



Fryda v Assumption Sisters of Nairobi Registered Trustees & another (Civil Suit 224 of 2010) [2023] KEELC 21366 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CIVIL SUIT 224 OF 2010
A OMBWAYO, J
NOVEMBER 9, 2023**

BETWEEN

WILLIAM CHARLES FRYDA PLAINTIFF

AND

**ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES 1ST
DEFENDANT**

ST. MARY'S MISSION HOSPITAL 2ND DEFENDANT

RULING

1. This ruling is in respect of two applications, 1st and 2nd Defendants application dated 15th March, 2021 and the Plaintiff's application dated 2nd May, 2023. On the first application dated 15th March, 2021, the Defendants sought for the following orders:
 1. That this Honourable court be pleased to compel the Plaintiff to release to the 2nd Defendant the original title documents for L.R No. 27228, L.R No. 27229, L.R 9361/10 and Kiine/Rukunga/28.
 2. That this Honourable court be pleased to compel the Plaintiff to release to the 2nd Defendant cheque books, books of accounts and all records that are in his possession touching on the 2nd Defendant.
 3. That this Honourable Court be pleased to give directions and/or any other orders that it may deem just and expedient.
 4. That cost of this Application be provided for.
2. The Application was based on grounds that the Plaintiff continues to withhold documents of L.R No. 27228, L.R No. 27229, L.R 9361/10 and Kiine/Rukunga/28, cheque books and books of accounts which release is imperative for purposes of transferring ownership. That the Court of Appeal in 184 of



2017 gave orders for all the parties to ensure that the 2nd Defendant is fully vested with the ownership management of the properties and the hospital.

3. The Plaintiff in response filed his replying affidavit dated 4th July, 2023 where he deposed that the grounds raised in his application dated 2nd May, 2023 were pursuant to the directions given by the court on 20th June, 2023. He denied being in possession of the said documents. He further deposed that the said original documents remained in the custody of the firm of Messrs Macharia Njeru Advocates pending the intended transfer of the suit properties from the 2nd Defendant to St. Mary's Mission Hospital.
4. The Plaintiff deposed that since the said documents are not in his possession he is unable to handover the same. He added that he lost access to the said documents when the Defendants took over St. Mary's Mission Hospital on 27th December, 2017 and 4th January, 2018 and that the same have been in the Defendants' possession. He deposed that he was only a signatory which powers were later taken over after the Defendants appointed other signatories.
5. He deposed that at some point the Defendants with the assistance of DCI obtained ex parte orders and raided the hospital in Langata and Elementaita. He stated that during the said violent take over, the said documents including the cheque book and books of accounts were at the hospital premises and never in his possession. The Plaintiff deposed that nothing stops the Defendants from requesting for the relevant books of accounts since they had appointed new signatories in his place.
6. He deposed that the Defendants took over the operation of the hospital more than five years ago and therefore he cannot be compelled to hand over cheque books and books of accounts that are not in his possession. He added that whereas the Defendants application was filed on 23rd February, 2023, the same is dated 15th March, 2021 so as to give an impression that the same was filed around 15th March, 2021 for the purposes of enforcing orders made in the court of appeal judgment dated 25th September, 2020. He urged the court to dismiss the Defendant's application with costs.
7. The second application dated 2nd May, 2023 filed by the Plaintiff sought for the following orders:
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to strike out the impugned application.
 4. That in any event, this honourable court be pleased to strike out the Affidavit sworn by Sister Felix Mwikali on 15th March, 2021 in support of the impugned application.
 5. That the costs of and incidental to this application be borne by the Defendants on a full indemnity basis and interest thereon at courts rates from the date of ruling until payment in full.
 6. That this court be pleased to grant any such further orders or directions that the court considers appropriate.
8. The application was based on the grounds that this court does not have jurisdiction to hear and determine the application. That the same has been brought under the guise of enforcing the clear and unambiguous orders made in the court of appeal judgment. That the Defendants do not have the locus standi to bring the said application as the proper applicant is St. Mary's Mission Hospital.



Submissions

9. Parties did not file their respective submissions to the applications.

Analysis and Determination

10. This court will decide on both applications conjunctively. It is not in dispute that the Court of Appeal in Nairobi Civil Appeal No. 184 of 2017 delivered its judgment on 25th September, 2020. The said court made a declaration that all parties jointly oversee the handover of the hospital from the 1st Defendant to the 2nd Defendant and to ensure that the 2nd Defendant is fully vested with the ownership and management of the properties and hospitals thereon.
11. The Defendants' application dated 15th March, 2021 seeks this court to make orders compelling the Plaintiff to surrender the original title documents, a cheque book and books of accounts to the 2nd Defendant.
12. The Plaintiff on the other hand in his application dated 2nd May, 2023 urged this court to strike out the Defendant's application dated 15th March, 2023 on the ground that it lacked jurisdiction to hear and determine the same. He averred that the Defendants' lacked the locus standi to bring the said application and that the same was brought under the disguise of a review.
13. Section 80 of the *Civil Procedure Act* provides as follows:
Any person who considers aggrieved-
 - a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or
 - b) By a decree or order from which no appeal is allowed by this Act;May apply for review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
14. Order 45 Rule 1(1) of the Civil Procedure Rules further provides as follows:-

Any person considering himself aggrieved—(a)by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or(b)by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.[Emphasis mine]

(2)A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”
15. The basis of both applications is pegged on the judgment by the Court of Appeal in Nairobi. The Defendants' application seeks further orders from the said orders granted by the Court of Appeal. They have brought the said application before this court.



16. In the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) the court held that:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

17. This court is of the view that the Defendants’ ought to have filed the instant application before the court of appeal seeking review. As earlier highlighted, this court did not give the said orders and it is trite law that review is done by the court that passed the orders, in this case the court of appeal in Nairobi.

18. In view of the forgoing, this court lacks the requisite jurisdiction to hear and determine the Defendants’ application dated 15th March, 2021 and the same is struck out with costs. The Plaintiff’s application dated 2nd May, 2023 is thereby allowed as prayed. It is so ordered.

RULING DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 9TH DAY OF NOVEMBER, 2023.

A. O. OMBWAYO

JUDGE

