



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 1033 OF 1994**

**FREDRICK S. MASINDE & OTHERS .....APPLICANT**

**VERSUS**

**EVANSON KAMAU & 4 OTHERS.....RESPONDENT**

**JUDGMENT**

By this application filed on 22nd October, 2002 brought under the provisions of s 3A of the Civil Procedure Act and all enabling provisions of law, the defendants/applicants seeks order that:

“1. A declaration do issue that to applicant have duly proved title to plot number LR 209/4527, known as Air India house and are entitled to all rent proceeds from the suit premises.

2. A declaration do issue that the applicants have satisfied the conditions set out by Justice A B Shah on 29th November, 1994 and are entitled to all rent proceeds from the 2nd respondent in respect of plot number LR No 209/4527, known as Air India house.

3. An order that the 2nd respondent do pay to the applicant all rent arrears since 1994 to-date with interest at commercial rates as ordered by the said judge and in default execution do issue.

3. The costs be borne by the 2nd plaintiff/respondent”.

The grounds on which the application is based are said to be *inter alia* that the applicants are the owners of the suit premises as evidenced by a certificate to title number LR 10785/22 of 28th December, 1993; that the Court had on 29th November, 1994 ordered the respondent to deposit due rents in an interest earning account pending applicants showing title to the suit premises and taking steps to make the respondent its direct tenant and that this had been done by terminating the head tenants tenancy thereby becoming landlords of the respondent.

The respondent, however, opposed the application on the grounds, *inter alia*, that one of the joint owners had passed away and as such the remaining owner had no authority to bring this application for benefits accruing to the estate of the deceased joint owner. They also contended that the respondent’s subtenancy to the head tenant, Odd Jobs, still subsisted as it had not been terminated by that tenant and that the head tenant passed away on 28th January, 2000 and that the administrators of the said “Odd Jobs” should be joined to the proceedings by the applicants.

The facts giving rise to this application are not in dispute. As from 19<sup>th</sup> April, 1973, the suit premises were owned by one Samuel Mutuohoro Wairegi and was occupied by many tenants including the

respondent herein. As the registered owner had failed to pay rates, the suit premises were sold by the Nairobi City Council to recover same and the applicants purchased it at an auction in 1993. They were duly registered as the owners thereof on 28th December, 1993 but were not issued with title until 23<sup>rd</sup> May 1996 as number LR No 1085/25.

Soon after the suit premises were vested in the applicants in 1993, they tried to evict the tenants. The tenants who were four, including the respondent however ganged up and filed this suit on 16th March 1994 to stop the applicants from evicting them therefrom. The third defendants, Odd Jobs, filed an affidavit contending that he was an adult and had been a tenant of the suit premises for 40 years and the other tenants of the suit premises were, the first plaintiff and the current respondent, adding that the respondent had been occupying the premises for over 20 years.

Nowhere did "Odd Jobs", say that they were the head tenants of the respondent. Acting on the above application at 7.05 pm on 15th March 1994 on personal judges letter head, A B Shah J, (as he then was) before the suit had been filed and on the undertaking of Dr John Khaminwa that he would file the suit and application on the following day and at his home, on a public holiday, the learned judge granted orders restraining the applicants from evicting the respondent and others from the suit premises. The judge also wrote a letter in his own handwriting to the police to enforce the order he had given on the 15th March, 1994. After the matter had been heard after several adjournments, on 29th November, 1994, after the respondent had changed his story from being a tenant to being a subtenant of the third defendant, "Odd Jobs", the learned judge made the following orders in favour of the respondent alone as the others had apparently left the suit premises:-

"Let the applicant deposit a sum of Shs 26,000/= in an interest bearing account (that covers rent for 1994) as payable by the applicant to third plaintiff within the next 15 days and continue depositing the Shs 3,000/= per month until the first 2 defendants show their title to suit property and follow the procedure for making the second plaintiff their direct tenant."

Almost eight years after the above order was made in an interlocutory application for an interlocutory injunction, the applicants are yet to receive anything for use of their property by the respondent, who does not deny that it is a tenant or subtenant. The suit has not also been proceeded with by the respondent nor have the summons been served. Despite the fact that the applicant had got himself registered as the owner of the suit premises and has also terminated the tenancy of the head tenant. "Odd Jobs" by a notice dated 16th January 1999, which notice had taken effect as no reference had been made by the said "Odd Jobs" to the Business Premises Tribunal and thereby constituting the respondent its tenant, in law, the respondent still contends that it is not yet a direct tenant of the applicant. In a letter dated 31st January 2002 by Messrs Shah and Parekh Advocates for the respondent under the initials of one "H M P" who may or may not be the same person as one "Harshadrai Mahilai Parekh", a director of the respondent, who swore the replying affidavit to this application, the respondent still contended that the applicant has not made it its direct tenant. He also disclosed for the first time that "Odd Jobs", who had sworn an affidavit on 15th March, 1994, wherein he had described himself as "an adult" of P O Box 42628 Nairobi, was not actually a person in law and that the real person behind the said name was one "Mohamed Anwar Mohamed Hafiz Allah Ditta" who had been trading as "Odd Jobs", had since passed away on 28th January, 2000 and that the matter could not proceed any further until letters of administration are obtained. Although the said "H M Parekh" attached a copy of the "Death Certificate", he does not attach a copy of the certificate of the business name in the absence of which it was unlawful for the said "Odd Jobs" to carry on its business under that name. The issues raised in this application are therefore many and include whether or not the terms of this court's order have been satisfied; whether the suit by "Odd Jobs" is still subsisting; whether there is a conflict of interest if the director is also the same as the counsel said to be advising the director of the respondent.

I have no doubt that the applicant has satisfied the terms of the order made by this court on 29th November, 1994. The applicant is now the registered owner of the suit premises and as the "head tenants" tenancy was terminated way back in 2000, by force of the provisions of Landlord and Tenant (Shops etc) Act, the respondent is now a protected tenant of the applicant. This does not require any future agreement and the contention of the respondent to the contrary is in my view intended to avoid payment of rent nor

would this court be sitting on appeal in entertaining this application as the court can vary its order under o 39 rule 4 of the Civil Procedure Rules at any time.

The next issue which this application has brought out, is the legal position of “ Odd Jobs” as it has been shown that it was not a body corporate or a person capable of being sued or to sue. It was an unregistered business name which in law could not be capable of filing suit. The suit by it or any reliance on actions by it are therefore of no effect and cannot be relied upon in suits by third parties. Even if the said “Odd Jobs” was truly the business name of the now deceased Mr Mohamed, as he passed away over 2 years ago, a fact which the respondent did not disclose to the applicant before the current application, as no application has been made for over 2 years, for substitution under o 23 rule 3(2) of the Civil Procedure Rules, the suit by “Odd Jobs” has now abated. The respondent cannot now rely on the rights of the said “Odd Jobs” in his case nor is it necessary for the applicants to join the legal representatives of the said “Odd Jobs” as his suit is now abated and is no longer a party to this suit. What now remains is for the applicants to apply for costs to be recovered from the estate of the said “Odd Jobs”.

Finally, should the court strike out this suit as being an abuse of the process of the Court as the summons have not been served for over 24 months?

According to o V rule 1(1), 1(2) and 1 (7) of the Civil Procedure Rules,

“(7) where no application has been made under subrule

(2) (for extension of validity of the summons after 12 months from the date of issue) the Court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons”.

It is therefore within the powers of this court to dismiss a suit whose summons have remained unserved for over 24 months on its own motion. As the summons herein have remained unserved for over 7 years having

been issued on 27th February 1995 and as the orders herein are merely being used to frustrate the applicant’s right to ownership of property without due compensation as required by the Constitution of this country,

I find that the interest of justice requires that it be struck out as provided by the Civil Procedure Rules.

In the event and for the aforesaid reasons, I hereby grant prayers 1,2,3 and 4 as prayed in the notice of motion dated 23rd October, 2002. I also dismiss the suit with costs under the provisions of o V rule (7) of the Civil Procedure Rules as the summons have remained unserved for over 24 months from the date they were originally issued on 27th February, 1995.

Orders accordingly.

Dated and delivered at Nairobi this 8<sup>th</sup> day of January, 2002

**G.P. MBITO**

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**JUDGE**