



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 911 OF 2009

EDWARD NJUNGA KANGETHE PLAINTIFF

-VERSUS-

JOEL KIEMA MUTINDA 1ST DEFENDANT

VIOLET NDAMU MUTINDA 2ND DEFENDANT

BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND 3RD DEFENDANT

R U L I N G

1. The **Notice of Motion** Application before the Court is dated and filed herein on 9th April 2015 by the Plaintiff/Applicant seeking the following Orders:
 1. **That this Honourable Court be pleased to review/and/or vary the Order made in this matter on the 1st April, 2014 and more specifically Order No. 3 thereof disallowing the Plaintiff's prayer No. 2 of the application dated 19th March 2013 and allow the same as had been prayed thereof.**
 2. **That costs of this application be provided for.**
2. The application is predicated upon the grounds set out therein and is also supported by affidavit of the Plaintiff sworn on 9th April 2015.
3. The application is opposed by the 1st and 2nd defendants vide a Replying affidavit sworn by the 2nd defendant on her on behalf and on the behalf of the 1st Defendant, on 10th June 2015.

Background

4. The genesis of this application is that on 25th September, 2009, the applicant entered into a sale agreement with the respondents for sale of L.R NO. 12948/266 (the suit property) which comprises of house No. 81 situated at Mountain View Estate, Nairobi. The respondents agreed to sell to the applicant the said premises at a price of Kshs.16,000,000/=. The applicant avers that he had paid a total Kshs.9,910,516/= when the respondents instructed the Board of trustees, National Social Security Fund (which was the 3rd defendant in the original suit) to cancel the sale, prompting the applicant to file a suit against the respondents for special performance. The

applicant file a notice of motion dated 18th June, 2012 seeking to have the respondents ordered to deposit Kshs.80,000/= in court or in a joint account, being monthly rent for the suit property. The applicant contended that he had paid the full purchase price of the suit property amounting to 16,000,000/= as per the sale agreement. The applicant further contended that having paid the full purchase price for the suit property he stood to lose a lot in terms of rent before the completion and determination of the appeal. Further, that the respondents benefitted from holding the deposit of the purchase price paid to them and at the same time continued to occupy the suit property, rent free to the applicant's detriment.

5. The respondents filed a replying affidavit sworn by the 2nd respondent on 3rd July, 2012, opposing the said application. They averred that the entire sum of 16,000,000/= had not been paid on their account. It was their case that the applicant had come to court with unclean hands as he had breached the orders of the court, in particular the ruling dated 25th January, 2012 which ordered him to deposit the balance of the purchase price within ten days; that the ten days expired on 3rd February, 2012 while the money was deposited in the joint account on 7th February, 2012. The respondents argued that the sale was not complete hence title had not passed to the applicant, therefore, they could not be required to pay rent for their own house.

The High Court, (Mutave, J), vide a ruling dated 18th October, 2012 allowed the applicant's application dated 18th June, 2012 with costs. The court observed that the applicant had indeed paid the entire purchase price of the suit premises as per the sale agreement and that it was only fair and just for the respondents to pay the requisite rent to ensure that both the applicant and the respondents were on equal footing pending the full hearing and determination of the matter. Consequently, the High Court ordered the respondents to deposit Kshs.80,000/= in a joint interest earning bank account in the names of the advocates for both the applicant and respondents as monthly rent effective from 31st October, 2012.

6. The defendants failed to comply with the above order, causing the plaintiff to file a Notice of Motion application dated 19th March 2013 seeking two main orders, namely;
 1. THAT JOEL KIEMA MUTINDA and VIOLET NDANU MUTINDA be detained in prison for a term not less than six (6) months for contempt of Court as the said JOEL KIEMA MUTINDA and VIOLET NDANU MUTINDA have disobeyed the ORDER of this Honourable Court made on 18th October, 2012, requiring them to deposit Kshs.80,000/= every month in a joint interest earning account opened in the names of the Advocates for the Plaintiff and those of the 1st and 2nd Defendants, with effect from 31st October 2012 until the hearing and determination of the suit.
 2. AN ORDER do issue directing the 1st and 2nd Defendants/Respondents to vacate the suit premises forthwith and the same be let out to a 3rd party and the monthly rent thereof be deposited in a joint interest earning account in the names of the advocates on record for the parties.
7. Justice Havelock, vide his ruling delivered on 1st April 2014 granted prayer one above and ordered that the 2nd Defendant be committed to thirty days in Civil Jail. The 1st defendant escaped that fate on account that he was not personally served with the court order. However, the judge did not grant prayer No. 2 for vacant possession.
8. Being dissatisfied with the ruling of Justice Havelock, the 1st and 2nd Defendants appealed to the court of Appeal via Civil Application no. NAI 74 of 2014 (UR 60/2014). In the proceedings leading to the stay of execution of Justice Havelock Orders, it was submitted for the Respondents to the satisfaction of the Court of Appeal that the Respondents merely lacked the means to pay the amount they were ordered to pay and that they did not willfully disobey the order. The court of Appeal found that argument not to be frivolous, and partly on that basis allowed a stay of execution of the orders of Justice Havelock made on 1st April 2014 pending the hearing and determination of the intended appeal.
9. It is now the Applicant's case that the Respondents have admitted their inability to pay the said rent of Shs.80,000/= and that their continued stay in the suit premises without paying the said

money amounts to unjust enrichment, and that if eventually the Plaintiff/Applicant wins the suit, the plaintiff will not recover the said rent. This reasoning informs the application for review of Justice Havelock's Orders regarding the one for vacant possession so that the suit premises can be led out to a 3rd party who can pay the rent.

10. Parties with the leave of court filed submissions which I have carefully considered. In my view, the following are the issues to be considered for determination in this application.
 - i. Whether the application satisfies, the requirements of Order 45 rule 10 of the Civil Procedure Rules for Review.
 - ii. Whether a judicial comment by the Court of Appeal that the Respondents inability to pay Shs.80,000/= may not be out of willful disobedience of the court order, but could be due to lack of money, now amounts to new evidence which can be used under Order 45 for review.
11. Under Order 45 Rule 1 an aggrieved party may apply for review of the orders where there is a discovery of new and important matter of evidence which offer exercise of due diligence was not within the knowledge of the aggrieved party at the time the decree or order was passed; or there is a mistake or error apparent on the face of the record; or for any sufficient reason. The application for review shall be filed without unreasonable delay.
12. It is the applicant's submission that he has complied with order 45 Rule 1, and that there is now new evidence that necessitates the review of orders of 1st April 2014, and that new evidence is that the 1st and 2nd Defendants have since averred that they lacked the means to pay Kshs.80,000/= per month they were ordered to pay. The Applicant submitted that the 1st and 2nd Defendants did not raise their inability to pay at the hearing of the application dated 18th June 2012 which was allowed on 18th October 2012 by Justice Mutava, and that all they did was to claim that the entire purchase price of Kshs.16,000,000/= had not been paid into their account. The Applicant submitted that the argument of the 1st and 2nd Defendant's inability to pay Kshs.80,000/= was not within the Plaintiff's knowledge when he prayed for orders he now seeks to review.
13. On their part the Respondents submitted that the Applicant has not complied with Order 45 Rule 1 and that in any event, there is no new and important evidence before the court to warrant a review. Further, the Respondents state that there is no error on the face of the record and that in any event this application for review is an afterthought brought after an inordinate delay.
14. The Applicant at ground number three (3) states that the defendants moved to the Court of Appeal where they stated that they cannot afford to pay Kshs.80,000.00. According to the Applicant this is new evidence warranting review of the court's orders of 1st April 2014. The Respondents' case is that the Court of Appeal appreciated that, that was an arguable point which is pending before it for determination. The Respondents submitted that the Plaintiff wants this Court to make decisions on issues which are pending before the Court of Appeal and that is not right. In any event, the Respondent submitted, the averments that the Defendants are not able to pay the Kshs. 80,000.00 are not new in this matter. In the affidavit in reply to the application dated 19th March 2013 the 2nd Defendant stated the same reasons (inability to pay). It is not new or fresh arguments being brought in here. The Respondents referred the Court to look at page three of Justice Havelock's ruling dated 1st April 2014. At line 5 through to 9 the judge has quoted those averments which is an indication that he put the issue into consideration when he made his ruling and declined to give the orders for the Defendants to vacate. It was submitted that the Plaintiff's argument on that line is meant to mislead the court.
15. The Respondents further submitted that the application herein was brought with inordinate delay. It is averred that the plaintiff brought his application after the Defendants obtained a stay of execution at the court of appeal. The Defendants have deposed that the Plaintiff has filed an application at the court of Appeal seeking that the appeal be struck out. What the plaintiff is not telling this court is that his application was heard and the court delivered its ruling on 2nd October 2015 dismissing the application. The application is annexed as annexure "VM2" in the Defendants replying affidavit. Attached to these submissions is the ruling of the court of appeal. In that ruling it will be seen that the issues the applicant is raising in this application are before the court of appeal for determination. The Plaintiff's attempts to have the appeal struck out failed. If this

court was to issue orders as sought in the current application the appeal before the court of appeal will be rendered nugatory. It is worth to note that the court of appeal has as well issued an order of stay of Justice Havelock's orders. It was submitted that this court should let the court of appeal deal with those issues and proceed to hear this matter on its merits.

16. In my view, the applicant has not satisfied the requirements of Order 45 Rule 1 for a review. There is no new and important evidence to warrant a review. The Respondent's had previously, as we have seen, stated their inability to pay rent for their own house. They had put this issue on record. On other grounds, I am also satisfied that this application for review was filed after an inordinate delay of five (5) months, and in my view amounts to an afterthought.
17. In answer to issue number two which I raised the Judicial comment by the Court of Appeal and the Respondents' position of their ability to pay the Shs.80,000/= were not conclusive submission. For the Court of Appeal the comment merely enabled the court to establish that the applicant before that court had an arguable appeal, and as the court noted, "an arguable appeal is not one that will necessarily succeed."

However, for the Respondents the averment that they could not pay the 80,000/= was to acknowledge the fact that the high Court had given an injunction against the sale of the suit property pending the trial during which the true owner would be known. The Respondents believe that the suit premises belong to them, and they are justified to aver that they are not in a position to pay rent for their own house.

18. However, of utmost relevance to this court is that if the review is granted, and the Defendants are ordered to vacate the premises, this order would unfairly destabilize the status quo in the matter which was not interfered with by the Ruling of Justice Mutava. Even Justice Havelock was very careful not to destabilize this status. A review, if granted would amount to giving the plaintiff what two previous Judges have considered not givable for the time being. Given that the ownership of the suit premises is seriously contested, an order requiring the Respondents to vacate the premise would be draconian.
19. The best this court can do is to allow the parties to ventilate their grievances in the Court of Appeal without disturbing the equilibrium set by the High Court earlier. It is also to be noted that despite what the Respondent state about their ability to pay Shs.80,000/=, the Defendant would have no option but to abide by any orders regarding payment of damages.
20. Pursuant to the foregoing paragraphs of this ruling the Plaintiff's application herein dated 9th April 2015 is dismissed with costs in the cause.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 4th DAY OF MARCH 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Wachira h/b Gachie for Plaintiff

Mr. Odhiambo h/b Musyoka for Defendant

Teresia – Court Clerk