



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 351 of 2010

WINNIE NYAMBURA KIHARA..... PLAINTIFF

VERSUS

MONICAH WANZA KALOKI.....1ST DEFENDANT

NANCY WAMBUI2ND DEFENDANT

PETER KIARIE KIMANI.....3RD DEFENDANT

**LEONARD CHEGE (sued as the National
Official of Worldwide Fellowship Center**

Kahawa West Nairobi).....4TH DEFENDANT

RULING

The Notice of Motion before the court for consideration is one dated 18th October 2011 filed by the Defendants, seeking orders that this Court stays orders issued on 22nd July 2011 and sets aside the said orders upon such terms it seems fit. The grounds for the application are that the Plaintiff does not own a plot within the 7 acres of L.R. No. 5569/5 Kahawa West which the 1st, 2nd and 3rd Defendants among other 29 people were awarded by this Honourable Court in HCCC No. 2794 of 1995 (OS). Further, that the Plaintiff was not a party in the said HCCC No. 2794 of 1995 (OS) and is living within the said 7 acres of L.R. No. 5569/5 as a tenant.

The Notice of Motion is supported by affidavits all sworn on 18th October 2011 by the 1st Defendant, 3rd Defendant and one Alfred Owour who was one of the Plaintiffs in HCCC No. 2794 of 1995 (OS). A supporting affidavit was also sworn on 30th September 2011 by one David Maina Ndirangu, a civil servant who was an Assistant Chief of Kahawa Location and knew the parties herein who were residing in his jurisdiction. All the deponents attested to the above-stated grounds, and stated that the Plaintiff was summoned to appear before the chief of the area and issued with a notice to vacate. Copies of various documents in support of the Defendants' claims were annexed including the said summons, notice to vacate and the decree issued in HCCC No. 2794 of 1995 (OS).

The Plaintiff opposed the Notice of Motion in an undated replying affidavit filed on 24th November 2011, wherein she denied that she was a tenant of the Defendants, and that she had not been given a notice to vacate nor had she been summoned by the chief on this matter. She further stated that she paid legal fees to the Advocates of the Plaintiffs in HCCC No. 2794 of 1995 (OS) and was represented in the said suit. Further, that she also paid money for subdivision of the subject plot.

The Plaintiff and Defendants filed written submissions, upon which they relied during the hearing of the Notice of Motion on 13th March 2013. The Defendants' Counsel argued in submissions dated 23rd January 2013 that the Plaintiff was not a party in HCCC No. 2794 of 1995 (OS), and does not own a plot in the suit premises. Further, that she obtained the orders of injunction on 22nd July 2011 by misrepresenting material facts to the court. It was submitted that it is in the interests of justice that the orders be set aside pursuant to the provisions of Order 40 Rule 7, and the counsel cited various judicial decision in support of his arguments, namely, Saflo vs Lloyd Masika Ltd ELC No 7 of 2009; Sam-con Ltd vs National Bank of Kenya & 2 Others (2005) eKLR; Josephat Supare Ole Sakunda & 10 others vs Harison Musau & Another, (2006) eKLR and Ahmed Hashi Aden T/A Torry Transporters vs Moses Kipkemoi Siongok & Another, Nakuru H.C Civil Appeal 3&2 of 2006.

The Plaintiff's counsel in submissions dated 7th February 2013 gave a detailed history of the orders given on 22nd July 2011, and argued that allowing the Defendants' application would decide the main suit at an interlocutory stage, taking into account that there were conflicts of facts that can only be decided upon at trial. Further, that it would lead to a violation of the Plaintiff's rights. He relied on the decisions in Isaiah Mutea M'Itunga vs Francis Kairetha Ibere 7 Another (2012) eKLR, EDCO Africa Limited & Another vs Boniface Ndege Kirigia & 2 Others (2012) eKLR and Mobile Kitale Service Station vs Mobil Oil Kenya Limited & Another (2004) 1 KLR in this regard. It was also argued that there was inordinate delay by the Defendants in filing the application.

I have read and carefully considered the pleadings and submissions made by the parties. The main issue to be decided is whether there are sufficient grounds to stay and/or set aside the orders given by Okwengu J. (as she then was) on 22nd July 2011. This application is brought pursuant to the provisions of Order 40 Rule 7 of the Civil Procedure Rules which states as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order. “

I will start with the issue whether the orders of 22nd July 2011 can be stayed . Order 40 Rule 7 has no provisions for stay of orders of injunction, and the only enabling provisions of law for stay of orders in the circumstances of the present Notice of Motion is Order 42 Rule 1 of the Civil Procedure Rules which applies only when an order is being appealed from. No appeal has been proffered by the Defendants from the orders of on 22nd July 2011 in the present case. The prayer for stay of the said orders is therefore denied for these reasons.

On the issue of setting aside of the orders for injunction, I note that most of the judicial authorities cited by the Defendants in support of their application did not concern setting aside of injunctions and different principles applied in those cases. The only relevant decision cited was that of Josephat Supare Ole Sakunda & 10 others vs Harison Musau & Another, (2006) eKLR which is distinguished on the ground that in that case the decision that was set aside did not incorporate any recorded reasons. In the present case the ruling delivered on 22nd July 2011 clearly states the reasons for the grant of a temporary injunction, and particularly the reasons why the Honourable Judge found that the Plaintiff had shown a *prima facie* case.

I also do not find that there was any material non-disclosure by the Plaintiff, as she previously pleaded in her application for injunction and still pleads that she believed herself to be one of the Plaintiffs in HCCC No. 2794 of 1995 (OS), and that she expended money in that belief. Finally, I also concur with the Plaintiff's submissions and judicial authorities cited that it is necessary to preserve the *status quo* pending the hearing and determination of the suit herein. Discharging or setting aside the injunction orders will result in the Plaintiff's eviction from the disputed plot which she claims to own, and will render her suit nugatory.

The Defendants' prayer for setting aside of the orders given on 22nd July 2011 is also denied for the foregoing reasons, and I hereby disallow their Notice of Motion dated 18th October 2011. The Defendants shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of ____May____, 2013.

P. NYAMWEYA

JUDGE