



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 121 OF 2010

JUMA KHAMIS.....1ST PLAINTIFF

SALIM MBARAK.....2ND PLAINTIFF

ABDALLA MAGRAM.....3RD PLAINTIFF

MOHAMED FAHIYE.....4TH PLAINTIFF

KHADIJA MOHAMED.....5TH PLAINTIFF

VERSUS

MUKESH SHAH.....1ST DEFENDANT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES.....2ND DEFENDANT

DURAHARD LIMITED.....3RD DEFENDANT

JUDGMENT

(Suit filed by plaintiffs claiming that an illegal distress has been levied upon them by the 1st and 2nd defendants; 1st and 2nd defendants filing defence denying the claim; pleaded in the plaint that plaintiffs are adults of sound mind; plaint accompanied by verifying affidavits sworn by the plaintiffs; turning out that 1st plaintiff was deceased all along and could not therefore have filed suit or sworn a verifying affidavit; plaint thus accompanied by false affidavits; whether such suit liable to be struck out; court of opinion that such suit must be struck out; in course of proceedings a 3rd party coming into suit by way of amendment of defence and filing a counterclaim; the 3rd party cannot be considered a defendant as plaintiff has no suit against her; no liberty therefore for such person to file a counterclaim; counterclaim dismissed; result being that both suit and counterclaim are dismissed).

1. The suit was commenced by way of a plaint filed on 23 April 2010. In the plaint, it is pleaded that the plaintiffs are resident in Mombasa, save for the 4th plaintiff who it was said is resident in Saudi Arabia. The 1st defendant is pleaded to be an adult of sound mind whereas the 2nd plaintiff is an auctioneer. The plaintiffs contend that they are owners of residential houses on the Plot No. 124/1 MN ('the suit property') and that they were paying ground rent, on an arrangement of house without land, until sometimes in the year 1988 when the erstwhile proprietor allowed them to occupy the property rent free. It is pleaded that on 17 April 2010, the 1st defendant through the 2nd defendant, advertised for sale by auction under the Distress for Rent Act, Cap 293, various houses on the suit property. It is claimed that the advertisement and intended sale was unlawful, null and void, for reason that the 1st defendant is a stranger to the plaintiffs who have occupied the property since 1988 and further that the houses are not amenable for disposal or alienation under the Distress for Rent Act.

2. In this suit, the plaintiffs seek the following orders :-

a) A declaration that the intended sale by the defendants of the plaintiffs' house under Distress of Rent Act is in the circumstances unlawful, null and void.

b) Damages.

c) Costs.

d) Any other or further relief this Honourable court deems fit to grant.

3. The 1st and 2nd defendants filed their statement of defence on 3 May 2010. They more or less denied the averments in the plaint. It was however admitted that the 2nd defendant had advertised for sale various houses on the suit property but it was denied that this was pursuant to instructions received from the 1st defendant. The defence was subsequently amended with an Amended Defence and Counterclaim being filed on 22 February 2019. That Amended Defence and Counterclaim introduces another party, Durahard Limited, as the 3rd defendant and the counterclaimant. I will deal with the propriety of this joinder later in this judgment. What the 3rd defendant pleaded is that she is the registered and beneficial owner of the suit property LR No. 1241/I/MN. It is admitted that the plaintiffs started a landlord-tenancy arrangement with the previous owner, one Salim Bin Mbarak Bakhshwen, under the system of house without land where they occupied a portion of the property. It is pleaded that the 3rd defendant purchased the suit property on 15 January 1997. It is averred that when the 3rd defendant took up the property, it was agreed that the plaintiffs will continue paying ground rent to the 3rd defendant and that the plaintiffs were aware that rent was payable to the 3rd defendant. It is pleaded that the plaintiffs are now in breach of the tenancy agreement by failing to settle the rent as required; erecting additional structures on the suit property without the consent of the 3rd defendant; and failing to secure the requisite approvals from the County Government before constructing the additional structures on the suit property.

4. In the counterclaim the 3rd defendant has sought the following orders :-

a. A declaration that the plaintiffs are in breach of the tenancy agreement.

b. Vacant possession by eviction of the plaintiffs from the suit property and the County Police Commander and the Officer Commanding Station, Bamburi Police Station to enforce the court orders.

c. Permanent injunction restraining the plaintiffs, their agents and/or servants from trespassing, constructing and in any way dealing with the suit property.

d. Costs of this suit.

e. Any other relief that this honorable court may deem just, fit and expedient to grant.

5. The plaintiffs filed a Reply to Amended Defence and Counterclaim on 27 March 2019, and joined issue with the defendants. They pleaded that the landlord/tenancy arrangement between them and the previous owner ceased to exist in the year 1988, upon which, they became tenants at will in whose favour time could run against the registered proprietor for purposes of the Limitation of Actions Act, Cap 22, Laws of Kenya. They pleaded that the proprietor's title became extinguished 12 years after the tenancy relationship had ended and that by virtue of Section 17 of the Limitation of Actions Act, the registered proprietor's interest over the property ceased for all time. They denied entering into any agreement with the 3rd defendant to pay rent to him and neither did they recognize him as landlord. They averred that there has never been any demand for rent by the 3rd defendant prior to the purported levy of distress for rent at about which time the 3rd defendant's interest came to the plaintiff's knowledge. In the defence to counterclaim, they pleaded that the landlord/tenant arrangement that they had with Salim Bin Mbarak Bakhshwen or his personal representatives had been repudiated by conduct and/or dissipated about the year 1988. They reiterated not being aware of the 3rd defendant's interest prior to the year 2010 and were equally unaware of any obligation to pay rent to anybody. They denied the breaches of agreement pleaded against them. They pleaded that the 3rd defendant's right of action over the land was barred by virtue of Section 7 of the Limitation of Action Act, as read with Section 17 and 38 thereof. They averred that they have had notorious, uninterrupted possession of those portions of the suit land they occupy in circumstances that come within the *nec vis nec clam nec precario* formulation and have thus acquired indefeasible prescriptive rights over the property. They asked :-

a) That the 3rd defendant's claim be dismissed with costs and that the court do order that the plaintiff are entitled to those portions of the suit land in their occupation by adverse possession.

b) In the alternative and only if the court is unable to record judgment in terms of (a) above, an order be made that the 3rd defendant do compensate the plaintiffs for the current value of their investment having regard to the longevity of their tenure and the inconvenience they would be exposed to in granting possession to the 3rd defendant.

c) Any other of further relief this honorable court may deem appropriate in the circumstances.

6. I think I need to mention that before the case proceeded for hearing, it emerged that the 1st plaintiff, Juma Khamis was actually dead even before this suit was filed. He died on 20 June 2009 yet this suit was filed on 23 April 2010. This information came through an application filed by one Asheey Juma Mbarak who applied on 20 November 2020 to be substituted for the deceased 1st plaintiff. I did not entertain this application, for to me, there was nothing to substitute, since the suit by the 1st plaintiff, if not the entire suit, was a nullity, for it cannot be said that there is any competent suit filed by a dead person which can subsequently be taken over. I was indeed disturbed that there was a verifying affidavit sworn by the claimed Juma Khamis verifying the contents of the plaint, and also an undertaking as to damages alleged to be signed by him. All these were false, negating the statements in the plaint, that all the plaintiffs are adults of sound mind residing and/or working in Mombasa, save for the 4th plaintiff who was alleged to be in Saudi Arabia. I reserved the discretion to revisit whether the suit is incompetent ab initio and without prejudice directed the matter to proceed. I will deal with this later in this judgment.

7. The plaintiffs presented evidence through one Mbarak About Mbarak (not a party) and also the 3rd and 5th plaintiffs testified. Their evidence was more or less similar. That they have been resident on the suit land since the 1970s; that they were initially paying ground rent to Salim Mbarak Bakhshwein (Mr. Bakhshwein), the previous proprietor; that in the early 1980s, Mr. Bakhshwein promised that he would sell to them the land where the houses are occupied and it was agreed that they could stop paying rent as this was being considered; that

shortly Mr. Bakhshwein died and they continued in possession without paying rent; that they were surprised when distress was levied against them; that they believed that the distress was being levied by the 1st defendant acting through the 2nd defendant which they thought was illegal as they did not know him and had no landlord/tenant relationship with him.

8. The 1st defendant testified as the sole witness of the defendants. His evidence was that the 3rd defendant purchased the suit property in the year 1996; that it purchased the property with some persons in possession; that the previous owner had informed the witness that these were tenants on a house without land arrangement; that the tenants refused to pay rent and distress was levied; that since they have refused to pay rent, they should be evicted.

9. After the hearing, I invited counsel to file written submissions which they did. I have taken them into account.

10. I have considered the matter. I do not think that I am able to make any substantive decision on the rights of the parties in this suit based on the nature of the pleadings before me.

11. Starting with the plaintiffs, it will be recalled that this case was filed by five persons who it was pleaded in the plaint “*are all adults of sound mind residing and/or working for gain in Mombasa save for the 4th plaintiff who resides in Saudi Arabia.*” It will also be recalled that all the mentioned plaintiffs swore affidavits verifying the correctness of the plaint, save for the 4th plaintiff whose verifying affidavit was sworn by one Asha Fahiye, who mentioned that she holds a power of attorney donated by the 4th plaintiff. All the verifying affidavits were sworn on 23 April 2010. I had mentioned earlier in this judgment that it emerged in the course of these proceedings that the 1st plaintiff had died even before this case was filed. From the Certificate of Death availed, he died on 20 June 2009. It is certain that he could not be present to enable him be a plaintiff in this case. Neither could he have availed himself on 23 April 2010 before the Commissioner for Oaths to swear the verifying affidavit. It is obvious that the verifying affidavit purportedly sworn by the 1st plaintiff is a false, if not fraudulent, affidavit. As emphasised in the case of *Babubhai Dhanji Puthak vs Zainab Mrekwe (1964) EA 24*, (referred to also in the case of *Zacharia Kariuki Kabithi vs Joseph Ndungu Mumbi & Another (2018) eKLR* submitted to me by Mr. Karina, learned counsel for the defendants), suits can only be instituted by or against living persons. Mbogholi Msagha J, indeed put the matter succinctly in the case of *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others (2018) eKLR* where after reviewing various Indian cases, he stated as follows :-

“The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.

In the Indian case of C. Muttu vs. Bharath Match Works AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another Indian Case of Pratap Chand Mehta vs Chrisna Devi Meuta AIR 1988 Delhi 267 the court citing another decision observed as follows,

“...if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

12. There cannot be any question that the suit by the 1st plaintiff is a nullity and also incapable of being taken over, for one cannot take over a nullity. The suit by the 1st plaintiff must be struck off.

13. The other pending question I need to deal with is whether the entire suit by the other plaintiffs also needs to be struck out. In his submissions, Mr. Mwakisha, learned counsel for the plaintiffs, submitted that since each of the plaintiffs swore and filed distinct verifying affidavits in support of their claims, their respective suits remain effectual. I am not persuaded. Clearly, the plaint is false when it avers that all the plaintiffs are adults of sound mind and living and/or working for gain in Mombasa. The verifying affidavits are also false for they affirm the correctness of a plaint which is itself false. I do not think that the suit by the plaintiffs is accompanied by a truthful verifying affidavit. Should a plaint accompanied by a false verifying affidavit be struck out or should it be allowed to stand?

14. I think we need to be strict with some critical matters in suits and I cannot think of a more critical matter such as whether or not the parties who are before court are alive or dead. If we are not firm, then people will be filing suits pretending to be persons who are actually deceased, and obtain orders through fraud. You can imagine what embarrassment it will cause to the court and the administration of justice when it turns out that the court granted orders in favour of a person who was actually never alive when the case was instituted. Such a suit is nothing but a fraud. In this instance, all the plaintiffs swore verifying affidavits stating that they are all alive which was false. And I do not think that this is a question of parties being mistaken as to whether or not the other person mentioned is alive. The plaintiffs live together communally and in fact their evidence was common. They are persons who say that they have lived together since the 1970s. They certainly

know each other very well. They knew at the time of filing suit who was alive and who was dead. They chose to tell this court that they are all alive when they knew very well that the 1st plaintiff was deceased. They were seeking orders before this court while at the same time misleading the court on the presence of one of the plaintiffs. Their verifying affidavits were false. I am unable to allow a suit to remain on record based on such verifying affidavits. As I have said, if courts are not going to be strict on matters such as this, the entire justice system will be put into disrepute. Public policy demands that persons approach court with honest depositions. Because the plaint is accompanied by false verifying affidavits, which as I have pointed out could not be a mistake in the deposition but a deliberate attempt to mislead the court, I think the correct thing to do is to strike out the plaint. I draw support from the decision in the case of *Gathangu Gatandugu vs Peter Ngugi (2005) eKLR*. In that case, Kimaru J struck out a plaint which was accompanied by a false verifying affidavit. The same failed to disclose that there had been another suit previous to the one filed. Similarly, Lenaola J (as he then was) in the case of *Mercy Kanyiri Makathimo vs Francis Mburugu Makathimo (2007) eKLR*, struck out a plaint that was accompanied by a false verifying affidavit.

15. I take cue from the above cases. I therefore proceed to strike out the plaintiffs suit. This ordinarily would be the end of the matter for the defendants had no counterclaim.

16. However, interestingly, a 3rd defendant somehow got himself into the suit between the plaintiffs and defendants and filed a counterclaim. He literally sneaked into these proceedings to present a claim against the plaintiffs. I do not think that this was procedural. I have gone through the record to see how this came about and it appears to have genesis in the proceedings of 30 July 2018. On that day, Mr. Mwakisha was present for the plaintiffs and Mr. Masila was present holding brief for Mr. Sitonik for the defendants. Mr. Mwakisha stated as follows :-

“We have not reached a settlement. Mr. Sitonik informed me that he intends to amend his defence to introduce a counterclaim. We have no objection to the amendment being done.”

Mr. Masila confirmed this and the court (Omollo J) directed as follows :-

“The defendant (sic) granted leave to file his amendment within 21 days of today. Parties to comply with Order 11 and the matter fixed for pre-trial directions before the DR (meaning Deputy Registrar) on 27.9.2018.”

17. It will be noted from the above, that there was never any mention of a new party being added. All that was said was that the defendants wish to amend to introduce a counterclaim. The parties did not tell the court that they wished to add a party to the suit so that the court can make an assessment of whether this was permissible or not. They in fact misled the court to granting leave by saying that it is the defendants who wish to introduce a counterclaim. The amendment that was done was never an amendment by the defendants introducing a counterclaim. Instead, a completely new party barged into the suit and declared herself 3rd defendant then proceeded to file what it described as a counterclaim.

18. There is everything wrong with this. First, no leave was ever granted by the court to introduce a new party. Secondly, this party, Durahard Limited, could not describe itself as 3rd defendant because the plaintiffs never sued her. She could not be a defendant at all. She could only describe herself as defendant if the plaintiffs had sued her. And not having been a defendant, Durahard Limited could not file a counterclaim. What Durahard Limited needed to do, if she wished to seek the orders that she has sought herein, was to file her own suit, against the persons it wished to have evicted from the suit land. Instead she wrongly entered into a suit, and thereby changed the entire character of it, from a suit alleging wrongful distress by the two defendants, to a suit for eviction. In response, the plaintiffs (forget for a moment that the 1st plaintiff never existed) pleaded the defence of limitation. Now, since this was an introduction by way of counterclaim, the so called 3rd defendant could not even file a reply to defence excluding the opportunity to file an extremely important pleading. In my view, if Durahard Limited wished to have a suit to evict the persons on the land, she needed to file her own suit for this purpose, identify the persons she needed to get out of the land, and present her prayers for consideration. The parties sued would then have a right to file a defence, and as plaintiff, there would be the right to file a reply to defence. For all intents and purposes, this was a new claim, separate from the issue of whether or not the named defendants could levy distress, and moreover, it was being introduced by a person who was not a party in the suit.

19. I regret given the above, my inability to deal with the issues raised by the 3rd defendant. She ought not to have been a party to this suit in the first instance. If she still wishes to have the issues raised in the counterclaim determined, then she should file her suit for consideration. I think that the procedural improprieties are sufficient to lead to a miscarriage of justice. A court should not pronounce itself, on a matter as important as what is before court, based on wrong pleadings. If you follow the wrong path, you may never arrive at your correct destination.

20. For the above reasons, the counterclaim is hereby struck out.

21. The only issue left is costs. I would ordinarily award costs to the defendants. But they also proceeded to allow a wrongful amendment which led to what I would consider a mistrial. Let every party bear his/her own costs.

22. For the avoidance of doubt, the issues raised by the pleadings herein remain to be determined and any party is at liberty to file a proper suit for determination.

23. Judgment accordingly.

DATED AND DELIVERED THIS 27TH DAY OF OCTOBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.