



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE ENVIRONMENT AND LAND COURT

ELC NO. E018 OF 2020

SUREGATE PROPERTIES LIMITED.....PLAINTIFF

-VERSUS-

ROBERT KIBORO.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The subject matter has been commenced by way of Originating Summons dated the 14th October 2020, and which is expressed to be brought pursuant to **Order 37 Rule 16 of the Civil Procedure Rules, 2010**. For clarity, the reliefs sought are as hereunder

I. The honourable court do make an order that the Applicant (Suregate Properties Ltd) do take control and occupation of L.R No. 1870/1X/97, Woodvale Grove, following the demise of the licensee and the expiry of the said licensee.

II. The OCS Kilimani Police Station do assist Cash Gate Auctioneers to comply with the said orders.

2. The Originating Summons herein, does contain the grounds at the foot thereof, but nevertheless the Originating summons is supported by an affidavit by one, Engineer Isaac Gathungu Wanjohi, sworn on the 14th October 2020, and to which the deponent has attached various annexures, in support of the subject claim.

3. However, the Originating Summons does not expressly relate to a specific Respondent, given that Robert Kiboro, who is named in the title thereon, is indicated to be Deceased.

4. In any event, the originating summons does not similarly show that same was intended to served upon any named Respondents and/or persons whatsoever.

5. Notwithstanding the foregoing, somehow one, namely Damaris Muthoni Kiboro entered appearance and thereafter filed a Replying Affidavit, sworn on the 7th December 2020, to which the said Deponent has raised and/or enumerated various issues, pertinent of which is the contention that the Applicant herein, is neither the owner nor registered proprietor of the suit property.

6. On the other hand, the Deponent to the Replying affidavit has further deponed that the Deceased, namely, Robert Kiboro, was indeed a share holder in the Applicant company herein and that the deceased's occupation and use of the suit property, was premised on the basis of same, being a shareholder of the said company.

7. Besides, the Deponent to the Replying Affidavit has further contested the allegations that the deceased was licensee of the Applicant company over and in respect of the suit property and that the occupants of the suit property, which include the widow and children of the deceased, are trespassers.

8. Stung by the Replying Affidavit sworn of the 7th December 2020, the Applicant herein filed what has been baptized as a **Replying Affidavit** and which was sworn on the 19th February 2021, and to which the Applicant herein has attached a copy of lease, though concerning property L.R NO. 1870/1X/194. For clarity, it is worthy to note that the property referenced in the attached lease is different from the suit property.

9. On or about the 12th March 2021, Damaris Muthoni Kiboro, swore a Supplementary Affidavit, in respect of which same has alluded to several other issues, one of which is that the suit property, upon which the Applicant seeks vacant possession, actually belongs to and is

registered in the name of Gateway Insurance Company Ltd and not the Applicant herein.

10. It is worthy to note, that the Applicant herein further swore what is described as a Protest Reply to the Supplementary Affidavit and same was sworn on the 23rd April 2021, and to which the Applicant has attached two (2), additional annexures.

11. From the record, the foregoing Documents, are the only ones filed and/or lodged by either party

DEpositionS by the parties

Applicants case

12. The Applicant's case is contained in the body of three documents namely, the supporting affidavit sworn on the 14th October 2020, the Replying Affidavit sworn on the 10th February 2021 and the Protest Reply to the Supplementary Replying affidavit, the latter sworn on the 23rd April 2021.

13. From the foregoing documents, the Applicant avers that same is the registered and legitimate owner of the suit property and that the suit property was placed under the occupation and use of one Robert Kiboro ,now Deceased, on the basis of a license to occupy.

14. It is further averred that the license to occupy, which was donated to Robert Kiboro, Deceased, was time bound and that same has since extinguished.

15. It further contended, that being a license, same was tied to the life of the said Robert Kiboro, who is stated to have Died on the 29th May 2020.

16. Owing to the foregoing, the Applicant has thus averred that same is entitled to take possession, control and occupation of the suit property from the current occupants, who are said to be trespassers.

Damaris Muthonoi Kiboro's case

17. Though not captured and/or described as a Respondent in the matter, Damaris Muthoni Kiboro entered appearance as the licensee and in this regard proceeded to and filed two sets of affidavits, the first affidavit is the Replying Affidavit sworn on the 7th December 2020, and the latter being the Supplementary Affidavit sworn on the 12th March 2021.

18. From the two affidavits, Damaris Muthoni Kiboro has averred *inter – alia*, that she is the legal Administrator of the Estate of Robert Nganga Kiboro,now Deceased, who has been referred to in the subject matter as the licensee. In this regard, Damaris has exhibited a copy of the Limited Grant of letters of Administration *ad – litem*, issued on the 6th January 2020, vide Nairobi HCC Succession Cause Number 1627 of 2019.

19. On the other hand, Damaris has further averred that the suit property belongs to and/or registered to Gateway Insurance Company Ltd and not the Applicant herein.

20. Besides, the Deponent herein has gone further and averred that the suit property was lawfully leased to and/or in favor of Robert Kiboro, (now deceased) and in this regard, a lease agreement was duly executed and registered against the suit property.

21. It is the further position of Damaris, that the deceased namely, Robert Kiboro, was a director/shareholder of the Applicant company and that by virtue of being so, the deceased has well as the deceased estate, have a stake in the affairs of the Applicant company.

22. Owing to the foregoing, Damaris has averred that even if the suit property belonged to the Applicant, which is not the case, the Applicant would not be in a position to evict the current occupants of the suit property, who comprise of among others, the widow of the deceased.

23. Finally, Damaris has averred that one Engineer Isaac Gathungu Wanjohi, who has sworn the affidavit on behalf of the Applicant, was a core-director of the Applicant company with the deceased herein and that the said deponent is merely keen to abuse his mandate, as an existing shareholder, to kickout and/or silence other legitimate shareholders.

Submissions

24. On the 28th April 2021, the Originating Summons came up for directions whereupon the honourable court directed that same be disposed of by way of written submissions.

25. Pursuant to the foregoing directions, the Applicant filed her maiden submissions on the 23rd February 2021, and thereafter filed what is described as Protest submissions on the 26th April 2021.

26. On the other hand, Damaris Muthoni, who stepped into the matter and entered appearance as the licensee/Respondent, filed her submissions on the 24th March 2021.

27. I must point out, that all the foregoing submission, as well as the case laws, referred to by either of the parties are on record and same have been duly considered and received due attention.

Issues for determination

28. Having reviewed the Originating Summons, the supporting affidavit thereto, the Replying Affidavit and the Protest Reply to Supplementary Replying Affidavit, all filed by and/or on behalf of the Applicant, as well as the written submissions and also having considered the responses filed by Damaris Muthoni Kiboro, on behalf of the Deceased, I form the opinion that the following issues Do arise and are thus worthy of determination;

I. Whether the Originating Summons herein is one envisaged under the provisions of order 37 of the Civil Procedure rules, 2010 and in any event, whether the dispute herein can be ventilated through an originating summons.

II. Whether the Dispute herein concerns ownership of the suit property and if so, whether the Applicant has any legitimate title thereto.

III. Whether the Persons in Occupation of the suit property are trespassers.

IV. Whether the Reliefs sought can be granted.

Analysis and determination

Issue number 1

Whether the originating summons herein is one envisaged under the provisions of order 37 of the Civil Procedure rules,2010 and in any event, whether the dispute herein can be ventilated through an originating summons.

29. It is common ground that the subject matter has been commenced by way of originating summons, which on the face thereof shows that same is predicated on the provisions of Order 37 Rule 16 of the Civil Procedure Rules 2010.

30. Perhaps before venturing to discuss the substratum of the issues herein, it is worthy and appropriate to take cognizance of the provisions which have been invoked and upon which the jurisdiction of the court is being pursued.

31. In this regard, the provisions of order 37 rule 16 of the civil procedure rules,2010, are hereby Reproduced;

Directions [Order 37, rule 16.]

The registrar shall, within thirty days of filing of the Originating Summons and with notice to the parties list it for directions before a judge in chambers.

32. My reading of the foregoing rule, shows that same is merely a procedural Rule and does not allow any Applicant to mount a claim of this nature by way of originating summons.

33. On the other hand, my reading of the entire provisions of order 37 of the civil procedure rules,2010, drives me to the conclusion that the persons who are allowed to commence proceedings vide Originating Summons and the Nature of Reliefs, which can be sought for and/or pursued by way of originating summons, are well delineated and/or stipulated therein.

34. From my reading, an Applicant like one before hand, who is seeking to Recover vacant possession of a property, which is under the occupation of another, whether as licensee, leasee and/or trespasser, is not envisaged and/or included in the situations covered and/or provided for in order 37 of the civil procedure rules 2010.

35. In any event, I also beg to state that Originating Summons, is a Summary process, that is designed to deal with and/or attend to short legal issues and/or disputes, which are neither elaborate nor involve deep rooted arguments, including allegations of fraud, forgeries and/or ownership.

36. However, in the matter before hand, what comes out is that the Applicant, is disputing the entitlement of the Deceased and by extension the Estate of the Deceased to the suit property and besides the applicant has further invited the honourable court to refer certain documents filed by Damaris to the Directorate of Criminal Investigations.

37. In my humble view, the nature of Reliefs and the issues that belie the subject dispute, cannot be addressed by way of an Originating Summons. Perhaps, this underscores, why the Applicant herself and her advocate, were unable to speak to a precipitate Rule under the provisions of order 37.

38. On the other hand, the areas, issues and situations, where Originating summons can be invoked and/or relied upon, have been variously addressed by the Court of Appeal and the exercise of diligence and a bit of research, could have been helpful to the Applicant and her Counsel.

39. On my own account, I beg to refer to and invite the attention of the Applicant and her Counsel to the Decision in the case of **Kenya Commercial Bank Ltd v Osebe (1982) eKLR**, where the honourable court of appeal observed as hereunder;

“Such procedure is primarily designed for the summary and ‘Ad hoc’ determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees, administrators, or (as here) the Courts’ own execution officers. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into a court.”

40. On the other hand, the same position was also reiterated in the case of **Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 Others (2009) eKLR**, where the honourable court of appeal observed as hereunder;

This Court, in the case of MUCHERU v MUCHERU [2002] 2 EA 455 held that the procedure of Originating Summons is intended to enable simple matters to be dealt with in a quick and summary manner. Surely an inquiry of rights pertaining to caveat is not a complicated matter. This Court has also in a stream of authorities, approved Sir Ralph Windham CJ’s holding in SALEH MOHAMMED MOHAMED v PH SALDANHA 3 KENYA SUPREME COURT (MOMBASA) Civil Case Number 243 of 1953 (UR) where his Lordship said:-

“Such procedure is primarily designed for the summary and “ad hoc” determination of points of law construction or of certain questions of fact, or for the obtaining of specific directions of the court such as trustee administrators, or (as here) the courts own executive officer. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into court.”

In the case of FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR at page 6 where the Court said:-

“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it.”

41. In my humble view, the issues that belie the subject dispute, including whether a suit can be filed against a Deceased person, whether the deceased was a licensee or lease or whether the persons in occupation are trespassers or otherwise, require adduction or production of evidence and a plenary hearing coupled with cross examination. Clearly, the originating summons herein, was not the appropriate vehicle to pursue the suit herein.

42. On my own account and cognizant of the established position in law, I would stand to strike out the originating summons for being inappropriate and/or otherwise an abuse of the Due process of the court.

Issue number 2

Whether the dispute herein concerns ownership of the suit property and if so whether the Applicant has any legitimate title thereto.

43. Though the Applicant herein, has filed the Originating Summons seeking to recover the control and/or occupation of the suit property, the Applicant herein has remained noncommittal on the basis upon which same seeks vacant possession.

44. One would have expected the Applicant, to exhibit and/or display the title and/or certificate of title, over and in respect of the suit property. In fact, it is such a title, that would premise the Applicant’s claim.

45. However, I must point out that in all the three affidavits, variously described, that have been filed by and/or on behalf of the Applicant, same has failed or I should say, refused to exhibit a copy of the lease, title or certificate of title, if any, existed.

46. Certainly, if the Applicant herein was genuine in pursuit of the subject matter, it behooved the Applicant to show unto the court the title to the property and thereafter invite the court to protect the Applicants ownership rights.

47. However, that is not the case, and what turns out is that the ownership of the suit property is in dispute. For clarity, the estate of the deceased, who are said to be licensees, have contended that the suit Property belongs to Gateway Insurance Company Ltd and not the Applicant.

48. Besides, the estate of the deceased have also raised an issue that the suit property was leased to the deceased and in this regard a lease agreement, was duly executed and thereafter registered.

49. From the foregoing, what comes to the fore is a serious controversy pertaining to and/or concerning ownership and title to the suit property. Possibly, there appears to be something that runs deep, but which has not been said.

50. In my humble view, such an issue would require adduction of evidence and cross examination, before the honourable court can arrive at a fair conclusion and/or announcement.

51. Notwithstanding the foregoing, the critical question however is whether in absence of title of the suit property, the Applicant herein, has the requisite *locus standi* to approach the honourable court and to seek reliefs over the suit property.

52. I am afraid that in the absence of title to the suit property, which can attract the intervention of the court, the Applicant herein is busy body. In this regard, it is sufficient to take cognizance of the provisions of Section 25 & 25 of the Land Registration Act 2012.

Issue number 3

Whether the persons in occupation of the suit property are trespassers.

53. According to the Applicant, one, Robert Kiboro (now deceased) was a licensee in respect of the suit property and that upon his death, the Applicant is thus entitled to recover vacant possession.

54. However, it is worthy to note that the documents speaking to license to occupy, upon which the Applicant relies, was neither dated nor attested by any advocate. In this regard, the validity and legality of the said undated and unattested document, cannot be authenticated.

55. Nevertheless, I have pointed out herein before that the Applicant has not shown to the court a copy of the title to the suit property and therefore the question would be, whether one without title, can enter to a legally binding agreement or document, with another for purposes of conferring rights and/or interest, whatsoever. In my humble view, the Doctrine of *Nemo dat quod non habet*, applies.

56. If any decision would be necessary, it is sufficient to refer to the decision in the case of **Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others [2015] eKLR**, the court observed as hereunder;

*Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in **BISHOPSGATE MOTOR FINANCE CORPORATION LTD V. TRANSPORT BRAKES LTD (1949) 1 KB 322, at pp. 336-337** when he stated:*

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

57. Notwithstanding the foregoing, the persons in occupation of the suit property and against whom the orders for vacant possession are being sought, have contended that same have a lawful claim to the suit property on two accounts namely;

a. The deceased enter into an executed a lease with the registered owner of the property, which lease was duly registered and thus the estate of the deceased has a right to the property.

b. The deceased was a core-shareholder in the Applicant company and hence, it was found that the suit property belongs to the Applicant then the estate of the deceased had a stake.

58. Clearly, the persons against whom the orders are sought, on the face of it, do not appear to be trespassers, even though same have also not been Impleaded in the matter.

59. To the contrary, the persons against whom the orders sought have contended that they have better title to the suit property, on the basis of a duly executed and registered lease between the registered owner thereof and the deceased.

60. In my humble view, this are issues, alongside the claim of ownership, which cannot be adjudicated in the manner sought by the Applicant.

Issue number 4

Whether the Reliefs sought can be granted.

61. The Applicant herein, has simply approached the court to procure and/or obtain what essentially an order of Eviction and vacant possession of the suit property.

62. However, even as the Applicant seeks the foregoing reliefs, over and in respect of the suit property, the Applicant herself has not exhibited title to the property.

63. In the premises, the question that then arises is, what is the Applicant's legal standing as pertains to the suit property, to be able to get an order of eviction and vacant possession.

64. In my humble view, the reliefs sought by the Applicant, who has described itself as the licensor, *albeit* with no title cannot be granted.

65. Perhaps another critical issue, which must not be forgotten is whether court proceedings can be commenced, maintained and/or adjudicated upon, when same has been commenced against a Deceased person.

66. In respect of the subject matter, the Applicant clearly indicates that the Deceased died on the 29th May 2020 (as deponed to in paragraph 3 in the affidavit), but yet proceeds to file the Originating summons on the 14th October 2020.

67. In my humble view, no legitimate suit can be commenced against a Deceased person and in any event a Deceased person cannot be served post humously.

68. In a nutshell, the filing of the subject suit, which curiously impleads the Deceased, was bad in law and otherwise *a nullity ab initio*.

69. In support of the foregoing position, I find solace in the Decision in the case of **Viktar Maina Ngunjiri & 4 Others v The Attorney General & 6 Others (2018) eKLR**, where the court observed as hereunder;

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.”

FINAL DISPOSITION.

70. The Originating Summons dated the 14th October 2020, wherein a Dead person has been sued or otherwise impleaded was/is a nullity. Same ought not, with the exercised of due diligence, to have been mounted in the first place.

71. Be that as it may, I come to the conclusion that the Originating summons herein is bad in law, devoid of merits and/or otherwise an abuse of the courts process. Consequently, the same is hereby Dismissed.

72. As concerns costs, I would have been constrained to condemn the Applicant to pay same. However, the question that remains to be answered is to whom ,given that the proceedings were commenced against a Dead person.

73. Even though, Damaris Muthoni Kiboro filed pleadings, same was never impleaded.

74. In the circumstances, I make No orders are made as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant