want the defendant to do it instead. And besides, counsel has not shown the merits of the plea that the applicant should return to the earlier application of 19th March, 2004 (which I have taken the decision to consolidate with the instant one) and re-prosecute the same.

Mr. Adala contended that the submissions made on behalf of the respondents would have been relevant only in an application which they could have made to set aside the Court orders of 7th July, 2004; yet no such application has been made, nearly one year since those orders were issued.

This is a matter which, I believe, has been made unnecessarily complex by the parties, or some of them. The respondents have, clearly institutionalised mystique over the litigation, beginning from several main suits to a surfeit of applications which, for entirely unclear reasons, are not prosecuted, and are not attended with clear lines of representation or service; yet *ex parte* orders are occasionally sought and then applied abusively in the manipulation of property entitlements and in making misleading requests at the Lands Office. If this process is allowed to continue it will result in a gross abuse and distortion of Court process, apart from causing much harm to the rights and expectations of some of the parties, in the operations of different public bodies.

I will make the following orders:

1. The defendant/applicant's 3rd prayer, that this application be consolidated with the outstanding aspects of his earlier Chamber Summons of 19th March, 2004 is granted.

2. A restriction is hereby issued against the respondents herein, their agents and associates or those deriving title from them, transferring, charging, leasing, selling or dealing with title L.R. No. 36/VII/288, Vol. N. 37/436 (File No. 11781) in any manner inconsistent with the rights of the applicant, or registering any instrument or document against that title, pending the hearing and disposal of the suit HCCC No. 92 of 2001 and any other of the pending suits as the Court may determine.

3. The plaintiffs' application by Chamber Summons dated 26th February, 2004 is hereby struck out, with costs to the defendant/applicant herein.

4. The plaintiffs/respondents shall, within 30 days of the date hereof, set down their suit in HCCC No. 92 of 2001 — *Samir Mohamed Abdo v. Said Elmi, Suleiman Mohamed Abdi and Abdikadir Sheikh Nur t/a Miski Shopping Complex* — for hearing, and a date shall be given on the basis of priority.

5. Failing compliance with Order No. 4 above, the defendant/applicant shall be at liberty to make a suitable application.

6. This file shall be specially kept in the Strong Room of the Court Registry.

7. The plaintiffs/respondents shall bear the costs of this application.

DATED and DELIVERED at Nairobi this 24th day of June, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendant/Applicant: Mr. Adala, Advocate

For the Plaintiff/Respondent: Mr. Gathaara, instructed by M/s. Z.N. Gathaara & Co. Advocates.