



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

CIVIL CASE NO. 821 OF 2000

KENNETH MBOGO MARARO PLAINTIFF

VERSUS

JORAM GATIBARU MARARO DEFENDANT

RULING

1. The Application herein is a Notice of Motion Application dated 13th April 2016. It is brought under Orders 45, 51, (presumably of the Civil Procedure Rules 2010, as it is not so indicated,) Section 3 and 3A of the Civil Procedure Act and all the enabling provisions of the Law. The Application is based on the grounds on the face of it, and the Affidavit sworn by **MARY WAIRIMU GIGABARU** dated 13th April 2016.

2. The Application is seeking for Orders that:

- *That the Orders issued on 17th January 2014 be reviewed and set aside.*
- *That costs be provided for.*

3. The subject orders of 17th January 2014, are as herebelow reproduced:

- *That Mary Wairimu Gatibaru and Jacinta Gathoni Kimotho be and are hereby substituted as the Defendants in place of Margaret Wanjiru Gatibaru*
- *That the Respondents do furnish an audited account of all the rent collected from the suit premises with effect from 1992 to date.*
- *That the rent herein be deposited in the Court pending determination of the suit.*
- *That the valuation of the suit property be done.*
- *That the file should be transferred to the Sub-ordinate Court.*
- *That mention on 31st January, 2014 to consider transfer.*

4. The Applicant avers that the Plaintiff took advantage of the fact that his brother **JORAM GATIBARU** was deceased, the appointed administrator **MARGARET WANJIRU GATIBARU** is 80 years old, and ailing, and the Advocated on record Mr. Kamonde was old, ailing and now deceased. That, the Applicants herein were appointed as joint administrators to replace the said **Margaret Wanjiru Gatibaru** who fell down, sustained a head injury and was unable to manage the Estate. Her daughter **Esther Gathoni Gatibaru** is the one who has been administering the Estate on her behalf and collecting rent from the subject property. In that regard, the Applicants herein cannot account for the rent collected. That, the second order relating to furnishing of audited accounts of all rent collected from the suit

premises since 1992 to date, cannot be complied with as the rent collected is an issue contested. Again, since the Administrators herein are newly appointed they are not in a position to give the audited accounts or account for the rent previously collected.

As regards the orders issued in relation to deposit of rent in Court pending the determination of the suit, the Applicant submitted that, the rent collected is utilised to maintain the premises in a habitable state, pay water and electricity bills and, Rates. That the balance goes to the medical expenses and maintenance of **Margaret Wanjiru Gatibaru**. Therefore, the said order cannot be obeyed. Similarly, the Plaintiff having refused to contribute 40% requested to construct the flats, he is not entitled to any proceeds of rent from the suit property. As regards the order for the suit property to be valued, the Applicant submitted that the Plaintiff is only entitled to half of the plot, and not the building or proceeds therefrom.

As regards, the Order, that the file be transferred to the Sub-ordinate Court. The Applicants submitted that this Honourable Court has become functus officio of this matter and the file be so transferred. Finally, the Applicants submitted that, the Plaintiff cannot select which order to be set aside. As, what favours the Plaintiff cannot be set aside to the prejudice of the Defendants. Consequently, the Applicant invited the Court to set aside all the orders issued on 17th January 2014.

5. The Application was opposed based on the grounds of opposition dated 21st April 2016. In a nutshell, the Respondent argued that the Application is frivolous, without merit, and is a waste of Court's precious time. That, it does not disclose any new or important matters of evidence, and offends the principles of review. That, the Applicant has not explained the inordinate delay and that the Applicants Supporting Affidavit only argues the merits of the case as such, the applicant is attempting to steal a match by presenting their version of the case before trial. Therefore, the Application is brought in bad faith, is an abuse of the process of Court and should be dismissed with costs to the Respondents.

In what is referred to as a “**Supporting Affidavit**” which I believe was meant to be a “**Replying Affidavit**” (which was annexed to the grounds in opposition of the Applicant). The deponent, Mr. Chigiti, the Counsel representing the Respondent, deponed that, on 14th February 2013, the Applicants Counsel wrote a letter to the Defendants to the effect that, the Letters of Grant issued to **Margaret Wanjiru Gatibaru** had been revoked, and the Applicants herein appointed. That, following that appointment of the Applicants, the letter stated, that they were now authorised to collect all rent and bank the proceeds in both their names and to further collect all payments. The deponent produced the said letter marked “**JC 1**”. Subsequently the Respondent made an Application to Court on 10th April 2014 to substitute the Administrators of the Estate of **JORAM GAGIBARU MARARO** and the same allowed on 17th January 2014. Several letters were then exchanged between the parties Counsels now on record. A look at the letters attached to the Affidavit sworn by Mr. **JOHN GHIGITI** dated 25th April 2014, (annexture “**JC 3**”), 20th August 2014, (annexture “**JC 5**”) 24th February 2015 (“**JC 6**”), they all support the averments that negotiation between the parties was ongoing. That was after the Orders of 17th January 2014 were made. It's therefore clear that the Applicants were all aware of the orders of 17th January 2014. The Respondent argued that, it is highly prejudicial to allow the Application as prayed. This is because the Applicant's Counsel participated in the proceedings before Honourable Justice E. K. Ogola after the 17th January 2014 orders and was agreeable to the Court issuing directions, allowing the parties to file supporting documents within 30 days and a further mention date for a possible recording of a consent and or further orders. As such, the Application herein is only intended to delay the suit and frustrate the Plaintiff's right to ventilate the case.

6. I have considered the entire Application. The grounds and Affidavit in support thereof, the grounds and “**Replying**” Affidavit, and the Submissions made by the respective parties. I shall rely on the facts herein and consider the prayers in the Application. In a nutshell the orders to be reviewed or set aside, are the orders issued by the Court on 17th January 2014. I have already reproduced those orders herein.

7. Before I deal with the same, I wish to make the following observation:

- ***The Court record reveals that this a family matter involving initially two brother, one is now deceased, hence the Defendants/Administrators***
- ***The entire matter revolves on a family property Land Reference 4401/365/219 Hamza Road, Nairobi. On the said property stands rental premises.***
- ***That, among the prayers sought for in the annexed Plaintiff dated 20th March 2012, is a prayer for:***

“That an account be taken of the rent monies received by the Defendants for the aforesaid sixteen rooms and the Defendant be ordered to pay the Plaintiff his share”

8. Be it as it were, it is clear to me that, the Applicants have all alone been aware of the orders they apply to be set aside. This is informed by the letter dated 10th April 2014 from the Respondents Counsel to the Applicants Counsel. As such the Applicant are less than candid in not acknowledging that fact. It's not surprising then that they have not addressed the delay in making this Application. In this regard, I agree with the Respondent's submissions that, the Applicant's have not addressed the grounds for setting aside a Court order or review. Similarly, all the correspondence herein outlined, between the parties clearly show they have been engaged in negotiation to settle the matter even after the said orders of 17th January 2014. I shall now address the orders issued on 17th January 2014

9. As regards 1st order substituting the Defendants, I see no dispute to the same. I find no purpose in ordering the same be reviewed or set aside. None of the parties has contested it. In deed the Applicants should be grateful to the Plaintiff for initiating the substitution.

10. As regards the 2nd orders relating to provision of audited account. The issue of rent collected and the utilisation thereof is an issue for determination. That prayer goes to the root cause of the dispute herein. To allow the order to remain as ordered would generally spent some of the main prayers in the Plaintiff. In particular prayer 1 in the Amended Plaintiff of 20th March 2012. It's therefore in order to set aside that order to enable the matter be dealt with on merit and based on evidence.

11. As regards the 3rd order, I have noticed that, an earlier ruling delivered in this matter by Honourable Justice L. Njagi (as he then was) dated 29th September 2003, declined to order depositing of rents into the joint account or into Court as prayed. This order may not have been brought to the Court's knowledge when the order of 17th January 2014 was made. I therefore find that, the said orders of 29th September 2003 and 17th January 2014 are in conflict, and cannot stand. I set aside order 3 of the orders of 17th January 2014.

12. As regards the 4th order relating to the valuation of the property, I find that the same has been part of discussion and/or negotiation between the parties even after the orders of 17th January 2004. It's up to the parties to pursue their negotiation into the same or deal with the same as part of the issues for determination at the trial. I see no purpose of an order setting it aside. That may only prohibit or deter the parties from continuing with the negotiation.

13. As regards the 5th order on the issue of transferring the suit to the Sub-ordinate Courts, the Court record shows that on the 14th February 2014 that order was vacated by the Honourable Justice Havelock (Rtd) on realisation that the subordinate Courts had no pecuniary jurisdiction. However, subsequently the said jurisdiction has been enhanced. The parties are at liberty to apply for the transfer of the case.

14. The last order for the matter to be mentioned of a mention on 31st January 2014 made has been overtaken by events.

15. In conclusion I find that, although the Applicant has not squarely dealt with the requirements of law relating to review or setting aside Court Orders, that can be cured under Article 159 2 (d) of the Constitution of Kenya which prohibits clerical of justice on technicalities. However, that does not however mean that Procedures laid down should be disregarded for no apparent reason.

16. The upshot of the aforesaid, is that I order:

1. The Notice of Motion Application dated 13th June 2016 be and is hereby allowed in following terms;

a. Orders 2 and 3 issued by the Court on 17th January 2014, in relation to the Application dated 4th July 2013 be and are hereby set aside.

b. Orders 1, 4, 5 thereof are not set aside and remain in force.

c. Order 6 thereof has been overtaken by events. Therefore no orders are made in relation to the same.

2. The costs of this Application are awarded to the Respondent. This is based on the fact that when the Orders of 17th January 2014 were made, the Applicants were absent despite having been served. Hence, it led the Respondents to believe that, the prayers in the Application of 4th July 2013 were not opposed.

3. To protect the Plaintiff from prejudice that may be suffered should the Defendants elect to have a slow pace in this matter, and taking into account the age of the case, (filed in the year 2000) and the fact that it's about 16 years old in Court, I order the Plaintiff should proceed to set down the suit for hearing within 45 days of the date of this Order.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI IN AN OPEN COURT THIS 15TH DAY OF JULY 2016.

G L NZIOKA

JUDGE

Ruling Read in open court in the presence of:

..... for the Plaintiff

..... for the Defendant

Teresia – Court Clerk