



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 77 OF 2019(OS)

1. BAKARI JUMA DIWANI

2. NGOME ZUMA MBAGUMA

3. MWAKA JULO MWAMBWAGA & 294 OTHERS.....PLAINTIFFS

VERSUS

CHARITY WANGUI MWANGI.....DEFENDANT

RULING

1. By a Notice of Motion dated 27th September 2019, the defendant sought to have the plaintiffs/respondents ordered to submit the original authority to appear, act and plead to be subjected to forensic examination to confirm the authority of the signature appearing thereon and to order the plaintiffs to submit copies of their identity card numbers appearing on the said authority to appear, act and plead for purposes of confirming their authenticity. The defendants further wanted the Deputy Registrar of this court to visit the locus in quo to establish whether indeed the plaintiffs are in occupation of the suit property. The application is supported by the affidavit of Macharia Esther Njigina Advocate sworn on 27th September 2019 and is based on the following grounds:

a. The authority to appear, plead and Act is undated.

b. A review of the signatures appearing on the Authority to Appear, plead and Act creates reasonable doubt as to whether the same was signed by each of the plaintiffs and a cursory look at the signatures on pages 5, 6 and 7 of the document indicates to a reasonable degree that the signatures

were signed by the same hand.

c. The court should only entertain genuine parties and not fictitious ones and it is imperative for the court to establish that the Authority to Appear, plead and Act is authentic as it goes to the very capacity of Bakari Juma Diwani to file and prosecute these proceedings.

d. A visit to the locus in quo is also necessary and in the interests of justice in order to ensure that the evidence of occupation is preserved prior to the trial.

e. It is in the interests of justice that the orders sought herein be granted.

2. It is further deposed that the defendant is also in the process of obtaining satellite imagery which will ascertain whether the plaintiffs have been in actual occupation of the suit property for the period of over 20 years as alleged, noting that there were no photographs annexed to either the affidavit in support of the Originating Summons or in support of the application for injunction to support the assertion that the plaintiffs are actually in possession of the suit property. The defendant contends that an immediate visit to the locus quo will enable the court to do justice to the parties before it by preserving the evidence of occupation. The defendant further contends that the orders sought in the application herein will enable the defendant to respond substantively to the plaintiff's application and originating summons, and that unless the orders sought herein are granted the defendant's constitutional rights under Articles 48, 49 and 50 (1) of the Constitution of Kenya 2010 will be infringed.

3. In opposing the application, the plaintiffs filed a replying affidavit sworn by Mwaka Julo Mbawabwanga, the 3rd plaintiff on 4th November, 2019 in which she deposed that the deponent of the affidavit in support of the application herein has no locus standi to depone on behalf of

her client and that there is no express consent to swear the said affidavit. The 3rd plaintiff further deposed that the plaintiffs signed the impugned documents and it would be a waste of time to subject the same to any forensic examination as requested by the applicant. It is the plaintiffs contention that the issue of whether the plaintiffs have stayed on the suit land for over 20 years is a matter of fact which can only be determined during hearing. The plaintiffs have no objection for the prayer for the court to visit the locus in quo. The plaintiffs contend that it is just and expedient that this application be dismissed and the parties proceed expeditiously with the main suit.

4. The application was canvassed by way of written submissions. In her submissions dated 9th December 2019, the applicant submitted inter alia, that it is apparent that the respondents have a common cause against the applicant as the suit has been filed by the 297 respondents in their individual capacity as they are named and listed in the originating summons dated 6th May 2019 and therefore follows that the present suit is not a representative suit. The applicant submitted that the provisions of Order 1 Rule 13 (2) and Order 4 Rule 1(2) and 3 of the Civil Procedure Rules are in mandatory terms and failure to comply with the same renders the suit incompetent and non-starter for lack of proper authority and for failure to comply with the said provisions. The applicant relied on the case of **J. N. Ngoka t/a Electrical Enterprises and 16 Others –v- Municipal Council of Eldoret, Eldoret HCCC NO. 60 of 2002 (unreported) and John Kariuki & 347 Others -v- John Mungai Njoroge & 8 Others Nakuru HCCC No.152 of 2003 (unreported)**

5. The applicant further submitted that the undated authority to act is improper and fatally defective as the signatures appearing therein are not genuine because the same indicates they were made by one or two individuals and/or the same hand and not the 296 respondents. The applicant urged the court to take judicial notice of alleged prevalence of land grabbing cases by squatters in Mombasa and urged the court to allow the application. The applicant submitted that unless the orders sought herein are granted, the applicant stands to suffer loss and damage as she will be compelled to defend a fatally incurable and defective suit and urged the court to be persuaded by the case of **of Ndungu Mugonyi & 473 Others –v- Stephen Wangombe & 9 Others (2005)eKLR.**

6. In their submissions dated 18th February, 2020 and filed on 21st February 2020, the respondents submitted that the affidavit in support of the application should be struck out because inter alia, the deponent has delved into evidentiary facts and therefore offends the provisions of Order 19 Rule 3 of the Civil Procedure. The respondents further submitted that the application is a delay tactic by the applicant over the suit, adding that subjecting the documents to forensic examination will defeat the overriding objective of the court laid down in Sections 1A and 1B of the Civil Procedure Act. The respondents further stated that they are agreeable to the applicant's prayer for the court to visit the locus in quo to ascertain the position on actual occupation of the suit land. It is the respondents' submission that the application is misconceived, vexatious and an attempt to divert the court's attention away from the real issues in question in this matter. The respondents urged the court to be guided by the principle of the overriding objective of the court and Article 159 of the Constitution and dismiss the application.

7. I have considered the application and the submissions made. The parties are in agreement that the court visits the locus in quo, hence the only issues for determination are whether the affidavit in support of the application should be struck out and whether the court should order the Authority to Appear, Act and plead and the copies of the respondents' identity card numbers appearing thereon to be subject to forensic examination.

8. The respondents' submission is that the affidavit in support of the application herein offends the provisions of Order 19 Rule 3 which provides that:

“3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

9. In the case of **Kentainers Limited –v- V. M. Assani & Others, HCCC NO. 1625 of 1996**, Ringera J (as then he was) quoted the Halsbury's Laws of England, 3rd Edition, paragraph 845 which says:

“Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated....For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties but are made for the purpose of keeping things in status quo till the right can be decided, or for purpose of obtaining some direction of the court as to the conduct of the case.”

10. In the affidavit of Macharia Esther Njigina, it is quite apparent that the applicant's counsel has deposed to contested matters of fact, particularly on the authenticity of the Authority to Appear, Act and plead as well as the respondents' identity cards. The applicant's counsel has also raised the issue as to whether or not the respondents have been in occupation of the suit land for over 20 years as alleged in the originating summons. The affidavit therefore offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules and the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya. It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. I am persuaded by the holding of Ringera J (as he then was) in the case referred to above where he stated:

“By deposing to such matters the advocate courts an adversarial invitation to step from his privilege position at the bar into the witness box. He is liable to be cross-examined on his deposition. It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.”

Accordingly, the contentious affidavit of Macharia Esther Njigina is hereby struck out.

11. The other issue for determination is whether the respondents' documents should be subjected to forensic examination. Evidently, this is

not a criminal court and pre-trial discovery and gathering of evidence must be managed by the parties. The applicant has doubts as to the authenticity of the Authority to Appear, Act and plead and the respondents' identity card numbers. The applicant is entitled to do so. However, in expressing her doubts over the authenticity of the said documents, the applicant cannot be allowed to turn the court into an investigative agency. By ordering forensic examination of the disputed documents, the court will, in my view, be descending into the parties' arena of availing evidence in support of their respective cases. In my view, parties must be left to present evidence in support of their respective cases.

12. For the above reasons, the defendant's application dated 27th September, 2019 is dismissed save for prayer 6 which both parties have consented to. Costs shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF JULY 2020.

C.K.YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant