



REPUBLIC OF KENYA

IN THE ENVIROMENT & LAND COURT AT MOMBASA

ELC CASE NO. 184 OF 2017

BAKARI MFAUME BAKARI.....PLAINTIFF

VERSUS

JOSEPH KARIUKI KIBARA.....1ST DEFENDANT

REGISTRAR OF TITLES MOMBASA.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The plaintiff has filed a plaint dated 29th May 2017 suing the three defendants herein. He alleges that at all material times, he is the occupant and registered tenant of land known as MSA/MS/BLOCK1/257 and that he was unlawfully evicted from the suit property by an order obtained by the 1st defendant in Mombasa CMCC No. 1667 of 2012, *Joseph Kariuki Kibara –vs- Bakari Mfaume Bakari* in respect of a non-existent land parcel No. MSA/MS/BLOCK 1/257A. The plaintiff contends that he gave vacant possession in compliance of the said order and sought leave to contest the suit and obtained status quo orders which were never implemented by the OCS Likoni as was directed. The plaintiff avers that the subordinate court which, according to him had no jurisdiction, ordered him to deposit a security for costs of Kshs. 100,000/= despite exhibiting to it that plot No. MSA/MS/BLOCK 1/257 A does not exist. He avers that the 1st defendant after evicting him employed his proxies, agents and hooligans who demolished all the plaintiff's residential house, servant's quarters, perimeter wall and stole all his house wares and subdivided the land among themselves.

2. It is the plaintiff's contention that the subordinate court in issuing the orders without jurisdiction violated his constitutional and fundamental rights to property which he has known to be his home for over 20 years. The plaintiff avers that he has suffered irreparable damage and loss occasioned by the unlawful proceedings, judgment and orders emanating from a court with no jurisdiction and fraudulent evidence presented before that court by the 1st Defendant. And as a result the plaintiff prays for the following 5 reliefs in the plaint:

- a) A declaration that the plaintiff is the legal and lawful owner of land parcel No. MSA/MS/BLOCK 1/257.**
- b) An order that the lease title issued to the 1st Defendant in respect of land parcel No. MSA/MS/BLOCK 1/ 257A be revoked.**
- c) A permanent injunction restraining the 1st Defendant by himself, agents, assigns or any other person appointed by him from entering, selling, disposing and/or dealing in any manner whatever's (sic) the plaintiff's property plot No. MSA/MS/BLOCK 1/257.**
- d) Damages for trespass and destruction, demolition of plaintiff's properties.**
- e) Costs of the suit with interest.**

3. By a Notice of Motion dated 29th May 2017, the plaintiff seeks orders that the proceedings in Mombasa CMCC No. 1667 of 2012 be stood over generally pending hearing and determination of this suit and that the sum of Kshs. 100,000/= deposited in court by the applicant as security for costs be released to the applicant forthwith.

4. The application is premised on the grounds on the face of the motion and supported by the affidavit of the applicant sworn on 29th May 2017. Briefly, the applicant avers that the 1st respondent sued him in Mombasa CMCC No. 1667 of 2012 and obtained ex-parte judgment in respect of land parcel No. MSA/MS/BLOCK 1/257A. The applicant states that he raised an objection on that court's jurisdiction but the court declined to consider the objection. The applicant further states that the Respondent obtained eviction orders against him which was executed by a court Bailiff and the O.C.S, Likoni Police Station, and added that he got to know of the proceedings in court during the eviction.

5. The applicant avers that upon giving vacant possession he sought leave to defend the suit and the ex-parte judgment and subsequent proceedings were set aside but on condition that the applicant deposits in court the sum of Kshs. 100,000/= as security for costs. He states that he complied with the order and filed his defence. The applicant's complaint is that he has suffered irreparable damage allegedly occasioned by the orders emanating from the subordinate court in Mombasa CMCC. No. 1667 of 2012. According to the applicant, the subordinate court had no jurisdiction to deal with the matter.

6. The application is opposed by the 1st defendant who filed a replying affidavit sworn by himself on 9th October 2017 in which he avers that the application does not serve any useful purpose in law. He states that the issue of jurisdiction was raised by the parties in the lower court case and the court considered it.

7. I have read and carefully considered the application, the affidavits and pleadings filed. The land parcel known as Title No. MSA/MS/BLOCK 1/257 and Title No. MSA/MS/BLOCK 1/257 A are substantial issues in the present suit as well as in Mombasa CMCC. No. 1667 of 2012.

8. Section 6 of the Civil Procedure Act provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

9. This suit is not an appeal against the decision made by the Lower court in CMCC No. 1667 of 2012. There cannot be two parallel proceedings over the same issue. This court is obliged by the provisions of Section 6 of the Civil Procedure Act to stay this suit pending the hearing and determination of Mombasa CMCC No. 1667 of 2012. If the applicant felt aggrieved by the decision of the court in CMCC No. 1667 of 2012, there are legal Mechanisms provided in law on how to have it reviewed or set aside. Parties can only challenge matters and issues before a Lower Court in this court through the proper channel and mechanism. I find the suit herein to be sub judice as explained in the foregoing, and this suit is stayed pending the hearing and determination Mombasa CMCC No. 1667 of 2012, or until further orders.

10. Accordingly, I find that the notice of motion dated 29th May 2017 has no merit and dismiss it.

Each party to bear their own costs.

Delivered and signed at Mombasa this 2nd day of May 2018.

C. YANO

JUDGE