



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 90 OF 2015

1. NGENGI MUIGAI

2. CATHERINE WANGUI NGENGI.....PLAINTIFFS

VERSUS

EAST AFRICAN BUILDING SOCIETY & OTHERS.....DEFENDANT

R U L I N G

1. The dispute in this matter first came to court on the 16/01/2004, found its way to the Environment and Land Court and retained its identity as HCC No. 11 of 2004 till 29/6/2015 when it was ordered transferred to this court.

2. From those dates, it is one of the matters that can be properly described to have overstayed in our court system. Has indeed overstayed when the dispute discerned from the pleadings seem to me to be not very complicated. Not so complicated because it simply seeks to challenge a sale of a property offered by the plaintiff to the defendant as security of some financial facilities and accommodation extended by the defendant to the plaintiff.

3. While the substantial dispute remains undetermined, the plaintiff has now approached the court and sought orders that:-

1. Spent

2. This Honourable Court be pleased to temporarily restrain the Defendants by themselves, their agents, employees and or managers namely Dato Kithiki Limited from further managing and collecting rent from the tenants to the suit premises Title No. MOMBASA BLOCK XVII/587 from the date of issuance of this order until this suit is heard and determined.

3. This Honourable court do Order the Defendants to file an Account of the Rental collection made from the suit premises todate together with file the Plaintiffs updated Loan Statement of Account within 14 days of its order.

4. This Honourable court be pleased to Order and Direct all the tenants to the suit premises to start making their rent payment to the Plaintiffs and or their agents forthwith.

5. The court do consider this matter for referral to the Court Mandate mediation process for expeditious and determination.

4. The grounds disclosed on the face of that motion and the Affidavit of CATHERINE WANGUI MUIGAI sworn and filed in support thereof are that having offered the suit property as security to the defendant by a legal charge dated 10/2/1997, the plaintiff account fell into arrears, for reasons that the plaintiffs consider primitive, and exorbitant interests and other arbitrary charges and a manager was appointed by the defendant to collect rent on the 9/01/2004 till now while the plaintiff continue to occupy a portion of the property.

5. The plaintiff approximate the sums collected so far to add up to some 8,400,000/= which when added to the sum alleged to have been paid directly gives a sum of Kshs.12,400,000/=. The plaintiff contend that such sum settles the debt pursuant to the application of the **duplum rule**. For those reasons, the plaintiff contend, that it is just to order that accounts be rendered as the defendant appear content not to have the suit heard and determined on the merits. On the same basis the plaintiff takes and holds the view that the defendant has no right or justification to continue collecting rent from the suit premises and should thus be restrained by the court.

6. When served, the Defendant swore and filed an Affidavit by one JACK KIMATHI, the legal officer – Recoveries, of the 4th defendant. He asserts to be conversant with the facts and authorised to depone to facts on behalf of all the defendants. The general position taken in

opposition was that the plaintiff was abusing the court process if regard is had of the status of the property as registered and the previous rulings by the court over the same matter which show that the plaintiff has no interest over the property as to be entitled to the rental income or the accounts thereof. The plaintiff was accused of misleading the court and thus doesn't deserve the court's discretion. The documents exhibited included an official search to show that the property was transferred to the first defendant on the 28/6/2004 together with rulings by which applications for injunction were dismissed for want of merits.

7. From the onset, I take the view that this is a file in which the court must give way forward, even if appears to the parties, or any of them, that the court appears to superintend upon them in the manner of canvassing their matter. The kind of way forward I must give is that the continued concentration on interlocutory application has denied the matter the chance to be disposed off and accorded to it an underserved overstay as a pending matter.

8. For that reason I direct that this be the last interlocutory application to be entertained by the court so that the matter must now be given a hearing date for purposes of the substantive dispute being heard and determined.

9. Coming to the merits of the application, I take the view that grant of Prayer 2 and 4 of the motion at this juncture and on the face of the previous orders given by the court would be to improperly revisit those orders refusing injunction and further determine the title to the suit property prematurely and contrary to what I understand to be the usual way of determining legal disputes. I find that before the rights of the parties regarding the title to the land is determined the court cannot grant the two prayers. The same are hereby dismissed.

How about the Orders for accounts?

10. Despite the fact of sale way back in 2004, the plaintiffs asserts, and it has not been challenged by the defendant, that they continue to occupy a Section of the premises as the defendant continues to occupy and collect rent on another section of property. Accounts are just but accounts and can never confirm title when none exist. Here the plaintiff prayer is merely that the defendant reveals to it how much it has collected through its agents, Datoo Kithiki Ltd, since January 2004. That prayer when looked at as against the main prayer in **Further Amended Plaintiff** which seeks a declaration that the plaintiff have been discharged from the obligations under the charge, must be seen to be a facilitative order that my assist the court, ultimately, should the situation arise as to require that the outstanding debt be ascertained.

11. It is not denied and cannot be deniable that the court has to finally determine whether the sale by which the defendant became the registered owner was valid or capable of being invalidated. So long as that issue remains live, and it does not count that prayer for interlocutory reliefs have been declined in the past, it will be important for all parties to know what disputed property has yielded over the years. I do not fathom any prejudice that may visit the Defendant if it is ordered to avail the accounts. For that reason, I find merit in the prayer, as said before, as a facilitative relief, for use by the court if the rental yield shall become of relevance to its final determination.

12. I do grant an order that within 30 days from the date of this ruling, the defendant shall file and serve upon the plaintiff true accounts of all the rents collected by its agents from the suit property beginning the 8/01/2004 till 31/01/2020.

13. On reference to mediation, I noticed that the defendant has not proffered any opposition in the Replying Affidavit it filed. I do take the view always that mediation as an Alternative Dispute Resolution Mechanism must be encouraged if the court was to meet its mandate towards expeditious disposal dispute resolution.

14. Having read the pleadings filed and the previous decisions rendered in the file, I do consider this as a matter suitable for court annexed mediation. I direct that the mediation be presided over by MR. ALLAN NYANGE SHARIA, Advocate, who has 45 days from today to assist parties come up with a consensus and to file his report in court before the 24/3/2020 when this matter will be mentioned for further orders.

15. On costs, I declare the costs of the application shall abide the outcome of the suit.

Dated and delivered at Mombasa on this 4th day of February 2020.

P.J.O. OTIENO

JUDGE