



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 942 OF 2013

KIAMBU MURUTANI COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MICHAEL NJUGUNA.....1ST DEFENDANT/APPLICANT

EQUITY BANK LIMITED.....2ND DEFENANT

ANTIQUA AUCTIONS.....3RD DEFENANT

RULING

1. This is the Notice of Motion dated 2nd February 2021 brought under order 12 rule 2, 7 of the Civil Procedure Rules, 2010, section 1, 3A of the Civil Procedure Act, Section 63 (e) of the Civil Procedure Act the inherent powers of the Court and all enabling provisions of the law.
2. It seeks orders:-
 1. *Spent.*
 2. *Spent.*
 3. *Spent.*
 4. *Spent.*
 5. *That the judgment delivered by Honourable Justice L. Komingoi be set aside.*
 6. *That the defendant be granted leave to cross-examine the Plaintiff's witnesses and to tender evidence in support of his defence.*
 7. *That the court be pleased to impose such conditions as it may deem fit in the circumstances.*
 8. *That costs be reserved.*
 9. *Costs be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs 1 to 8.
4. The application is supported by the affidavit of Michael Njuguna, the defendant/applicant herein sworn on the 2nd February 2021.
5. The application is opposed. There is a replying affidavit sworn by Anthony Kamuna, Chairman of the Plaintiff/Respondent on the 19th February 2021.
6. There is also the Notice of Motion dated 3rd March 2021, brought under order 22 rule 29 order 51 rule 1 of the Civil Procedure Rules, section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

7. It seeks orders:-

- 1. That the plaintiff/applicant be authorized to appoint a licensed Auctioneer to evict and remove the 1st defendant, his tenants and their families or any person claiming through them from Title Number Kiambu Municipality Block 1/57.**
- 2. That this honourable court be pleased to order the Officer Commanding Police Station (OCS) Kiambu Police Station to provide security during the eviction exercise.**
- 3. That the 1st defendant be condemned to bear the plaintiff's/applicant's costs and the Auctioneers costs of carrying out the eviction exercise.**

8. The grounds are on the face of the application and are set out in paragraphs 1 to 6.

9. The application is supported by the affidavit of Anthony Kamuna Chairman, of the Plaintiff/Applicant sworn on the 3rd March 2021.

10. The application is oppose. There is a replying affidavit sworn by Michael Njuguna the defendant herein sworn on the 15th April 2021.

11. On the 11th March 2021, the court directed that the two applications be heard together. They were canvassed by oral submissions on the 20th April 2021.

12. I have considered the Notice of Motion dated 2nd February 2021. It seeks to set aside this court's judgment delivered on 10th December 2020.

Order 12 rule 2 of the Civil Procedure Rules provides that:-

" 2. If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is attends satisfied:-

(a) that notice of hearing was duly served, it may proceed ex parte;

(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing."

Order 12 rule 7 of the Civil Procedure Rules provides that:-

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

13. It is the defendant's/applicant's case that his previous advocates mismanaged the case.

14. I have gone through the court record. On the 8th April 2019 PW1, Anthony Kamuna the Chairman of the Plaintiff testified. He was cross examined by Mr. Karei who was acting for the 2nd and 3rd defenants. On that date the plaintiff closed its case. Mr. Karei then sought time to avail the defence witnesses.

15. On the 10th July 2019, Mr. Thuo attended court and told the court he had been instructed to appear for the 1st defendant.

16. On the 3rd February 2020, in the presence of Mr. Njeru for the plaintiff and Mr. Thuo for the 1st defendant the following consent was recorded:-

"By consent: (1) the plaintiff be allowed to re open its case and to file additional documents within 14 days.

(2) The 1st defendant be allowed to file his additional documents if need be.

(3) The 1st defendant be allowed to cross examine the plaintiff's witness.

(4) The status quo be maintained. The suit property is still registered in the 1st defendant's name who should not dispose of the suit property.

(5) The 1st defendant be granted leave to amend defence and/or witness statements if need be within 14 days upon service".

17. The said consent was adopted by the court and matter fixed for hearing on 13th July 2020.

18. On the 13th July 2020, neither the 1st defendant nor his counsel was present. There was no explanation for their absence. As the date had been taken in the presence of both counsel this court directed that the matter proceeds.

19. The plaintiff then, recalled P.W.1 Antony Kamuna who produced the additional documents. The plaintiff then closed its case. Consequently, the 1st defendant's case was closed and the plaintiff was given time to put in final submissions.

20. It is therefore not true that the 1st defendant was not aware of the proceedings herein. I have gone through his supporting affidavit and I find no plausible reasons to warrant this court to exercise discretion in his favour.

21. Upon learning that judgment had been delivered in favour of the plaintiff, he filed a Notice of Appeal dated 17th December 2020. The same has not been withdrawn.

22. In conclusion, I find no merit in the Notice of Motion dated 2nd February 2021 and the same is dismissed with costs to the plaintiff/respondent.

23. I have also considered the plaintiff's Notice of Motion dated 3rd March 2021 and the replying affidavit sworn by Michael Njuguna the defendant/respondent. There is a valid Judgment of this honourable court dated 10th December 2020. The same has not been stayed and/or set aside. I allow the application in the following terms:-

(i) That the plaintiff/applicant is hereby authorized to appoint a licenced Auctioneer to evict and remove the 1st defendant, his tenants, and their families or any person claiming through them from Title Number Kiambu Municipality/Block 1/57.

(ii) That the OCS Kiambu Police Station is hereby ordered to provide security during the eviction exercise.

(iii) That the 1st defendant do bear the plaintiff's costs and the Auctioneer's costs during the eviction exercise.

It is so ordered.

Dated, signed and delivered in Nairobi on this 24th day of June 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Njeru for the Plaintiff

Mr. Mutanda for Mr. Gitonga for the 1st Defendant

No appearance for the 2nd and 3rd Defendants

Phyllis – Court Assistant