



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 337 OF 1998

MAVOLONI COMPANY LIMITED.....PLAINTIFF

-Vs-

STANDARD CHARTERED ESTATE

MANAGEMENT LIMITED..... 1ST DEFENDANT

ROSAM ENTERPRISES2ND DEFENDANT

GREEN ACRE VEGETABLE AND

FLOWER EXPORTING COMPANY 3RD DEFENDANT

THE CHIEF REGISTRAR..... 4TH DEFENDANT

RULING

1. The application before the court is a Notice of Motion dated 8th April 2014 filed by the Plaintiff under Orders 12 Rule 7, 22 Rule 22 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act. The application seeks the following prayers:-
 - a. That this application be certified urgent and heard ex-parte in the first instance on account of its urgency.
 - b. That there be temporary stay of execution of the judgement and decree and or sale of title Numbers Ndalani/Mavoloni Block 1/1030 and Ndalani/Mavoloni/Block1/1250 pending hearing and determination of this application inter-parties.
 - c. That judgement of this Honourable court delivered on 22nd May 2009 be set aside, together with the decree and all consequential orders therefrom.
 - d. That this Honourable court do grant any other Order or relief it may deem fit to grant in the circumstances of this case.
 - e. That costs of this application to be costs in the cause.
2. The application is premised on the grounds set out therein and is supported by Affidavit of **JOSEPH MUNYAO MUTISYA** dated 8th April 2014, his Supplementary Affidavit filed in court on 14th May 2014 and his Further Affidavit filed in court on 27th May 2014.

3. The application is opposed by the 3rd Defendant/Respondent vide a Replying Affidavit dated 6th May 2014 and a Further Affidavit dated 7th May 2014 by **JOSEPH MUISYO NZIOKA**. The 1st and 2nd Defendants are no longer parties to these proceedings pursuant to the court's ruling on 30th April 2014 while the 4th Defendant did not participate in the proceedings leading to this ruling.
4. The brief history of the application is that the current suit was filed in 1998. Sometime in 2009 the hearing took place in the absence of the Plaintiff, whose suit was dismissed and judgement entered for the 3rd Defendant in terms of the 3rd Defendant's counterclaim pursuant to an amended defence and counter-claim dated 30th September 2004. The Defendant subsequently extracted the decree which was in the following terms.
 - a. The 3rd Defendant is granted an Order of vacant possession of both suit properties known as **Ndalani/Mavoloni/Block 1/1131** and **Kakuzi/Ithanga/Gituamba/Block 1/876**.
 - b. The 3rd Defendant/Plaintiff will have the cost of the suit.
5. Thereafter the 3rd Defendant filed their bill of costs, which was dully served upon M/S. Kilikumi & Co. Advocates, for the Plaintiff, who had failed to appear for the hearing of this suit on behalf of the Plaintiff. The bill of cost was eventually taxed by the court and eventually a decree issued for Ksh.2,500,718.20/=. On or about 13th May 2013 the court issued a Notice to Show Cause why execution should not issue. The Orders were granted. Shortly, the court issued prohibitory Orders which were registered against all those properties know as **Ndalani/Mavoloni/Block 1/1250** and **Ndalani/Mavoloni Block 1/1030**, the 3rd Defendant then took steps to sell the suit properties and this is what has provoked the Plaintiff to file this application seeking for the setting aside of the aforesaid judgement. The Plaintiff alleges that M/S. Kilukumi & Company Advocates, failed to represent the Plaintiff in court, and that the consequences of such failure should not be visited on a client. Vide annexure '**JMM4**' to the Supporting Affidavit of **JOSEPH MUNYAO MUTISYA**, the firm of Kilukumi & Co. Advocates confirm that they failed to act for the Plaintiff/Applicant. This acknowledgment emboldens the Applicant to submit that the sins of a counsel cannot be visited upon a litigant.
6. The other grounds for the application as put forth by the Applicant are that at the time when the aforesaid judgement was entered on 22nd May 2009, there was a judgement and decree in Machakos **HCCC No.43 of 2006** which is substantially a claim between the same parties as in this case, and that in the Machakos case the Applicants herein have a judgement in their favour on a similar subject matter. However, that judgement was set aside to be reviewed on the condition that the interested party (the 3rd Defendant herein) deposit Ksh.3,631,00/= in court, which was done.
7. It is now the Plaintiff's submission that since the judgement in **HCCC NO. 43 of 2006** (Machakos) was set aside for review, the judgement in favour of the 3rd Defendant herein should as well be set aside so that the matters may be looked as a fresh.
8. In reply to those submissions the 3rd Defendant has submitted that the proceedings leading to the entry of judgement in favour of the 3rd Defendant herein were all procedural, and that the Plaintiff's Advocate M/S. Kilukumi & Co. Advocates were lawfully on record and that the said advocates were served with the proceedings at all stages. This submission is correct, as the said advocate indeed acknowledged that they were served, but due to the change of the Plaintiff company directorship and contacts, they failed to contact them. In my view, the introduction of a letter from the firm of Kilukumi & Co. Advocates as an annexure to the Supporting Affidavit was unprocedural
9. . The Respondent would not be given an opportunity to respond to that letter. Accordingly I herewith strike out paragraph 9 of the Supporting Affidavit of **JOSEPH MUNYAO MUTISYA**

and expunge any reference to M/S. Kilukumi & Co. Advocate in these proceedings. The said paragraph 9 of the Supporting Affidavit is in breach of Order 19 Rule 3(1), as no evidence has been advanced by the Plaintiff company as to why Mr. KIOKO KILUKUMI could not swear an Affidavit stating what he has purportedly stated in his letter marked 'JMM4'.

10. In further response it was submitted for the 3rd Defendant that the **HCCC NO.43 of 2006** Machakos was filed in 2006 by the Plaintiff after the Plaintiff abandoned the current suit which was filed in 1998. Mr. Owino for the 3rd Defendant/Respondent noted that the prayers in the said Machakos case are more or less similar to the prayers in this suit as well as the properties the subject matter in that suit. The only difference is that in the Machakos case the Plaintiff company conveniently omitted to include the 1st and 3rd Defendants as parties. The said Machakos case was filed against only nominal Defendants – The Registrar of Lands in Machakos and Thika and the Commissioner of Lands.

11. I have carefully considered the application and submissions of the parties. It is clear to me that the judgement entered herein for the 3rd Defendant was procedural and lawful. It is also clear to me that the Plaintiff/Applicant has not satisfied the criteria for setting aside ex-parte judgement. The conduct of the Plaintiff in filing the Machakos case in 2006 while it had filed the current suit in 1998 also appears irrational or meant to delay the determination of this suit. However, and purely for the sake of procedural justice, and given that the suits involves virtually same parties and same subject matter, and especially given that the judgement entered in the Machakos suit has been set aside conditionally, I will reluctantly allow the application and set aside the judgement herein also conditionally, so that all the parties may now proceed to have the two suits consolidated and heard together to allow a final determination of all the issues under one roof.

12. In the upshot I make the following Orders;

- a. **That the judgement delivered herein on 22nd May 2009 is hereby set aside.**
- b. **That the decretal sum and or costs amounting to Kshs.2,500,718.20 plus interest thereon accrued to-date, shall be deposited in court within 30 days from today failure whereof this Order will automatically lapse.**
- c. **That the Plaintiff/Applicant shall pay the costs of this application.**
- d. **That the parties shall elect which, between this suit and the HCCC No.43 of 2006 (Machakos), they shall proceed with. Upon such election, the suits shall be consolidated and heard together.**

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 3rd Day of October 2014.

E.K.O OGOLA

JUDGE

Present:-

Mutai for Plaintiff/Applicant

Owino for 3rd Defendant/Respondent

Teresia – Court clerk