



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 116 OF 2019

**EMMA ADINA PORTER (suing on behalf of the
Estate of ARTHUR THOMAS PORTER).....1ST PLAINTIFF**
EMMA ADINA PORTER.....2ND PLAINTIFF
-VERSUS-
BIXBY LIMITED.....1ST DEFENDANT
MARY WANJIKU KIHORI.....2ND DEFENDANT
AKIDELE DANIEL PORTER.....3RD DEFENDANT

RULING

The Plaintiffs brought this suit against the Defendants on 28th March, 2019 through a plaint dated 7th March, 2019. The Plaintiffs amended the plaint with leave of the court on 20th November, 2019. In the amended plaint dated 12th November, 2019, the Plaintiffs sought among other reliefs the following orders;

1. A mandatory order directed to the Defendants to immediately surrender to the Plaintiffs the original title in respect of all that parcel of land known as L.R No. 209/5919/8 Title No. 19139 situated along Manyani Road, Nairobi (hereinafter referred to only as “the suit property”).
2. An order directing the Defendants to account for and subsequently surrender to the Plaintiffs all amounts together with interest calculated at court rates collected as rent from the suit property from 2012 to date.
3. An order directing the Defendants to immediately grant vacant possession of the suit property to the Plaintiffs.

Together with the plaint, the Plaintiffs had filed an application by way of Notice of Motion dated 7th March, 2019 seeking among others, the following orders;

1. That pending the hearing and determination of this application and subsequently the suit, an injunction does issue restraining the Defendants from attempting to transfer and/or transferring and/or in any other manner whatsoever dealing with or interfering with the suit property.
2. That pending the hearing and determination of this application and subsequently the suit, the Defendants be ordered to deposit the original title in respect of the suit property in court.
3. That pending the hearing and determination of this application, the Defendants be ordered to furnish the court with an accurate account of all rent collected from the suit property from 2012.

On 24th October, 2019, the court made the following orders by consent of the parties;

“By consent the Notice of Motion dated 7th March, 2019 is compromised on the following terms;

- 1. The order of inhibition made herein on 29th March, 2019 shall remain in force until the hearing and final determination of**

the suit or further orders by the court.

2. The firm of MMC Africa Law shall give a professional undertaking which shall be filed in court within seven (7) days from the date hereof that they shall not part with, release or handover the original title for the suit property namely Title No. 19139, L.R No. 209/5919/8 to any person or party without leave of the court until the hearing and final determination of the suit or further orders by the court.

3. The parties shall comply fully with Order 11 of the Civil Procedure Rules within 30 days from the date hereof.

4. The matter shall be mentioned before the Deputy Registrar on 16th December, 2019 for pre-trial case conference.”

The foregoing consent was entered into by the parties for the purposes of fast-tracking the hearing of the main suit. Instead of pursuing the hearing of the main suit in respect of which both parties had agreed had some element of urgency, the Plaintiffs chose to file yet another interlocutory application which is now before the court. The application was brought by way of Notice of Motion dated 10th September, 2020. In the application, the Plaintiffs have sought the following orders;

1. Spent.

2. This Honourable court be pleased to issue Orders directing the Defendants/Respondents and /or any of their representatives and/or their respective servant/agents and/or anyone acting on their authority or instruction to immediately grant the 2nd Plaintiff/Applicant and/or any of her representatives and/or anyone acting on her authority access to the suit property to confirm the status of the property and to conduct a valuation of the property.

3. That the Nairobi County Commander of the National Police Service and/or the Officer Commanding Police Station (OCS) within the jurisdiction of the suit property be ordered to supervise and ensure compliance with the access order.

4. That this Honourable Court be pleased to order the Defendants/Respondents and/or any of their respective representatives and/or their respective servants/agents and/or anyone acting on their authority or instructions to immediately provide an accurate statement of accounts of all the rent collected from the suit property since 2012.

5. That this Honourable court be pleased to order the Defendants/Respondents and/or any of their representatives and/or their servants/agents and/or anyone acting on their authority or instructions to provide an accurate statement of accounts of all taxes paid in relation to the rent collected from suit property.

6. That pending the hearing and determination of this suit, this Honorable court be pleased to order the Defendants/Respondents and/or any of their representatives and/or their servants/agents and/or anyone acting on their authority or instructions to deposit in a joint interest account in the name of the Advocates on record all rent collected from the suit property.

7. Any other order that meets the ends of justice.

8. That cost of the application be provided for.

The Plaintiffs' application was brought on the grounds set out on the face thereof and on the supporting affidavit of the 2nd Plaintiff sworn on 9th September, 2020. The Plaintiffs averred that Arthur Thomas Porter, deceased was the registered proprietor of the suit property and that the 2nd Plaintiff was the sole administratrix of his estate. The Plaintiffs averred that the deceased relocated to Canada from Kenya 40 years ago and left the management of the suit property in the hands of Lloyd Masika whose role was to collect rent from the property at a fee. The Plaintiffs averred that Lloyd Masika managed the suit property until 2012 when the management of the same was taken over by the 2nd Defendant who was the deceased's acquaintance who assured the deceased that that change in the management of the property would save expenses being incurred on the property.

The Plaintiffs averred that the 2nd Defendant's role was to collect rent from the property and to deposit the same in the deceased's bank account. The 2nd Defendant was also given the responsibility of carrying out routine repairs to the property. The Plaintiffs averred that the 2nd Defendant did not make any deposit of rent collected from the suit property to the deceased account. The Plaintiffs averred that the 2nd Defendant claimed that all the rent collected were being utilized in repairing the suit property. The Plaintiffs averred that the 2nd Defendant had not deposited any rent collected from the suit property in the deceased's account. The Plaintiffs averred further that the Plaintiffs needed to access the suit property to carry out valuation of the same to assist them in the prosecution of the suit. The Plaintiffs averred further that it was also necessary for the Defendants to provide accurate account of the rent collected and any taxes paid from the rent if any.

The application was opposed by the defendants through grounds of opposition dated 21st September, 2020. The Defendants contended that the application was an abuse of the process of the court on account of the fact that the parties had entered into a consent that compromised some of the reliefs sought by the Plaintiffs in the application which consent had not been set aside. The Defendants contended further that the Plaintiffs had sought accounts in their final prayers in the amended plaint and as such the same could not be granted in an interlocutory application. The Defendants averred that the access order sought by the Plaintiffs to enable them carry out a valuation of the suit property was not necessary since the value of the suit property was not in dispute in the suit. The Defendants contended that the Plaintiffs' application was filed contrary to the overriding objectives of the Civil Procedure Rules set out in section 1A of the Civil Procedure Act which is meant to facilitate just, expeditious, proportionate and affordable resolution of disputes.

The Plaintiffs' application was argued by way of written submissions. The Plaintiffs filed their submissions on 29th October, 2020 while the Defendants filed their submissions on 30th November, 2020. I have considered the Plaintiffs' application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the Defendants in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The following is my view on the matter. I am in agreement with the Defendants that to a large extent, the Plaintiff's application amounts to an abuse of the process of the court.

The Plaintiffs had filed an earlier application dated 7th March, 2019 in which they had sought several orders including an order for accounts. When the parties appeared before the court on 24th October, 2019, they both appreciated the urgency of the matter and the fact that the issues raised in the suit are highly contentious and cannot be resolved by the court on affidavit evidence. It was on that understanding that they agreed to compromise the application dated 7th March, 2019 on the terms that I have set out herein earlier so that the hearing of the main suit can be fast-tracked.

As submitted by the Defendants, the parties have taken divergent views on the issue of the ownership of the suit property. The Plaintiffs have claimed that the suit property is owned by the deceased, Arthur Thomas Porter who had sold the same to the 2nd Plaintiff who is also the sole administratrix of his estate. On their part, the Defendants have admitted that the property is owned by the deceased. They have claimed however that the deceased had transferred the property to the 1st Defendant and that the instrument of transfer in favour of the 1st Defendant is awaiting registration. The Plaintiffs have termed the purported transfer of the suit property to the 1st Defendant a fraud.

It is common ground that the title of the suit property is in the possession of the 2nd and 3rd Defendants. The Plaintiffs have contended that they are not aware of the circumstances under which the 2nd and 3rd Defendants came into possession of the said title. The 2nd and 3rd Defendants have contended that the same was handed over to them by the deceased. The Defendants position is that they have a right to collect rent from the suit property. As at the time of filing this suit, the Plaintiffs had not received rent from the suit property for 8 years. In view of what I have stated above, the Plaintiffs' right to receive rent from the suit property is contested by the Defendants. There is no doubt that the issues in dispute between the parties can only be determined at a full trial. It was on this realization that the parties compromised the application dated 7th March, 2020 so that they could prepare the suit for full hearing. Due to the foregoing, the court was surprised to see another interlocutory application from the Plaintiffs.

I am of the view that the limbs of the Plaintiffs' application seeking accounts and the payment of rent into court can be termed as an abuse of the court process for the following reasons. As rightly submitted by the Defendants, the issue of furnishing of accounts at this stage of proceedings was compromised by the parties through a consent that was recorded on 24th October, 2019. It is an abuse of the court process for the plaintiffs to re-open the issue again for argument while the said consent has not been set aside. The re-opening of the issue for argument a fresh also goes against the provisions of section 1A of the Civil Procedure Act that enjoins the court to apply the Civil Procedure Rules in a manner that facilitates just, expeditious, proportionate and affordable resolution of disputes.

Again, as I have mentioned earlier, the parties had appreciated the fact that the issue of the ownership of the suit property and who is entitled to receive rent are contentious and cannot be resolved through affidavit evidence. It is an abuse of the court process for the plaintiffs to go against that understanding and bring the present application for accounts and depositing of rent in court instead of seeking an urgent hearing date for the main suit at which the contentious issues can be determined once and for all. In his book, The Law and Practice of Compromise, David Foskett, QC has stated as follows at page 77:

“An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issue of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action.”

Still on the issue of accounts, I am in agreement with the Defendants that this is not a suit for accounts and that the furnishing of accounts will depend on the findings that the court will make regarding the ownership of the suit property. In the circumstances, since the plaintiffs have sought accounts as part of their final reliefs in the suit, the Plaintiffs cannot seek the same at this interlocutory stage. If the court was to grant the prayer for accounts, the court would have granted a final relief before hearing the dispute between the parties.

For the foregoing reasons, it is my finding that the plaintiffs' application has no merit as concerns the prayers for accounts and the payment of rent in court. As concerns the prayer for access to the suit property, I am of the view that no prejudice will be suffered by the Defendants if they grant to the Plaintiffs temporary access to the suit property to enable them inspect and carry out valuation of the property for whatever purpose they wish to use the same for.

In conclusion, the Notice of Motion application dated 10th September, 2020 succeeds partially. The same is allowed on the following terms;

1. The defendants jointly and severally shall grant to the 2nd Plaintiff and/or her agents or representatives a single unrestricted temporary access or entry into the suit property during working hours for the purposes only of inspecting the same and conducting a valuation in respect thereof.
2. The date and time when the 2nd Plaintiff and/or her agents or representatives shall visit the suit property shall be arranged between the advocates for the parties on record but the visit shall take place within 30 days from the date hereof.
3. The costs of the application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL 2021.

OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Omemo h/b for Mr. Kimathi for the Plaintiffs

Mr. Musyoka for the Defendants

Ms. C. Nyokabi-Court Assistant