



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 151 OF 2019

MAYFAIR ESTABLISHMENTS LIMITED.....PLAINTIFF

VERSUS

STEPHEN MBUGUA KIHANYA.....DEFENDANT

RULING

1. By a Notice of Motion dated 8th June, 2020 brought under Section 13 of the Environment & Land Court Act, Order 22 Rule 22 and Order 40 Rule 1 of the Civil Procedure Rules, Sections 1A & 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya and all enabling provisions of the law, the Interested/Affected Parties are seeking the following orders:

1. Spent

2. That this Honourable Court be pleased to give and order for reinstatement of the Applicants/Interested/Affected Parties to the suit premises known as PLOT NO.MOMBASA/BLOCK X/103 forthwith pending further proceedings herein.

3. That the plaintiff and or its agents be stopped from demolishing the suit premises that is building on PLOT NO. MOMBASA/BLOCK X/103 pending the hearing and determination of the application.

4. That the ex-parte proceedings done on 26th November, 2019 and the decree granted on 12th March 2020 be set aside unconditionally as the entire suit is a nullity from its inception or upon terms as this Honourable court may deem just and expedient.

5. That the applicants be granted leave to defend this suit as the Interested or affected parties.

6. That a declaration that the entire suit herein is a nullity,

7. Costs of this application be provided.

2. The application is premised on the grounds on the face of the motion and supported by the affidavits of Dennis Muhiu, Elizabeht Mbugua alias Bertha Wamira and David Kihanya sworn on 8th June, 2020. It is the applicants' case that the suit herein was filed on 21st August 2019 against the defendant who had died on 30th November, 2002 and therefore the decree issued by this court on 12th March, 2020 was against a dead person. The applicants contend that the entire suit and proceedings are a nullity from the inception. The applicants aver that they reside and have been residing in the suit property with their families for over thirty (30) years and have been evicted pursuant to nullity proceedings and decree. The have annexed a copy of death certificate showing that the defendant died on 30th November 2002. The applicants have also annexed a copy of a certificate of lease in the name of the deceased, a copy of a will allegedly left by the deceased, copies of pleadings in Kiambu High Court Succession Cause No.82 of 2016 (Formerly Mombasa High Court Succession Cause No.162 of 2013), photographs showing partial demolition of some building, and documents showing payment of rates and rent. The applicants have also exhibited a draft defence.

3. The application is opposed by a the plaintiff through a replying affidavit sworn on 11th June, 2020 and a Notice of Preliminary Objection dated 15th June, 2020. It is the plaintiff's contention that the applicants are strangers to this suit as they are neither parties nor made parties by an order of the court. That the court having delivered its judgment is functus officio and the case cannot be reopened. The plaintiff further avers that the applicants have no capacity/locus standi to defend this suit on behalf of the defendant or even to file the present application because they are not administrators of the estate of the defendant and no grant of letters of administration of the estate of the defendant has ever been issued.

4. The plaintiff states that the prayers seeking to stop the plaintiff from demolishing the suit property has been overtaken by events because the building has already been demolished. Photographs showing the demolished house together with a copy of demolition permit have been

annexed. The plaintiff expressed doubts on the allegation that the defendant died on 30th November, 2002, because on 30th October, 2018 the plaintiff's advocates wrote a letter to the defendant demanding payment of outstanding rent and rates, and the firm of Gachiri Kariuki & Co. Advocates responded on 16th October, 2019 indicating that they had been instructed by the defendant and forwarded a Bankers cheque dated 15th October, 2019 for Kshs.3,840 being payment of the outstanding rates. Copies of the said letters and cheque have been annexed. The plaintiff states that it rejected and returned the said cheque because it should have been paid to the County Government of Mombasa and that legal proceedings for recovery of the premises for breach of the lease had already been commenced. A copy of the said letter is also annexed.

5. The plaintiff further contends that the applicants cannot defend a suit they claim to be a nullity. The plaintiff being the lessor, and pursuant to the lease it did not need a court order to take over the suit premises but filed this suit out of abundance of caution. The plaintiff states that it has exercised its rights as a lessor under the lease not only by taking repossession of the suit property, but by registering the cancellation of the defendant's lease. Copies of the documents showing the registration of the cancellation of the lease have been annexed.

6. The application was canvassed by way of written submissions. The firm of Mogaka Omwenga & Mabeya Advocates for the applicants filed their submissions dated 29th June, 2020 on 15th July, 2020. It was submitted that the plaintiff instituted the current suit on 21st August, 2019 which is more than sixteen (16) years after the demise of the defendant. That the matter proceeded to its finality without knowledge of the existence of the suit by the applicants herein. The applicants' advocates cited Article 22 of the Constitution and relied on the case of **Gladys Njeri Muhura –v- Daniel Kariuki Muthiguro (2018)eKLR** in which Kemei, J stated:

“.....the general rule is that suits and actions must be prosecuted by and against living parties. Since the deceased person cannot be a party to a legal proceeding the effect of the death is to suspend the action as to the deceased until the legal representative is substituted as a party.....”

7. It is the applicants' submission that they have been residing in the suit property for over thirty (30) years together with their families as children of the defendant who died in the year 2002, and that being the beneficiaries of the estate of the defendant by virtue of the lease agreement, they have an interest in the suit property and their rights have been infringed by the execution of the orders granted by the court to the plaintiff. The applicants state that no letters of administration have been issued, hence a legal representative is yet to be appointed by the court in the pending succession proceedings. The applicants submitted that the court should not deny them justice based on procedural technicalities. They cited Section 2 of the Civil Procedure Act, Section 13 and 19 of the Environment and Land Court Act and Articles 42 and 70 of the Constitution of Kenya. The applicants submitted that they have identifiable interest in the subject matter of the suit and are necessary party and relied on the case of **Trusted Society of Human Rights Alliance – v- Mumo Matemu (2014)eKLR**.

8. It is the Applicants position that the suit and proceedings against the defendant are void ab initio and a nullity having been filed after his demise. The applicants submitted that the service which was effected upon the son of the defendant did not adhere to the procedure under Order 5 Rule 2 of the Civil Procedure Rules.

9. The applicants counsel also relied on the decision of this court in **Ali Nassor Mwafumbi & Another –v- Eliud Simon Mbilu & Another (2019)eKLR** in which the court quoted the **Indian Cases of C. Muttu –v- Bharath Match Works AIR 1964 Kant 293 and Pratap Chand Mehta v Chrisna Devi Mehta AIR 1988 Delhi 267; Gladys Njeri Muhura –v- Daniel Kariuki Muthiguro (supra), and Benjamin Leonard MC Foy –v- United Africa Company Limited (1961) ALL ER 1169.**

10. The applicants counsel further submitted that the court becomes functus officio only after a judgment or award had been perfected by a decree or formal order, which has not been exercised in this matter. Counsel relied on the case of **Jersey Evening Post Ltd –v- Al Thani (2002) JLR 542 at 550** which was cited and applied by the **Supreme Court in Raila Odinga & 2 Others –v- Independent Electoral & Boundaries Commission & 3 Others (2013)eKLR and Coffee Board of Kenya –v- Thika Coffee Mills Limited & 2 Others (2014) eKLR**. The applicants abandoned the prayer seeking to stop the plaintiff from demolishing the suit property because it was already spent. The applicants however, urged the court to grant the other prayers.

11. In their submission filed on 13th July, 2020, M/s Oluga & Company Advocates for the Plaintiff submitted that the applicants are strangers to this suit and cannot seek any orders in a suit to which they are not parties. The plaintiff's counsel relied on the case of **Kenya Dock Workers Union –v- Kenya Ports Authority (2014)eKLR** and argued that the applicants should first have applied for leave to be joined in the suit as affected/interested parties. That they did not do so and no prayer in the application for joinder and therefore cannot make themselves a party to the suit unilaterally without leave of court.

12. The plaintiff's submission is that the court having delivered its judgment is functus officio and the case cannot be re-opened. It is the plaintiff's submission that the decree issued herein has been perfected through eviction of the plaintiff and demolition of the house on the suit property. They argued that if the applicants have a claim, their response does not lie in this case, but should seek redress in a different forum. The plaintiff argued that the allegation that the defendant died in 2002 is not true because he instructed M/s Gachiri Kariuki & Company Advocates to pay outstanding rates in October 2019. The plaintiff further submitted that even if the defendant was dead, it is only the legal representative or administrators of his estate who can defend a suit brought against him/his estate. That the applicant lack legal capacity to defend this suit and therefore their request for leave to defend this suit cannot be granted. The plaintiff's counsel cited Section 2 of the Civil Procedure Act on the definition of a legal representative. The plaintiff argued that it is paradoxical that the applicants accuse the plaintiff of committing an illegality by filing this suit against the defendant whom they allege is dead but they also want to commit an illegality by defending the suit yet they are not legal representatives of the defendant. It was submitted that legal capacity is not a procedural technicality that can be cured by Section 19 of the Environment and Land Court Act as submitted by the applicants. That legal capacity of a party is everything and without it, even the overriding objective of the law cannot come to the aid of the applicants.

13. It was the plaintiff's submission that service of summons has been conceded and that order 5 rules 8 and 12 of the Civil Procedure Rules permit service of summons to be effected upon the defendant's agent or adult member of the family. It was further submitted that only the defendant can file defence in this suit and the applicants cannot file such defence.

14. The plaintiff argued that if it was true that the defendant who was a lessee of the suit property has died, the lease determined upon his demise and that the same could not be transferred to the applicants. That the applicants do not therefore have any right to be on the suit property or to claim any rights over the same, adding that the applicants do not have a good defence. It was further argued that with or without this suit the plaintiff's right of repossession had crystallized due to breach of the lease and the taking over of the suit property was automatic right of the plaintiff and the same cannot be faulted on the allegation that this suit is a nullity. That the plaintiff has exercised its rights as a lessor under the lease not only by taking repossession of the suit property but by registering the cancellation of the defendant's lease. The plaintiff therefore urged the court to dismiss the application with costs to the plaintiff.

15. I have considered all the issues raised in the application. The issues for determination arising out of the motion, affidavits and submissions filed are:

i) Whether the notice of motion is competent or is properly before the court.

ii) Whether the court is functus officio

iii) Whether the suit is a nullity

16. It has been submitted by the plaintiff that the application has been brought by strangers to the suit because the applicants have no capacity/locus standi to defend the suit on behalf of the defendant or even to file the present application as they are not administrators of the estate of the defendant and no grant of letters of administration of the estate of the defendant has been issued. The applicants admit that they filed the present application before they have been issued with a grant of letters of administration of the estate of the deceased. To institute and prosecute an action in respect of a deceased person, a litigant is clothed with locus upon obtaining a limited or a full grant of letters of administration. In the case of **Otieno –v- Ougo & Another (1986-1989)EALR 468**, the Court of Appeal rendered itself thus:

“.....an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception....To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus means he cannot be heard, even on whether or not he has a case worth listening to.... ”

17. As at the time the application herein was filed on 8th June, 2020, there is no evidence that the applicants herein had taken out and obtained letters of administration in respect of the estate of Stephen Mbugua Kihanya (deceased). Therefore the applicants had not capacity or *locus standi* to bring the current application or even to defend the suit. Legal capacity of a party is everything and without it, even the overriding objective of the law cannot come to their aid. In the absence of locus standi, no doubt the application herein is incompetent. Accordingly and for the above reason, the application is struck out.

18. The other issue raised is that this court is functus officio having rendered its judgment which has since been perfected by the decree by execution through eviction of the applicants and demolition of the house on the suit property. It is a general principle in law that litigation must come to an end. Ordinarily, a suit would come to an end when a court has rendered a decision and that decision has been acted upon or executed. At that point, the court is said to be “functus officio” and any party who is aggrieved must now pursue the course of review or appeal to a higher court. In this case, the court did deliver its judgment which, as already stated, has been perfected. Ordinarily, the matter would now be out of the hands of this court and the court would be “functus officio” and therefore not entitled to revisit the matter. This court would therefore be “functus officio”. However, it has now come to the attention of the court that the suit was filed against a defendant who was already dead by the time the suit was filed. In my view, even though the court was “functus officio”, it would not shut its eyes on what, is clearly a nullity. It is the view of this court that if it makes a finding that the court is “functus officio” and therefore unable to revisit the matter, it would create unprecedented legal absurdity where the court process is used to sustain a nullity under the guise of the principle that the court is “functus officio”.

19. In the case of **Geeta Bharat Shah & Others – v- Jomar Said Mwatayari & Another (2009) eKLR**, the Court of Appeal while considering an appeal over a matter in which the suit was filed against a defendant who was dead at the time of filing suit stated as follows:

“We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted he sued a dead person, the court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead....”

20. The Court of Appeal in the above case went ahead and stated as follows:

“.....it goes without saying that dead people cannot read advertisements and thus could not have been served.....”

21. In this case, evidence in the form of a death certificate and succession cause proceedings have been shown to the court showing that at the time of filing suit on 21st August, 2019, the defendant was long dead, having died on 30th November, 2002, and therefore not capable of being served in any manner. And going by the decision of the Court of Appeal in the case of **Geeta Bharat Shah & 4 Others –v- Omar Said Mwatayari & Another (supra)**, there was even no need for the applicants to urge the court to declare the suit a nullity. The court has no alternative other than to down its tools as the court has no jurisdiction to continue to hear a suit filed against a person who was already

dead by the time the suit was filed. It follows therefore that the suit is a nullity.

22. In the case of **Benjamin Leonard MC Foy –v- United Africa Company Limited (1961) 3 ALL ER 1169** it was held as follows:

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”

23. This is what the applicants herein are attempting to do in the present case. This cannot happen because the defendant died before the suit was filed and the applicants are not the representative of his estate, and even if they were, it is not possible for them to take over a nullity.

24. In another Indian case of **C. Muttu –v-Bharath Match Works AIR 1964 Kant 293**, it was stated:

“if he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity.....it is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

25. In yet another Indian **Case of Pratap Chand Mehta –v- Chrisna Devi Mehta AIR 1988 Delhi 267**, the court citing another decision observed as follows:

“....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed.....”

26. In the result, I declare that the suit is a nullity as the same was filed against a defendant who was dead at the time the suit was filed. The judgment entered herein on 12th March, 2020 and the decree are set aside and the suit is struck out.

Similarly, the notice of motion dated 8th June, 2020 is struck out. Each party to bear their own costs.

27. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 9th day of November 2020

.....

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE