



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 107 OF 2019

ROBEN INTERGRATED COUNSULTING SERVICES LTD... PLAINTIFF

VERSUS

BOMBOLE BECHIA BOMBOLE.....DEFENDANT

RULING

(Suit by plaintiff seeking orders of eviction of the defendant from certain land; together with the suit, plaintiff filing an application seeking the eviction of the defendant; held that it would be improper in the circumstances of the case to issue the final order of eviction without first giving the defendant an opportunity to be heard on merits; application dismissed)

1. This suit was commenced through a plaint which was filed on 17 June 2019. The plaintiff is a limited liability company and it is its case that it is the registered owner of the land parcel Kwale/Tsunza S.S/5 (the suit land) which it purchased in the year 2013. Upon purchase, the plaintiff surveyed the land and it turned out that the defendant was in occupation of part of it and had put up a structure. It is averred that on 29 October 2018, the defendant was given a notice to vacate and he agreed to vacate within one week but that to date he is yet to move out. It is pleaded that instead, the defendant made a request to the plaintiff to construct for him a house on his (defendant's) land and it is said that in the spirit of good neighbourliness, the plaintiff constructed a house for the defendant on his land. The defendant did not however move and it is contended that he is now bringing extraneous issues that the house constructed is not of good quality. The plaintiff has averred that the house it has constructed for the defendant is bigger and better than the house the defendant had in the plaintiff's land. In the plaint, the plaintiff has sought orders to declare the defendant a trespasser and to have an order of eviction issued. It has also sought mesne profits and costs of the suit.

2. Together with the plaint, the plaintiff filed an application seeking the following orders (slightly paraphrased for brevity) :-

- a. Spent (a certification of urgency)
- b. That this Honourable Court do declare that the respondent's continued occupation of the suit land is unlawful and the same constitutes illegal trespass.
- c. That this Honourable Court be pleased to issue an eviction order compelling the Respondent by himself, servants, agents and or legal representatives to move out of the suit land pending the hearing and determination of this application.
- d. That the OCS Kinango Police Station and the in-charge administration Kinango location do provide security in the enforcement of the orders above.
- e. That this Honourable Court be pleased to issue an eviction order compelling the Respondent by himself, servants, agents and or legal representatives to move out of the suit land pending the hearing and determination of this application.
- f. That costs of this application be in the cause.

3. The application is said to be brought pursuant to the provisions of Section 13 of the Land and Environment Court Act (sic), Section 152A, B, E, and F, Order 51 Rules 1 of the Civil Procedures (sic) Rules, Section 1A, 1B, 3, 3A, and 63 (e) of the Civil Procedure Act and all enabling provisions of the law.

4. Within the application and in the supporting affidavit, sworn by Ruth Wanyua Wachira, the Managing Director of the applicant, the applicant has more or reiterated the averments in the plaint which I have already set out above. The applicant annexed a copy of its title deed to the suit land, some handwritten agreements through which the respondent is said to have agreed to move out of the suit land, and

photographs of the respondent's old house within the suit land and the new house allegedly constructed for him in the land that the respondent owns.

5. The application was first placed before the court on 17 June 2019 ex-parte when the applicant was directed to serve the application. A date of 15 October 2019 for inter partes hearing was then taken. By the said date, the respondent had not entered appearance and had not filed anything to oppose the suit and the application. He was however in court on the said date and made submission that this suit is res judicata the suit Kwale CMCC No. 83 of 2018, where he is plaintiff and he has sued Ruth Wachira and Thomas Muindu Kithome. He had the pleadings in that case but my assessment of the same was that that case does not make this suit res judicata, for the persons sued were different from the plaintiff in this case. In my discretion I granted the respondent 14 days to reply to the present application and directed the matter to proceed inter partes on 31 October 2019. On 30 October 2019, the respondent appointed counsel and filed a preliminary objection that this suit is res judicata. On 31 October 2019, at the inter partes hearing of the application, I informed counsel for the respondent that I had already dealt with the res judicata objection and I was not prepared to grant more time to the respondent on the application and I directed it to proceed. Mr. Kwengu, learned counsel for the applicant made brief submissions and relied on the cases of *Kenya Breweries Limited & Another vs Washington O. Okeyo, Nairobi Civil Appeal No. 332 of 2000* and *Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another (2019) eKLR*. Ms. Onyango, learned counsel for the respondent, did not dispute that the applicant owns the suit land but she submitted that no survey report is annexed and that there is no confirmation that the respondent had agreed to vacate.

6. I have considered the application and the law upon which the same is premised. Section 13 of the Environment and Land Court Act has been cited but it does nothing more than simply setting down the jurisdiction of the Environment and Land Court and the issue of jurisdiction is not in question in these proceedings. The other Section noted is Section 152 A, B, E and F, but it is not disclosed what statute of these sections is relied upon and it would be wrong for me to speculate. Order 51 Rule 1 of the Civil Procedure Rule merely provides that applications be made by way of Notice of Motion. Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, are general sections inter alia providing for the discretion of the Court and the expeditious disposal of cases. Section 63 (e) of the Civil Procedure Act, gives the Court general power to make such interlocutory orders as it deems fit. It will be noted from the above that none of the provisions of the law relied upon by the applicant touch on any order of eviction as sought in this application.

7. I do observe that what the applicant wants in this application is not an injunction but an order of the eviction of the respondent and a declaration that he is a trespasser which is similar to the final orders sought in the plaint. I would hesitate to grant orders of such finality without first hearing the defendant. There may be cogent reasons why the defendant has not moved out of the suit premises which can only be determined after the suit is heard on merits, and without first hearing the matter, it would be premature for me to declare him a trespasser. In my view, given the circumstances of this case, it would be improper to issue the order of eviction or a declaration that the defendant is a trespasser without first hearing the suit. I thus decline to issue the orders sought in this application.

8. I have also looked at the authorities supplied by the applicant's counsel but they do not help his client's cause. The case of *Kenya Breweries & Another vs Washington Okeyo* is not a case involving land but one that involved a motor-vehicle where the High Court made an order of mandatory injunction. The Court of Appeal reversed this order of mandatory injunction and asserted that a mandatory order ought not to be made in absence of special circumstances. The case of *Robert Mugo vs Ecobank* was a case where the applicant sought orders of injunction to stop a sale by chargee and I do not see how it applies to this case which seeks final orders of eviction.

9. I reiterate that in the circumstances of this case, it would be unfair to the defendant for this court to issue the final order of eviction without first giving him an opportunity to be heard on merits.

10. It is for the above reasons that I dismiss this application but since nothing substantial was filed to oppose it I will not make any orders as to costs.

11. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of January 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr Muyala holding brief for Mr Kwengu for the plaintiff/applicant.

Ms Onyango present for the defendant/respondent.

Court Assistant; David Koitamet.