



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC JR. CASE. NO. E013 OF 2021

NUH ABDILLE HASSAN.....EX-PARTE APPLICANT

- VERSUS -

THE PRINCIPAL MAGISTRATES COURT AT MILIMANI.....1ST RESPONDENT

O C S PANGANI POLICE STATION.....2ND RESPONDENT

HALIMA MAHMOOD ALI.....INTERSTED PARTY

RULING

1. The ex-parte applicant, Nuh Abdille Hassan, brought a chamber summons dated 6/7/2021 under certificate of urgency, seeking leave to bring a judicial review motion to quash the decision of the Magistrate Court made on 21/6/2021 in **Nairobi CMCC No 800 of 2018; Nuh Abdille Hassan vs Halima Mahmood Ali**. He faulted the Magistrate Court for issuing an eviction order against him after it had made a determination to the effect that it did not have jurisdiction over the matter and after it had struck out the suit.

2. The application was electronically placed before me and I dealt with it on 9/7/2021. Upon perusing the application *ex-parte*, the court noted from paragraph 20 of the supporting affidavit that Okongo J was seized of a related dispute involving the same parties and the same suit premises, to wit, **Nairobi ELC Case No 775 of 2017; Halima Mahmood Ali v Nuh Abdille Hassan**.

3. Because of the above related suit, and because of the fact that the *ex-parte* applicant had expressed apprehension of imminent eviction on the basis of the impugned order of the Magistrate Court, this court made the following directions/orders:

“1. That the application shall be listed before Okongo J for directions on 15/7/2021.

2. That there shall be an interim stay in terms of prayer 4”

4. When the matter was placed before Okongo J for disposal directions on 15/7/2021, Mr Wandabwa, counsel for the interested party, urged the court to set aside the *ex-parte* interim order. Okongo J directed the interested party to bring a formal application for review and gave disposal directions on the anticipated formal review application. He directed the parties to come for interpartes hearing of the review application before me on 22/7/2021. On 22/7/2021, I directed the parties to come for hearing of the application today, 23/7/2021. The application was indeed heard today and is what falls for determination in this ruling.

5. Mr Wandabwa, counsel for the interested party, advanced three key grounds why the interim stay order should be set aside. First, counsel contended that the order of 9/7/2021 was obtained through non-disclosure of material facts. It was contended that the *ex-parte* applicant failed to disclose that they were in possession of the suit property on account of an order obtained from the Magistrate Court fraudulently in 2018 and that the said fraudulent order was vacated by the Magistrate Court in May 2021.

6. Secondly, counsel contended that the *ex-parte* applicant failed to disclose that there existed **Judicial Review Misc Application Number E012/2021 [JR E012/2021]** in which the *ex-parte* applicant had sought similar orders and in which Okongo J had failed to give an interim stay order. It was the position of counsel that Okongo J having given hearing directions in JR E012/2021, the same could only be withdrawn with the express leave of the court.

7. Thirdly, counsel submitted that this court not having granted leave *ex-parte* on 9/7/2021, the interim preservative order of stay should not have been granted.

8. In response, Mrs Wambungu, counsel for the *ex-parte* applicant submitted that, besides praying for leave and for an order of stay of the impugned decision, the *ex-parte* applicant had specifically prayed for a stay order pending the interpartes hearing of the application for leave. It was the position of counsel that the court properly gave an interim stay pending the interpartes hearing of the application. Secondly, counsel submitted that what informed the *ex-parte* applicant's decision to withdraw JR E012/2021 and file a fresh judicial review application was the fact that the interested party had received a communication dated 2/7/2021 addressed to the OCPD of Starehe, directing the OCPD to verify the authenticity of the eviction order and referring the eviction order to the District Security Committee for enforcement. She added that the *ex-parte* applicant opted to withdraw judicial review E012/2021 because once the ball starts rolling in judicial review proceedings, there is no room for other interlocutory applications.

9. Thirdly, counsel for the *ex-parte* applicant submitted that Judicial Review E012/2021 stood withdrawn the moment the notice of withdrawal was filed because the application had not been served. Fourthly, counsel invited the court to take into account the fact that the impugned order giving rise to the judicial review proceedings was informed by the fact that the Magistrate Court had given eviction orders notwithstanding the fact that both the Magistrate Court and Okongo J had made findings to the effect that the Magistrate Court did not have pecuniary jurisdiction to deal with the dispute. Counsel urged the court to dismiss the application for review.

10. I have considered the interested party's application together with her submissions. I have also considered the *ex-parte* applicant's response and submissions. Similarly, I have considered the relevant law and jurisprudence. The single question falling for determination in this application is whether there is a proper basis for setting aside the interim order of stay.

11. The impugned order was an interim preservatory order of stay which was to be in force pending the interpartes disposal of the application by Okongo J who was seized of a related suit, to wit, ELC 775/2017. Ordinarily, the application would be disposed *ex-parte*. However, because the court noted from paragraph 20 of the supporting affidavit that Okongo J was seized of a related dispute, it decided to send this matter to Okongo J for disposal. In the interim period, taking into account the fact that the *ex-parte* applicant was being referred to Okongo J on a Friday and had, through the application, expressed apprehension of imminent eviction on the basis of what he alleged was an eviction order issued by the Magistrate Court without jurisdiction, the court granted an interim stay within the framework of **Section 13 (7)** of the **Environment and Land Court Act**.

12. The first and second grounds urged by the applicant is that there was non-disclosure of material facts by the *ex-parte* applicant. I have looked at the materials placed before the court. The one material fact which the *ex-parte* applicant did not disclose is the fact that he had previously filed ELC JR E012/2021, seeking similar orders and Okongo J had given directions on it. In my view, notwithstanding the fact that JR E012/2021 was withdrawn, the *ex-parte* applicant had a duty to disclose to this court the fact that he had filed **ELC JR E012/2021** and Okongo J had given directions on it. Had the *ex-parte* applicant made full disclosure, the court would perhaps have taken a different view of the plea for interim stay pending interpartes hearing of the application. Similarly, if inclined to grant the interim stay, the court would have framed the stay order differently.

13. It is now an established principle in our civil legal system that a party seeking an *ex-parte* order is obligated to make full and frank disclosure of all material facts relating to the matter before court. Indeed, the Court of Appeal [quoting Gili Robert Golf L.F - as he then was, in **In the Adria (Vasso) 1 QB 477 AT 477**] reiterated this principle in the following words in **Owners of the Motor Vessel "Lillians" v Caltex Oil (Kenya) Ltd (1989)eKLR**:

"It is axiomatic that in *ex-parte* proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the *ex-parte* application, even though the facts were such that, with full disclosure, an order would have been justified."

14. Regrettably, the *ex-parte* applicant did not disclose the fact that he had previously presented exactly the same application and Okongo J had rendered himself on the said application by giving disposal directions thereon without granting an interim order of stay. This, in my view, is sufficient ground for discharging the *ex-parte* order.

15. The other key ground on which the interested party advanced was that the court not having granted leave, it should not have granted the preservatory interim orders of stay. I have observed that the court deemed it necessary to send the application to Okongo J, who was seized of **ELC Case No 775/2017**, for disposal and also deemed it necessary to exercise discretionary jurisdiction under **Section 13 (7)** to grant a preservatory interim stay pending interpartes hearing of the application by Okongo J. In granting the Environment and Land Court the discretionary jurisdiction specified under **Section 13 (7)** of the Act, the Legislature appreciated that a situation such as the one which the court was presented with in this matter on a Friday would arise from time to time in disputes relating to occupation of land. It is therefore my view that the court properly exercised jurisdiction under **Section 13 (7)** of the Act.

16. In conclusion, the court is satisfied that there was non-disclosure of a material fact relating to a preceding application. I will in the circumstances vacate the *ex-parte* order of 9/7/2021. However, because of the nature of this dispute and given the fact that I am rendering this decision late on a Friday, and I am sending this matter to Okongo J, the effective date of the vacation order will be 29/7/2021, which is the day when this matter will be listed and placed before Okongo J for interpartes disposal of the application dated 6/7/2021. That is three (3) working days away.

17. In light of the foregoing, the interested party's application dated 15/7/2021 is disposed in the following terms:

a. The interim stay order issued on 9/7/2021 shall stand vacated and shall lapse on 29/7/2021.

b. This matter shall be listed on 29/7/2021 for hearing of the application dated 6/7/2021 before Okongo J who is or was seized of a related case, ELC Case No 775/2017.

c. Responses to the said application shall be filed and served on or before Monday 26/7/2021 and parties shall file and

exchange written submissions thereon before 28/7/2021.

d. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JULY, 2021

B M EBOSO

JUDGE

In the Presence of: -

Mrs Wambugu for the Ex-parte Applicant

Ms Kamau for the Interested Party

Court Assistant: June Nafula