



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.108 OF 2012

DANIEL BERNHARD REINHARD

ELIZABETH BERNHARD REINHARD

(Suing through their Attorney **JOYCE REINHARD**)

JOYCE JEPLETING REINHARD.....PLAINTIFFS

VERSUS

DAMARIS NTHENYA

GIOVANNI OZZI.....DEFENDANTS

RULING

1. I have before me two applications and a Notice of Preliminary Objection for determination. The 1st Application dated and filed herein on 30th September 2019 has been brought by Maurizio Marino and Amici Mie Limited styling themselves as Affected/Interested Parties and seeking some 13 orders to the effect that: -

a) Spent

b) Maurizio Marino and Amici Mie Limited be heard in these proceedings as Interested Parties/Affected Parties under the provisions of Section 91 of the Civil Procedure Act on their application for stay of further execution against them, setting aside, restitution, reinstatement, compensation, declarations and other orders in relation to their rights of possession, their trade in Plot Nos 654 (CR No. 30961), Plot No. 588 (CR No. 30959) and Plot No. 589 (CR No. 30960) (hereinafter referred to as the suit premises) and the recovery (of) movable and perishable assets taken from them by force on the misapplication of orders of this Court.

c) Spent

d) Pending the hearing and determination of the summons dated 30.9.2019 for the annulment and revocation of grant of letters of administration in Malindi High Court Succession Cause No. 47 of 2008 any further execution of the Judgment and decree in this suit by any means be stayed.

e) The Judgment and decree in so far as they affect the rights of Maurizio Marino and Amici Mie Limited to occupy and possess and to carry on business in Plot Nos 654 (CR No. 30961), Plot No. 588 (CR No. 30959) and Plot No. 589 (CR No. 30960) be set aside as a matter of right.

f) Order No. 4 in the orders given on 30.7.2019 directing the OCS Watamu to enforce orders given on 20.8.2018 be set aside in so far as they affect the rights of Maurizio Marino and Amici Mie Limited.

g) Maurizio Marino and Amici Mie Limited be reinstated to Plot Nos. 654(CR No. 30961), Plot No. 588 (CR No. 30959) and Plot No. 589 (CR No. 30960) with immediate effect as a matter of right.

h) All movable assets of any description belonging to Maurizio Marino and Amici Mie Limited be returned to Maurizio Marino and Amici Mie Limited unconditionally and with immediate effect and in the interim the 3rd Plaintiff be compelled to return

every movable item to the suit premises as there was no suit, Judgment or decree for any movable item or asset.

i) The 3rd Plaintiff be evicted from Plot Nos 654(CR No. 30961) Plot No. 588 (CR No. 30959) and Plot No. 589 (CR No. 30960) with immediate effect.

j) The County Criminal Investigations Officer in the County of Kilifi and the Officer Commanding Station, Watamu be directed to enforce any order given under this application in the event the 3rd Plaintiff becomes violent.

k) The Officer Commanding Station be summoned to the Court to explain why he and his officers presided over the eviction of the Applicants from Plot Nos 654(CR No. 30961), Plot No. 588 (CR No. 30959) and Plot No. 589 (CR No. 30960) before 6.00 a.m.

l) Compensation be accessed (sic) by this Court and be paid by the 3rd Plaintiff to the Applicants for all loss of business incurred after she removed them from the suit premises;

m) The Court be pleased to compel the 3rd Plaintiff to provide a full inventory of all movable assets belonging to the Applicants that she found in the suit premises and in doing so the Court to proceed on the basis that there are no letters of administration relating to any movable asserts and there was no Judgment, decree, order or warrant relating to any movable asset at any time in August 2019; and

n) (The) cost of this application be paid by the 3rd Plaintiff.

2. The said application which is supported by an affidavit sworn by the said Maurizio Marino is premised inter alia on the grounds that: -

i) Until he was evicted from the suit premises, Maurizio Marino was a tenant therein operating a tourist resort under the name Amici Miei Limited under a lease executed with the 2nd Defendant;

ii) There was no order or decree for possession of any movable assets within the suit premises. The 3rd Plaintiff having filed a Notice to Show Cause against the Defendants did not wait for the Defendants to Show Cause but used armed Police to take over the assets of the Applicants;

iii) There was no grant in relation to any movable assets issued to the 3rd Plaintiff and she knew that the premises were rented out to other persons by the Defendants;

iv) The Court should have directed notice to be served upon the applicants before ordering eviction as the eviction orders against the Defendants were relied upon to evict the Applicants; and

v) The 3rd Plaintiff had forged the Petition and the affidavit in support of the Petition for Letters of Administration intestate even though those documents are alleged to have been signed by the 1st and 2nd Plaintiffs. A Judgment and decree procured by fraud and documents obtained by fraud ought to be set aside as a matter of right.

3. By her Grounds of Opposition dated and filed herein on 25th November 2019, the Plaintiff avers: -

a) That the application is misadvised, baseless, frivolous, scandalous and an outright abuse of the due process of the Court generally tainted with dishonesty and does not entitle the Applicant to the reliefs sought;

b) That the applicants have come to Court too late in the day yet they have been aware of the same all through since service was being done at the suit premises;

c) That the intended interested parties have no locus standi and have not shown their interest in the suit premises;

d) That the application is incompetent and untenable in law having been brought under wrong and/or unknown provisions of the law;

e) That Judgment has been entered in this matter and the execution has been done therefore this matter is res judicata;

f) That this Honourable Court does not have the jurisdiction to grant the prayers sought in the application as this is a matter between a purported landlord and tenant (and) should be handled by the correct forum;

g) That the Applicant is not entitled to orders sought herein and the said application should be dismissed with costs since the said application is untenable in law;

h) That allowing this instant application would occasion the Respondent insurmountable prejudice on a matter that had been fully concluded; and

i) That the Application seeks to delay the fair hearing and determination of this cause.

4. Before the Motion dated 30th September 2019 could be heard, the Plaintiff in person filed another Notice of Motion application dated 16th December 2019 urging the Court to be pleased to grant leave for execution before the costs are ascertained.

5. In response to the said application, 2nd Defendant instituted a Notice of Preliminary Objection dated 21st January 2020 objecting to the application on the grounds that the Plaintiff is duly represented by a firm of Advocates and cannot plead and file documents in person without filing a Notice to Act in Person.

6. By yet another application dated 20th August 2020 as filed herein by Alfred Andres Keller (hereinafter the Objector), the Objector prays for orders as follows: -

2. That pending the hearing and determination of this application the Court be pleased to vacate/suspend the eviction orders dated 16th July 2020;

3. That this Court do issue directions in respect of the conflicting orders; and

4. (That the) costs be in the cause.

7. The Objector's application is premised on the grounds: -

i) That the Honourable Court issued orders dated 16th July 2020 directing the Court Bailiff to evict the Objector; and

ii) That the said order is in direct conflict with the Court Orders dated 9th June 2020 whereby the Court had issued a Stay of Execution and it is in the interest of justice that directions be given in respect of the two orders.

8. I have given full consideration to the applications before me as well as the Notice of Preliminary Objection. I have equally perused and considered the submissions as filed by the parties in regard thereto.

9. Starting with the Motion dated 30th September 2019, the two applicants, Maurizio Marino and Amici Mie Limited seek to be enjoined in these proceedings as affected/interested parties and for a number of other orders issued earlier on in these proceedings to be set aside, varied and/or vacated. They also urge the Court to evict the Plaintiff from the suit premises and for themselves to be reinstated thereto.

10. A perusal of the application by the two reveals that they do not claim to be the owners of the suit properties. Their claim is based on a tenancy agreement allegedly executed between themselves and the 2nd Defendant herein. Strangely, no copy of the tenancy agreement was annexed to their application. Instead, the applicants have spent a considerable portion of their Supporting Affidavit trying to demonstrate that the Plaintiff had obtained the suit premises by way of forgery.

11. Arising from the arguments advanced by the two applicants it was apparent to me that they are only but seeking to advance the cause of the defendants in these proceedings. This matter as it were was in Court since the year 2012 as the ownership of the property in question was contested between the Plaintiff and the Defendants. Judgment was eventually delivered in favour of the Plaintiff on 19th July 2018.

12. Since then a number of parties have come up in opposition to the proposed execution of the decree obtained herein by the Plaintiff. The 2nd Defendant from whom the Applicants derive title had by an application herein dated 11th October 2018 also purported to be a tenant of the 1st Defendant. That application was dismissed on the 30th July 2019. I am not persuaded that the two applicants purporting to be the same 2nd Defendant's tenants on the property were unaware of those proceedings. Indeed, their detailed affidavit in support of the claim to ownership of the premises by the Defendants attests to their deep knowledge of the dispute.

13. As it were the two applicants have not shown if indeed they had any interest in the ownership of the suit properties why they failed to take any steps to be enjoined during the pendency thereof. The basis for joinder in a suit is to enable a party to effectually and completely adjudicate upon and settle all the questions involved in a suit. It is of no use for a party to seek to be enjoined in a suit long after the Court has already made findings on the issues raised.

14. At any rate as a tenant to the said premises tracing their occupation thereof to a lease agreement executed with the Defendants, their interests with the said Defendants were intertwined and they cannot be heard to object to execution on the basis of their relationship with persons who had already been found by the Court not to have been the rightful owners of the suit properties.

15. As was stated by Turner LJ in ***Bellamy –vs- Sabine (1857) 1 D & J. 566 at 584:*** -

“Where a litigation is pending between the Plaintiff and the Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding not only on the litigating parties but also on those who derive title under them by alienating pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the proceedings would ever end.....”

16. Those old principles were indeed echoed by our own Court of Appeal in ***Mawji –vs- US International University of Africa & Another (1976) KLR 185***, where the Learned Judges of Appeal observed thus: -

“Every man is presumed to be attentive to what passes in the Courts of justice of the State of Sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendente lite for valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the Judgment or decree in the suit.”

17. While the applicants may not have purchased the suit property, the tenancy agreement they purport to have entered into with the Judgment debtors over the premises is bound by the decision of this Court and no amount of wriggling shall change that fact.

18. It follows without more that I find no merit in the Motion dated 30th September 2019 and I dismiss the same with costs to the Plaintiff.

19. In respect of the 2nd Defendant’s Preliminary Objection dated 21st January 2020, the same related to an application filed herein by the Plaintiff in person dated 16th December 2019. According to the 2nd Defendant, the Plaintiff having appointed an Advocate on record cannot plead and file documents in person without first filing a Notice to Act in Person. By the said Objection, this Court heard the 2nd Defendant to be stating that the Plaintiffs’ Motion dated 16th December 2019 was incompetent and hence the same ought to be struck out.

20. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides as follows: -

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court-

a) Upon an application with notice to all the parties; or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

21. It was not in doubt that Judgment was rendered herein on 19th July 2018 and the Plaintiff’s application filed herein in person dated 19th December 2019 evinced her intention to act in person a year after Judgment had been entered in her favour.

22. As I understood it however, the essence of Order 9 Rule 9 of the Civil Procedure Rules is to protect advocates from mischievous clients who will wait until a Judgment has been delivered and then sack the advocate and either replace him with another advocate or act in person. That does not appear to me to be the position herein.

23. From a perusal of the record, the Plaintiff was represented in these proceedings up and until the time Judgment was rendered herein on 19th July 2018 by Messrs Katwa & Kemboy Advocates. Having disagreed with the said Advocates, the Plaintiff filed a Notice of Motion dated 19th September 2018 seeking inter alia, an order that the Advocate on record for herself cease acting as such. Subsequently on 15th October 2018, this Court allowed the Plaintiff to act in person.

24. On the same day, the Plaintiff would appoint Messrs Chepkwony & Associates Advocates to act for her in the matter. That relationship did not however last long. Some one year after their appointment, and by an application dated and filed herein on 28th November 2019, Messrs Chepkwony & Associates sought to be granted leave to cease acting for the Plaintiff. Some three (3) weeks down the line, the Plaintiff filed the impugned Motion dated 19th December 2019.

25. In the circumstances herein, I did not think that the Plaintiff was under any obligation to file a formal Notice to Act in Person. What was important in the circumstances herein was for the Plaintiff to provide full details of her address for ease of service and not necessarily to file a Notice of Appointment to Act in Person having been left with no Advocate on record.

26. When faced with an application to strike out an application filed by an Advocate who had not properly filed a notice of change of Advocate in ***Kamlesh Mansukhlal Damji Pattni –vs- Nasir Ibrahim Ali & 2 Others (2005) eKLR***, the Court of Appeal held thus: -

“Such an extreme order would not serve the cause of justice as the Respondents in that case would merely ensure that their current or new advocates filed appropriate Notices of Appointment and would refile the same application. Justice would not have been achieved but rather time, delay and a little expense would have been sacrificed.”

27. Similarly, I am of the considered view that even if I were to find that the Plaintiff ought to have filed a Notice to Act in Person, which I have not, proceeding to strike out the Motion dated 19th December 2019 would amount to giving undue regard to technicalities of procedure contrary to Article 159 (2) (d) of the Constitution and would defeat the overriding objectives as set out under Section 1A of the Civil Procedure Act whose purpose is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

28. It follows therefor that I did not find any merit in the Preliminary Objection by the 2nd Defendant and the same is equally dismissed with costs.

29. That leaves me with the application dated 20th August 2020 by Alfred Andres Keller (the Objector) in which he urges this Court to vacate the eviction order issued herein on 16th July 2020 on account that the same conflicts with the orders issued earlier on 9th June 2020 wherein the Court had granted orders of stay of execution.

30. By an application dated 12th September 2018, the Objector herein had sought to be enjoined as a Defendant in this suit on the basis that he is the lawful owner of the suit property. He also sought a stay of execution of the Judgment herein. In his Supporting Affidavit to the application for joinder, the Objector averred that he had come to learn of the Judgment on 10th September 2018 when he was served with a warrant by the Court Bailiff to give vacant possession of what he called his property.

31. Having considered the said application and more so the failure by the Objector to annex a Copy of the agreement through which he claimed to have acquired the suit property, this Court dismissed his application for Joinder and/or stay of execution on 30th July 2019. The Objector has neither appealed the decision nor sought to have it set aside.

32. About a year after his application for joinder and stay of execution was dismissed, the Objector filed a Notice of Motion herein dated 4th June 2020 under Order 42 Rule 51 (2) of the Civil Procedure Rules praying for an order that a Notice of Objection be issued in terms of order 22 Rule 52 as he was the legal owner of the property that was attached.

33. The Objector then purports to have obtained an order of stay of execution on the same day granted by the Deputy Registrar of this Court. A perusal of the file herein does not however reveal anywhere where the file was taken before the Deputy Registrar and/or that the Orders of stay were granted or endorsed.

34. Under Rule 22 Rule 52 of the Civil Procedure Rules, where such an application was made, the Court had discretion to grant a stay of execution where satisfied that it was warranted for a period not exceeding 14 days. As I have stated, there is nowhere on record where such orders were granted and/or that the same were extended or in existence on 16th July 2020 when this Court once again issued orders for his eviction from the suit.

35. It goes without saying that from the record, there were no orders that were in conflict. Indeed, having filed an application to be enjoined in the proceedings and for a stay of execution which application was rejected by this Court on 30th July 2019, the second application by the same party filed on 4th June 2020 was instituted in gross abuse of the Court process.

36. That being the case, it follows that the Motion dated 20th August 2020 as filed by Alfred Andres Keller was filed in furtherance of the abuse of the Court process. The same is misconceived, meant to mislead this Court and without any legal or actual basis. It is equally dismissed with costs.

37. In the result, both applications as well as the Preliminary Objection are hereby dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE