



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 86 OF 2016

SHEIKHA MOHAMED ALI & 4 OTHERS.....PLAINTIFFS

VERSUS

HAMID MOHAMED ABDULKADIRDEFENDANT

R U L I N G

1. This ruling is in respect of the Defendant's Notice of Motion dated 16th July 2019. In the Application, the Defendant is seeking orders of stay of execution of the judgment delivered on 11th May, 2017 and the decree and all consequential orders pending the hearing and determination of the application. The defendant also seeks an order of stay of execution of the orders dated 31st May, 2019 and 11th July 2019 and restoration of the defendant into the premises and return and/or compensate the defendant of all the properties seized from the premises and/or destroyed.

2. The defendant's application is premised on the grounds that the ex-parte orders made on 30th April, 2019, 31st May 2019 and 11th July 2019 are illegal and unlawful; that the application dated 30th April, 2019 had been served on the Defendant's Advocate and had been listed for hearing on the 16th July, 2019 and has not proceeded because the court was not sitting and that the plaintiffs have taken advantage of the absence of the sitting of the court and made grave misrepresentation to the court on 31st May, 2019.

3. The application is supported by the affidavit of Hamid Mohamed Abdulkadir sworn on 16th July, 2019 and a further affidavit sworn on 2nd August 2019. It is the defendant's submission that the execution the plaintiffs carried out on 16th May, 2019 was illegal and unlawful. The defendant contends that he had complied with the conditions set for grant of stay by the court on 14th January, 2019 and as such any execution thereof by the plaintiffs would be unlawful and in direct contravention and flagrant breach of the orders of stay granted by the court. The defendant avers that the property measuring 12.92 acres being TITLE NO. 619 SECTION 1 MN (ORIGINAL NO. 50/2) was subdivided way back on 14th November, 2003 before this suit was instituted, and as such the lease in respect of that property ceased to exist. The defendant further avers that he is occupying different land parcels measuring ½ acre for which he has duly paid rent including for the year 2019. It is further the defendant's submission that the decree herein is erroneous, false and does not conform with the judgment and the ruling of the court dated 14th January, 2019. It is the defendant's submission that the execution carried out by the plaintiffs on 16th July, 2019 was unlawful, irregular, invalid and therefore illegal and that the decree was directed to the court bailiff not the Hamza Jeneby Auctioneers. The defendant submits that he has established a case for grant of stay of execution or further execution on the premises occupied by the defendant and the substantial loss has been occasioned to him when Hamza Jeneby Auctioneers descended on his matrimonial residence and carted away the defendant's property in excess of Kshs. 3 million. It is further submitted that the substratum of the Appeal shall be completely destroyed and the appeal rendered nugatory in the absence of stay orders. The defendant cited the provisions of order 22 Rule 22 of the Civil Procedure Rules and submitted that he is entitled to the orders of restoration and for the return and/or compensation in respect of the property destroyed and/or damaged during the impugned eviction carried out by Hamza Jeneby Auctioneers. The defendant urged the court to allow his application dated 16th July 2019. The defendant further urged the court to strike out the affidavit of Mrs. Natasha Ali Advocate dated 19th July 2019 and to have the plaintiffs' Notice of Motion dated 18th July 2019 dismissed.

4. The Plaintiffs filed Notice of Motion Applications dated 30th April 2019, 31st May 2019, 11th July, 2019 and 18th July 2019. The plaintiffs' said applications are to be considered singly and jointly as a response to the defendant's Notice of Motion dated 16th July, 2019. It was the plaintiff submission *inter alia* that the court has already rendered its judgment in the suit and has declined to set aside its judgment after an application made by the defendant. That the court cannot go back and re-determine or re-examine the merits of the suit. The plaintiffs further submitted that the stay of execution of decree granted on 14/1/2019 was conditional. That the second condition required the defendant to pay monthly mesne profits which the plaintiffs maintain was not complied with and therefore the plaintiffs were entitled to execute. The Plaintiffs further submitted that the defendant's submissions that the subject land has been subdivided goes to the merits of the suit and cannot be raised at this stage as that will be tantamount to challenging the judgment of this court. The plaintiffs further submitted that even then, the subdivisions arose from the same parcel, that is plot no. 619, and that the relationship of the plaintiffs and the defendant was that of a lessor and lessee in respect of the respective portion which the defendant was ordered to give vacant possession. The plaintiffs

submitted that there is no suit for special damages and therefore the orders for compensation cannot be granted. Further, that the court cannot grant the orders for restoration as the court will be going against its own judgment. The plaintiffs urged the court to dismiss the defendant's application.

5. I have considered the application and the rival submissions made. The only issue to consider is whether the orders of stay of execution sought and a restoration of the defendant into the premises and/or compensation for the properties seized from the premises and/or destroyed and/or damaged can be granted.

6. In this case, judgment was entered for the plaintiffs in the following terms:

a. The defendants to give vacant possession or be evicted from parcel of LAND SUBDIVISION 619 SECTION 1 MAINLAND NORTH (ORIGINAL NO.50/2);

b. Rent arrears of Kshs.1,209,500.00

c. Mesne profits at the rate of Kshs.6,500/= per month from 1st June 2015 until vacant possession is given;

d. The defendant is ordered to pay costs of this suit.

7. The matter had proceeded ex-parte as the defendant and his advocate did not attend court during the hearing despite being duly served with a hearing notice. The defendant made an application for stay of execution of the judgment and decree and to set aside the judgment. By a ruling dated 6th February, 2018, the court declined to grant the defendant the orders sought. Being dissatisfied with this court's ruling, the defendant filed a notice of appeal at the Court of Appeal.

8. By a notice of motion dated 15th February 2018, the defendant sought for orders of stay of execution pending the lodging, hearing and determination of the intended appeal against the judgment and decree herein and the ruling delivered on 6th February, 2018. The court considered the said application for stay of execution and allowed the same on condition that the defendants pay the full decretal sum of Kshs.1,209,500 (less the sum of kshs.604,750 already paid) and pay the outstanding rents arrears within 21 days from 14th February 2019 and thereafter continue to pay the mesne profit at the monthly rate agreed in the lease agreement, failing which execution would issue. The plaintiffs contend that the defendant did not abide by all the conditions granted, hence applied for execution. The defendant however, contends that the execution the plaintiffs carried out was illegal and unlawful. The defendant submits that the suit property being TITLE NO.619 SECTION 1 MAINLAND NORTH (ORIGINAL NO.50/2) was subdivided way back on 14th November 2003 and as such the lease in respect of that property ceased to exist.

9. It is a general principle in law that litigation must come to an end. Ordinarily, a suit would come to an end when a court has rendered a decision and that decision has been acted upon or executed. As at that point the court is said to be "*functus officio*" and any party who is aggrieved must now pursue the Court of Appeal or review to a higher court. In this case, the court did deliver its judgment and ruling on an application for stay of execution. The decree and orders have already been extracted and executed. As such judgment has been perfected in this case and the matter is now out of the hands of this court. The proper forum at this stage, in my view is a superior court. I am of the view that in the circumstances this court is in fact "*functus officio*" and is not entitled to revisit the matter. The issue of the suit property having been subdivided before the filing of the suit and the submission by the defendant that the lease in respect of that property ceased to exist goes to the merits of the case which this court has already rendered a decision on.

10. Further, that there has been previous proceedings before this court over stay of execution is not in dispute. The law pertaining to the doctrine of res judicata is captured under the provisions of section 7 of the Civil Procedure Act which states that "*no court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been substantially raised, and has been heard and finally decided by such court.*" Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties relating to the same issues previously and finally determined by any court of competent jurisdiction. It has also been stated that the principle applies to applications with the same force whether the application be final or interlocutory. In my view, the present application which seeks orders of stay of execution is res judicata in view of the previous notice of motion dated 15th February 2018 which was heard and determined by the court.

11. By reason of the foregoing, I find that the defendant's Notice of Motion dated 16th July 2019 is devoid of merit and the same is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 19th day of February 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mrs. Ali for plaintiffs

Asige for defendant

Yumna Court Assistant

C.K. YANO

JUDGE