



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E121 OF 2018

OKSANA INVESTMENT SUPPLIES LTD.....PLAINTIFF

-VERSUS-

ALICE WANJIRU WAMWEA.....DEFENDANT

RULING

1. **OXSANA INVESTMENT SUPPLIES LIMITED**, the Plaintiff is a Limited Liability Company duly registered under the Companies Act, CAP 486. The Defendant **ALICE WANJIRU WAMWEA** is a female adult.
2. The Plaintiff instituted this suit against the Defendant praying for vacant possession of **L.R. 209/11395 (IR 53103) (the property) Nairobi**; and a prayer for rent arrears, for unspecified amount, from the date of auction of the property “to date” and interest at bank rate.
3. The Plaintiff in this matter was simultaneously filed together with a Notice of Motion dated 17th October 2018.

BACKGROUND

4. The Notice of Motion dated 17th October 2018, filed by the Plaintiff, came before Court *ex-parte*, on 18th October 2018. On that day the Court ordered that the same be served for *inter partes* hearing on 24th October 2018.
5. On 24th October 2018 only the Plaintiff’s Learned Counsel was present. There was, presented before Court, an affidavit of **Mathias Mboya** sworn on 23rd October 2018. It is important to set out some of the paragraphs of that affidavit in this Ruling as follows:

AFFIDAVIT OF SERVICE

I, Mathias Mboya of Post Box No.26330 – 00100, Nairobi County do hereby make oath and state as follows:

1. **THAT** I am a process server of this Honourable Court under Certificate No.0079.
2. **THAT** with instructions received from M/S. Muhatia Pala & Associates Advocates [MPA] on 22nd October 2018, I proceeded to serve copies of the application dated 17th October 2018 and Mention/Hearing notice dated 19th October 2018 at 11.00 a.m. upon the Respondent/Defendant herein one Alice Wanjiru Wamwea at her business premises situated at Mathare Road, Jonsaga Shopping Centre, adjacent to Peka Plaza and opposite Jonsaga Police Station Nairobi County.
3. **THAT** upon introduction and the purpose of my visit, I served the Respondent/Defendant with the application and the hearing notice but she declined to sign.
4. **THAT** the said Defendant/Respondent was not known to me at the time of service.
5. **THAT** I now return into this Honourable Court duly served copies.

6. The Court on 24th October 2018, having perused that Affidavit of Service, granted the following orders, as prayed in the Notice of Motion dated 17th October 2018:

IT IS HEREBY ORDERED:

1. **THAT** the Defendant be and is hereby restrained from collecting rent on property erected on **L.R. N. 209/11395 (I.R 53103)** Situated in Jonsaga area, Huruma Nairobi County. The rental to that property shall be paid to **Account No. Nic Bank 1005688945 Kilimani Branch** pending the hearing determination of this suit.
2. **THAT** for avoidance of doubt the Plaintiff is not entitled to evict the Defendant by virtue of the order issued herein.
3. **THAT** this Application be heard *ex parte* in the first instance.
4. **THAT** an order be and is hereby issued of vacant possession against the Respondent or her agents from all that property **No. 209/11395 (I.R.53103)** until this suit is heard and determined.
5. **THAT** the OCS Huruma and AP incharge of Huruma Chief's Camp to ensure compliance.
6. **THAT** the cost of this Application be by the Respondent.

7. The Defendant filed a Notice Motion application dated 2nd November 2018 seeking orders for the stay of the Court orders issued on 24th October 2018 and leave be granted for the Plaintiff's process server, Mathias Mboya to be cross examined on the content of his Affidavit of Service sworn on 23rd October 2018.

8. On 16th November 2018 the Court granted the Defendant *ex parte* order staying the Court order of 24th October 2018.

9. After various attendance of the parties before Court, and very protracted proceedings, and after filing of applications by the parties, the parties entered into a consent order on 6th December 2018 before Court as follows:

"By consent the orders granted on 24th October 2018 be and are hereby set aside. The Notice of Motion dated 17th November 2018 to be heard inter partes".

10. With that consent in place the Court heard the submissions on the Notice of Motion dated 17th October 2018.

NOTICE OF MOTION DATED 17th OCTOBER 2018

PLAINTIFF'S SUBMISSIONS

11. The Plaintiff's Notice of Motion of 17th October 2018 seeks the following orders:

1. **THAT** this application be heard *ex parte* in the first instance.
2. **THAT** this Honourable Court be pleased to issue a Permanent Injunction restraining the Respondent or her agents, person acting on her behalf and or dealing in any way with the suit from collection any rent from the property erected on **L.R. NO. 209/11395 (I.R. 53103) situated in Jonsaga Area, Huruma, Nairobi County** and the same be paid to Applicant's loan **Account No. NIC BANK, 1005688945, Kilimani Branch, Nairobi** pending the hearing and determination of this suit.
3. **THAT** this Honourable Court issue an order of Vacant possession against the Respondent or her agents from all that property **No. 209/11395 (I.R.53103)** until this suit is heard and determined.
4. **THAT** this Honourable Court be pleased to make any other orders that it deems fit for the fair administration of justice.
5. **THAT** the OCS Huruma and AP incharge of Huruma Chief's Camp to ensure compliance.
6. **THAT** the Court of this Application be borne by the Respondent.

12. Those prayers are supported by the depositions of Paul Mwangi Njuki (Paul) in his affidavit sworn but undated. Paul the Managing Director of the Plaintiff by that affidavit stated that the Plaintiff purchased the property through a public auction on 28th March 2018. Prior to that auction the property was owned by the Defendant. That the Plaintiff obtained a Loan, from NIC Bank, to purchase the property. That the Defendant having knowledge of that purchase has failed to vacate the property and as a consequence the Plaintiff was unable to service the Loan of NIC Bank. It is on that ground the Plaintiff prayed the Defendant be evicted from the property.

13. Paul also swore a Supplementary Affidavit dated 20th November 2018 in that affidavit he deponed that, following the order of 24th October 2018, the Plaintiff took vacant possession of the property and that the Defendant should therefore seek her remedies in damages.

14. In the Affidavit dated 4th December 2018, Paul further deponed to matters already dealt with in his previous affidavits and also deponed that he personally accompanied the process server, Mathias Mboya, when the Defendant was served. That it was him who pointed to Mathias Mboya the Defendant. Further that Godfrey Asacha Mutiva, an Executive Officer of his Learned Counsels firm was present when the

Defendant was served. Paul therefore associated himself with the affidavit of service of Mathias Mboya. Paul further stated that HCCC 86 of 2016, where the Defendant has sued Faulu Microfinance Bank and the auctioneer, bore no relation to this case.

15. The Learned Counsel for the Plaintiff in his submissions relied on the provisions of Section 99 of the Land Act, which section he submitted protected innocent purchaser. He also relied on Article 40 of the Constitution, which Article protections right to property. He further relied on Section 26 of the Land Registration Act.

DEFENDANT'S SUBMISSIONS

16. The Defendant relied on her affidavit, sworn by her on 2nd November 2018. She deponed, in that affidavit, that on 1st November 2018 at 4:30p.m. She received a call from Jonsaga Police Post whereby she was requested to collect a copy of the order made on 24th October 2018, in this matter. The Defendant stated that was the only document she had received, on this matter, because she had not been served as alleged by Mathias Mboya.

17. Learned Counsel for the Defendant submitted that the Defendant was not served, as alleged, with Notice of Motion dated 17th October 2018. He further submitted that this Court had no jurisdiction to entertain this matter by virtue of section 13(2) of the Environment and Land Court Act. That further Section 6 of Cap 21 forbids this Court to proceed with this matter in view of the subsisting suit HCCC 86 of 2016.

ANALYSIS AND DETERMINATION

18. The Defendant has raised, by her Counsel's submission an issue of the jurisdiction of this Court, which issue I shall consider as a preliminary matter.

19. Section 13 of the Environment and Land Court Act provides that the Environment and Land Court shall have power to hear and determine disputes as set out here:

(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) Relating to compulsory acquisition of land;

(c) Relating to land administration and management;

(d) Relating to public, private and community land and contracts, leases in action or other instruments granting any enforceable interests in land; and

(e) Any other dispute relating to environment and land.

1. 18. The dispute before Court is one seeking vacant possession of the property. The Plaintiff, it is not denied, is the registered owner of the property, albeit that the property is charged to the NIC Bank. It is therefore clear that the dispute is not one that falls within the ambit of Section 13 of the Environment and Land Court Act. The Defendant's objection therefore is rejected.

20. A close consideration of the prayers sought in the Plaint and the prayers sought in the Notice of Motion dated 17th October 2018 will reveal a remarkable similarity.

21. In the Notice of Motion the Plaintiff seeks to restrain the Defendant from receiving the rent of the property; and restrain the Defendant from dealing with the property. It also seeks that the rent be paid into the Plaintiff's Loan Account. It further seeks that the Court do issue an order of vacant possession of the property.

22. In the Plaint the Plaintiff seeks:

(a) Vacant possession; and

(b) Rent arrears from the date of auction to date and interest at Bank's rate.

23. It is therefore clear that the Plaintiff, by its Notice of Motion dated 17th October 2018, it sought for final orders as sought in the Plaint.

24. The Court of Appeal in the case **OLIVE MWIHAKI MUGENDA & ANOTHER V OKIYA OMTATA OKOITI & 4 OTHERS [2016] eKLR** considered a persuasive decision of India on issuance of final orders at interlocutory stage and stated:

2. "**Ashok Kumar Bajpai V Dr. (Smt) Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88**, at paragraph 17 of the decision the Indian Court expressed as follows:

i. "... It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order to make it clear as what are the special

circumstances for which such a relief is being granted to a party”.

3. In that case Olive Mwhaki Mugenda (Supra) the Court of Appeal held:

a. “Applying the decisions of this Court in Vivo Energy Kenya Limited -V- Maloba Petrol Station Limited & 3 Others (2015) eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms -V- Naftali Ogola (2009) eKLR it has been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. We have compared and contrasted the ruling and orders delivered on 18th December 2015 with the prayers in the Petition dated 21st October 2015. The Ruling of 18th December 2015 effectively granted final prayers in paragraph 62 (c), (d), (f), (g), (h) and (j) of the petition”

25. The Plaintiff approached the Court, with this suit and the Notice of Motion, nine months after it purchased the property. What is it that would justify the issuance of final orders at interlocutory stage, in view of that delay? The Plaintiff filed a suit seeking eviction of the Defendant and rental income and cannot be entitled to seek the very same orders at interlocutory stage unless the Plaintiff invokes the Rules of procedure which entitle a party to enter of judgment.

26. It is because of the above finding that I am of the view that there cannot be the application of Section 99 of the Land Act; nor Article 40 of the Constitution; and neither the application of Section 26 of the Land Registration Act. Those provisions may be applicable at the trial.

27. The Defendant’s argument that this suit is barred by virtue of Section 6 of Cap 21 cannot be considered merely through evidence from the Bar. The Court needs to be moved in that regard.

28. In the end the application, by Notice of Motion dated 17th October 2018, fails. It fails because the Plaintiff, by that application, seeks final orders at interlocutory stage. The Plaintiff in submission did request the Court to consider making a determination on where the rental income should be deposit, pending the hearing of this case.

29. In my view the interest of justice would best be served by having the rental income deposited in joint account of both advocates.

30. Having made the determination that the Notice of Motion dated 17th July 2018 fails there is no reason why the costs thereof should not follow the event. The costs therefore will be borne by the Plaintiff.

31. The orders of the Court therefore are as follows:

(a) The Notice of Motion dated 17th October 2018 is dismissed with costs to the Defendant.

(b) The Advocates representing the parties herein shall within 30 days from this date open a joint account into which the tenants at property L.R. 209/11395 (I.R. 53103) situated in Jonsaga area, Huruma, Nairobi County shall deposit their rent until further orders of the Court.

(c) By the determination of the Notice of Motion dated 17th October 2018 it follows that the applications by Notice of Motion dated 16th and 28th November 2018 are spent

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT