



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT. NO. 92 OF 2018

RISINGSTAR COMMODITIES LIMITED.....PLAINTIFF

VERSUS

MOHAMED IQBAL MOHAMED.....DEFENDANT

RULING

1. The Application before me for determination is the Notice of Motion 23rd August 2018 by the Interested Parties/Applicants. The Application seeks *inter alia*, an order to enjoin the applicants as interested parties in the suit as well as an order reviewing and setting aside the consent order granted by the Court on 31st July 2018 and issued on 17th August 2018.

2. The Application is supported by the affidavit of Mehmood Ali Mohamed Haji Suleiman sworn on 23rd August, 2018 and is based on the grounds on the face of the motion. Briefly, the applicants aver that they together with the defendant, are joint administrators of the estate of the late Ayshulbhai Alimohamed Haji Suleiman a.k.a Ayshabhai Alimohamed Haji Suleiman (deceased). That the go-down No.2 situate on LAND TITLE NO. MOMBASA/BLOCK 1/267 forms part of the said estate and that decisions and acts relating to the estate have to be made jointly and with concurrent and endorsement of the three administrators of the estate.

3. The Applicants state that the defendant claims to have obtained the orders in issue granting him possession of the premises leading to the defendant to forcefully break and gain entry to the suit premises and forcefully take possession of the same. It is their contention the applicants and the defendant were already in possession of the suit premises, the same having been handed over to them as administrators of the said estate by the plaintiff.

4. The applicants state that the 1st Applicant was in possession of the keys to the go-down, material facts the defendant knew and refused, failed or neglected to disclose to the court. It is the applicants' contention that the orders do not relate to the suit premises since they do not mention the said premises, but a perusal of the court file shows that the issue was the suit premises. The applicants further contend that a perusal of the court file and reading of the pleadings show that the defendant was sued in his personal capacity and not as an administrator of the estate of the deceased or of the suit properties. The applicants contend that had this material fact been disclosed, the orders granted would not have been granted.

5. It is the applicants' contention that the defendant had no capacity to act alone and in his personal capacity to defend the suit in so far as what was at issue was the suit premises forming part of the said estate. The applicants aver that they had no knowledge of the plaintiff's suit nor the defendant's replies as well as the consent entered into between the defendant and the plaintiff until when the defendant broke into the premises. That the defendant's action and failure to inform and consult the co-administrators on the suit and consent indicates that the defendant is not acting in the interests of the estate and its beneficiaries and indicate lack of transparency and accountability to the estate and the beneficiaries thereof. The applicants are apprehensive that should the defendant continue to be singularly in possession of the suit premises to their exclusion, the defendant may lease, sell, alienate, hire, rent out, dispose of or otherwise deal in the suit premises in a manner that will be prejudicial and detrimental to the interest of the estate and the beneficiaries thereof. The applicants further aver that the possession and occupation of the suit premises has denied and continue to deny the estate income and are agreeable to an amicable settlement whereby all the administrators will take joint possession of the suit premises and lease it out to generate income to the estate and its beneficiaries. It is the applicants' contention that the estate and the beneficiaries stand to suffer irreparable damage and loss that cannot be compensated by way of damages should this application not be granted.

6. The application is opposed by the defendant who filled a replying affidavit sworn and filed on 4th September, 2018. He depones *inter alia* that Mehmood Ali Mohamed Suleiman has no evidence of authority to swear affidavit in support of the application on behalf of Mustaq Ali Mohamed Haji Suleiman hence the claim is unfounded. He avers that the suit premises has always been in the possession of Rising Star Commodities Limited who have not been paying rent since 2014 and the applicants have not taken any action. That he has always invited the applicants to join him to take action but the applicants have not taken any action. That he has always invited the applicants to join him to take action but the applicants have not been cooperative, forcing him to solely commence the process of levying distress against the plaintiff

who in turn instituted this suit. That the plaintiff and the defendant thereafter came to a consensus to settle the matter and filed consent in which the defendant was handed possession of the suit premises. The defendant denies that the applicants were in possession of the suit premises.

7. The defendant further avers that he did not fail to disclose that he was an administrator and was pursuing the distress and defended the suit as such. The defendant averred that the plaintiff instituted the suit against him in his personal capacity but in his pleadings, the defendant disclosed that he was an administrator and acting as such. It is the defendant's contention that the applicants have never pursued the plaintiff despite the plaintiff having been occupying the suit premises without paying rent. The defendant is surprised that the applicants are now interested in the matter when the defendant has managed to procure vacant possession of the same. He denied that the applicants have suffered any prejudice.

8. The defendant further contends that the instant case having been compromised, the applicants are at liberty to file another matter in the succession cause.

9. The application is also opposed by the plaintiff who filed grounds of opposition dated 24th September 2018 to the effect that this court is functus officio having issued the order dated 31st July 2018 pursuant to the consent filed and that the court lacks jurisdiction to determine succession disputes between the defendant and the applicants.

10. The application was canvassed by way of written submissions which were duly filed by all the parties.

11. I have considered the application, the affidavits filed, the grounds of opposition and the submissions made by the parties as well as the authorities cited. The main issues for determination are whether the applicants herein should be enjoined in this suit and whether the order of the court arising from the consent filed by the plaintiff and the defendant should be set aside.

12. Under the provisions of Order 1 of the Civil Procedure Rules a party may seek joinder either as a plaintiff or defendant. Order 1 Rule 10 (2) provides as follows:

“10 (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.”

13. In their application, the applicants seek to be enjoined in this suit and have the order herein which settled the matter be reviewed and set aside. From the wording of the application, the applicants simply want to be joined as interested parties. In my view, the applicants recourse could have been to be enjoined either as plaintiffs where they can rightly agitate their rights or interest over the suit property or as defendants where they could defend the suit and probably raise a counter-claim to assert their rights. In this case, there is already a consent order by the parties on 31st July 2018 setting the matter. The order has been extracted and executed. 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 this point the court is said to be “functus officio” and any party who is aggrieved must now pursue the course of appeal or review to a higher court. In my view, the application to be enjoined has come too late. If the applicants want to agitate their rights over the suit property, it is my view that the same can be adequately addressed in **Mombasa High Court Succession Cause No.475 of 2014** where the applicants and the defendant are co-administrators. Alternatively, the applicants may as well institute a fresh suit against the defendant to agitate their rights if any. I do not think that it is necessary to enjoin the applicants at this stage.

14. The applicants also want the orders entered herein reviewed and set aside. The orders herein were issued on 31st July 2018 and arose from a consent of the parties to the suit. The law pertaining to the setting aside of consent orders has been clearly stated and well settled. In the case of **Board of Trustees National Social Security Fund –v- Michael Mwalo (2015)eKLR** the Court of Appeal stated as follows:

“A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order of a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court.”

15. In the case of **Flora Wasike –v- Desterio Wamboko (1988)1 KAR 625** Hancox JA (as he then was) :

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

16. The issue for determination in this application is whether the applicants have met the threshold for setting aside of the consent order. The record shows that the consent was entered by the parties to this suit on 31st July 2018. The suit was filed in court on 18th April 2018 seeking specific orders against the defendant. It was settled by the said consent order. I find that the applicants have not proved that there was misrepresentation, mistake or coercion. There is no suggestion of fraud or collusion.

17. As already stated, a court cannot interfere with a consent judgment or order except in such circumstances as would afford a good ground for varying or rescinding a contract between parties. No such circumstances have been shown to exist in this case. Although the applicants have stated that they have an interest in the suit premises and were not aware of this suit and therefore never participated in it, I find that the applicants' interests have been catered for as the suit premises are now in the possession of the defendant who is a co-administrator with the applicants. Moreover, the applicants have not been left without a remedy as they can institute a fresh suit against the defendant or make an

application in the succession cause if they find that the defendant has sidelined them or is in possession unlawfully. Accordingly, I decline to set aside the consent orders granted on 31st July 2018 and issued on 27th August, 2018.

18. In the result, I find that the Notice of Motion dated 23rd August 2018 has no merit and dismiss it. Considering the circumstances of this case and the relationship of the parties, I order that each party bear their own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 21ST day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Hassan for the defendant

Wamotsa for the interested parties/applicant

No appearance for plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE

21/1/19