



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 388 OF 2010

PAULINE MUTEE MAKUMU..... 1ST PLAINTIFF

KILUNGU JUSTUS MULL..... 2ND PLAINTIFF

VERSUS

URSULA KRESZENNTIA1ST DEFENDANT

MONIKA HERKENRATH..... 2ND DEFENDANT

JAFARALI KASSAM ABDULLA..... 3RD DEFENDANT

OSCAR JUMA4TH DEFENDANT

RULING

(Application for execution of decree before taxation of costs; Section 94 Civil Procedure Act; need for decree to be settled before execution; in this instance no decree drawn; application dismissed for being premature)

1. The application before me is that dated 17 September 2020 filed by the successful plaintiffs. The application is brought pursuant to the provisions of Sections 3A, 94, and 38 (a) of the Civil Procedure Act, Cap 21, Laws of Kenya. The substantive order sought is for leave to execute the judgment before taxation of costs. The application is opposed.

2. By way of background, the plaintiffs filed suit vide which they contended to have purchased the land parcel Subdivision No. 2444 (Original No. 1938/1) Section 1 Mainland North, from the 1st and 2nd defendants vide an agreement executed in the year 2003. There was constructed on the land a guest house whereby the applicants operated an accommodation and restaurant business. The same land was later sold to the 3rd defendant and title transferred to him in the year 2012. What the 3rd defendant did subsequently was to move into the property and demolish the guest house. In their suit, the applicants sought for orders inter alia to nullify the sale to the 3rd defendant; an order of specific performance; further mandatory orders to have the 1st and 2nd defendants execute a transfer to a half share of the suit land to the applicants; and an order for compensation for the value of the buildings destroyed. The case was heard by Omollo J and judgment delivered on 7 October 2019. In her judgment, the Honourable Judge ordered entered judgment in favour of the applicants for specific performance and also for damages for the destroyed buildings in the sum of KShs. 53,000,000/= (Kenya Shillings Fifty Three Million). The judgment was jointly and severally against all the defendants.

3. After the judgment, the 3rd defendant filed an application for stay of execution pending appeal. I heard that application and delivered a ruling on 16 July 2020. I was prepared to grant stay of execution pending appeal subject to deposit of the sum of KShs. 53,000,000/= within 30 days. I stated that if the money is so deposited, there will be no registration of any disposition until the appeal is determined, and if the security was not deposited, then the plaintiffs would be at liberty to fully execute the decree.

4. I have already mentioned that in this application, the plaintiffs wish to execute the decree before taxation of costs as the respondents have not complied with the order of 16 July 2020.

5. The application is opposed by the affidavit of Jafarali Kassam Abdulla. He has deposed that he is the registered proprietor of the suit land. He has deposed that he has read the judgment delivered and that his name does not appear as a defendant. To the best of his knowledge, the judgment has not been amended to include his name and therefore he has argued that no orders can be sought or granted against him under that judgment. He contends that there was no prayer in the amended plaint which compelled him to surrender the Original Certificate of Title of the suit premises. He further avers that there was no prayer in the plaint for an order that the Land Registrar do transfer title into the names

of the plaintiffs and no such order can therefore be granted at this late stage. He avers that he has not been shown any decree or order compelling the 1st and 2nd defendants to execute any transfer of the suit premises in favour of the plaintiffs and neither has he seen evidence of service of such decree or order. He deposed that although an amount of KShs. 53 million was awarded, this was not pleaded. He contends that this was a fatal mistake in the judgment. He further deposes that the judgment provided that it is the 1st and 2nd defendants to perform their obligations (that is to transfer the property) by executing a transfer, and that this obligation has not been altered so as to transfer it to the Land Registrar. He further avers that no order ought to issue against the Land Registrar before he is heard as he was not a party to this suit. He has pointed to the transfer annexed to the application which he states is intended to be executed by the Land Registrar yet the Land Registrar has no power or capacity to transfer the land and has no power to execute instruments. He contends that this application is aimed at altering the judgment to introduce orders and decrees that were never granted. He has referred to Order 21 Rule 3(3) which provides that a judgment once signed cannot be altered. He has questioned why, more than one year since the judgment, the applicants have not filed any bill of costs or why the attempted execution cannot await taxation of costs. He contends that there is no urgency in execution as the subject matter is a parcel of land which is not going anywhere. He has stated that as the registered owner he undertakes not to dispose of any interest until the appeal is heard and that a restriction may be registered. He has said that he has not seen the decree and therefore there is none capable of being executed. He has further mentioned that he will file an application for stay pending appeal in the Court of Appeal as he is not satisfied with the order of this court which required deposit of KShs. 53 million as a condition for stay.

6. I have considered the matter and the submissions of Mrs. Umara, learned counsel for the applicants, and Mr. Kinyua, learned counsel for the 3rd defendant. This would ordinarily be a simple application vide which a successful party wishes to execute the decree before taxation of costs. Various issues have however been raised in the replying affidavit which I need to first put straight.

7. Mr. Abdulla, who swore the replying affidavit, has stated that the judgment herein does not bind him as his name is not mentioned in the judgment delivered on 7 October 2019. I have painstakingly gone through the record herein which is quiet bulky. This suit was commenced through a plaint filed on 3 November 2010 against two defendants, namely Ursula Kreszenntia and Monika Herkenrath, who were identified as the 1st and 2nd defendants respectively. When the suit was filed, the two defendants were the registered owners of the suit property. In the plaint, the plaintiffs averred that they were entitled to ownership of half of the suit property by way of purchase. They inter alia sought orders for specific performance for transfer of this half share to them. At that point in time the guesthouse in the suit premises was standing and operating. While the matter was still pending, the 1st and 2nd defendants transferred the suit property to Mr. Jafarali Kassam Abdulla. Mr. Abdulla proceeded to move into the property and demolish the guest house and other structures therein. This prompted the plaintiffs to amend their original plaint. An amended plaint was filed on 12 September 2012 with Jafarali Kassam Abdulla being introduced as the 3rd defendant and Oscar Juma as 4th defendant. Mr. Abdulla thereafter proceeded to file a statement of defence on 14 October 2013 and he fully participated in the suit. He in fact testified as DW-1 in the matter. He is the same Mr. Abdulla who now claims that the judgment herein does not bind him because it does not mention him.

8. I have looked at the judgment. The heading thereof shows the defendants as Ursula Kreszenntia, Monika Herkenrath, Peter Jurgen Herkenrath, and Oscar Juma as defendants. This is clearly a typographical error, for the 3rd defendant is nobody else but Jafarali Kassam Abdulla. Any reference in that judgment to the 3rd defendant refers to no other person other than Jafarali Kassam Abdulla. Mr. Abdulla should at no point try to argue that this judgment does not refer to him and that it does not affect him. It does. In fact, he is aware of this, for it is nobody else but him, Jafarali Kassam Abdulla, who filed the application for stay pending appeal. Moreover, he does acknowledge that he has filed a Notice of Appeal and intends to file an appeal to the Court of Appeal and an application for stay pending appeal. Why is he doing all this, if he is not affected by the judgment? I am sorry to tell Mr. Abdulla that he cannot try to use an obvious typographical error to avoid the judgment herein. This judgment is subject to being executed against Mr. Abdulla despite the typographical error in the heading of the judgment.

9. I have seen arguments that a judgment cannot be amended, but this is certainly an argument in ignorance of Section 99 of the Civil Procedure Act, which provides as follows :-

99. Amendment of judgments, decrees or orders

Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

10. It will be seen that judgments can indeed be amended to cure clerical or arithmetical slips. This will be certainly be formally done, but even pending that formality, the judgment herein does bind Mr. Abdulla, and he will be deemed to be the 3rd defendant mentioned in that judgment, pending the formality of correction of the judgment.

11. Now to the body of the application, it seeks execution before judgment. I would readily grant the order but there is one problem. I have not seen, and it has not been mentioned, that a decree has been drawn and signed. On this point, I agree with Mr. Kinyua's submissions that this cannot be brushed away. A decree is supposed to be drawn and extracted in the manner provided for in Order 21 Rule 8. I have no evidence that this has been done. Section 94, upon which this application is based does allow for the execution of decrees before costs, meaning that first there needs to be a decree. It is this decree which makes clear the precise orders to be executed and that is why the law requires for all parties to be given an opportunity to approve it.

12. This application is therefore premature. Let a decree first be settled before the plaintiffs can seek to execute the judgment, whether before or after taxation of costs.

13. For reason that this application is premature, I have no option but to dismiss it. I regret my inability to award costs to the 3rd defendant, for reason that he tried to mislead this court that he is not the 3rd defendant, and so each party will bear his/her own costs of this application.

14. Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF MARCH, 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA