



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 514 OF 2016

RICHARD NGAHU NDUHIU.....1ST PLAINTIFF

STEPHEN MUTETI.....2ND PLAINTIFF

PETER KILO WAKHISI.....3RD PLAINTIFF

JOSPHAT MURIITHI GATIMU.....4TH PLAINTIFF

JOSEPH KINYUA CHEGE.....5TH PLAINTIFF

DORCAS WANJIRU MUGO.....6TH PLAINTIFF

VERSUS

FRANCIS ODHIAMBO T/A UPAKO CENTER.....DEFENDANT

RULING

The Plaintiffs brought this suit against the defendant on 13th May, 2016 seeking among others, vacant possession of L.R No. Dagoretti/Riruta/6264 (hereinafter referred to as “the suit property”) and a permanent injunction restraining the defendant from dealing or interfering in whatever manner with the property.

In their plaint, the plaintiffs averred that they were the registered proprietors of the suit property as trustees of Emmanuel Miracle Church. The plaintiffs averred that they purchased the suit property from one, Patrick Kimani Mathiora at a consideration of Kshs.11,800,000/= in 2014. The plaintiffs averred that when they were purchasing the suit property, the defendant was in occupation of the same as a tenant of Patrick Kimani Mathiora and following tripartite negotiations it was agreed that the defendant’s tenancy in respect of the suit property would be terminated and the defendant given compensation in the sum of Kshs.1,000,000/- for the loss that he was going to suffer as a consequence thereof. The plaintiffs averred that despite the suit property having been transferred to them and the defendant paid the agreed compensation of Kshs.1,000,000/-, the defendant who had undertaken to deliver vacant possession of the suit property upon receipt of the said compensation failed to do so without any good reason.

Together with the plaint, the plaintiffs brought an application by way of Notice of Motion dated 13th May, 2016 seeking among others, a mandatory injunction compelling the defendant to vacate the suit property pending the hearing and determination of the suit. According to the affidavit of service sworn by Peter Andani Ondika on 18th May, 2016 and filed in court on the same date, the defendant was served with the plaint and the injunction application on 17th May, 2016. When the application came up for hearing on 23rd May, 2016 the defendant did not attend court and the application was allowed as unopposed. The court issued among others, an order for the eviction of the defendant from the suit property.

On 27th May, 2016, the plaintiffs brought another application by way of Notice of Motion of the same date seeking an order for the Police to assist the auctioneers in carrying out the eviction of the defendant from the suit property. According to the affidavit of Peter Andani Ondika sworn on 6th June, 2016 and filed in court on 7th June, 2016, this application was also served upon the defendant on 6th June, 2016. The application came up for hearing on 9th June, 2016 when the same was also allowed as unopposed when the defendant did not attend court for the hearing of the same. Following the said order for Police assistance, the defendant was forcefully evicted from the suit property on 22nd June, 2016.

What is now before the court is the defendant’s Notice of Motion application dated 22nd June, 2016 seeking the setting aside of the eviction

orders that were given on 23rd May, 2016 and leave to defend the plaintiff's application dated 13th May, 2016 pursuant to which the said orders were granted. The application was brought on the grounds that the defendant was not served with the application or any other pleading in this suit prior to the issuance of the said order. The defendant contended that he was involved in various suits with the plaintiffs at the Business Premises Rent Tribunal and the Chief Magistrates Court in Nairobi over his tenancy in the suit property and that the plaintiffs did not only conceal material facts to the court but also gave false information to get the orders sought to be set aside. The defendant contended that he only learnt of this suit when the plaintiffs and their agents came to the suit property on 22nd June, 2016 in the company of Police Officers to evict him.

The application was opposed by the plaintiffs through an affidavit sworn by the 3rd plaintiff on 30th June, 2017. The plaintiffs reiterated that they were the registered proprietors of the suit property having acquired the same at a consideration of Kshs.11,800,000/-. The plaintiffs reiterated further that when they were purchasing the suit property, the defendant had agreed to vacate the same on being paid Kshs.1,000,000/-. The plaintiffs averred that the defendant was duly paid the said amount through bankers cheques after which he signed a discharge voucher in which he undertook to give vacant possession of the suit property.

The plaintiffs averred that when the defendant failed to give vacant possession, they brought these proceedings and obtained an order for his eviction from the suit property. The plaintiffs averred that the defendant was evicted from the suit property peacefully under the supervision of Police officers. The plaintiffs admitted that there were other proceedings between the parties at the Business Premises Tribunal and at the Chief Magistrate's court but contended that the same concerned rent arrears. The plaintiffs averred that the tribunal had no jurisdiction to determine disputes over title to land. The plaintiffs contended that the defendant was a mere tenant and subsequently a trespasser on the suit property with no proprietary interest in the same. The plaintiffs averred that following the eviction of the defendant from the suit property they took possession thereof and have developed the same. The plaintiffs averred that any injury suffered by the defendant can be compensated in damages.

The application was argued on 11th April, 2018 when Mr. Ombwayo appeared for the defendant and Mr. Nyende for the plaintiffs. I have considered the application together with the supporting affidavit. I have also considered the affidavit filed by the plaintiffs in opposition to the application and the submissions that were made by the parties' respective advocates. Order 51 Rule 14 (4) of the Civil Procedure Rules gives the court power to hear an application *ex parte* where a respondent does not oppose such application or fails to appear for the hearing of the same. Order 51 Rule 15 of the Civil Procedure Rules on the other hand gives the court power to set aside an order made *ex parte*. The power given in order 51 Rule 15 is discretionary. Like any other discretionary power, the same must be exercised judicially.

The defendant has contended that he was not served with the plaintiffs' application dated 13th May, 2016. The process server swore an affidavit that was filed in court on 18th May 2016 in which he stated that he served the said application upon the defendant. In the affidavit, the process server stated the date, place and time when he effected service upon the defendant. He also stated how he identified the defendant and what the defendant was doing at the material time when he was served. At the request of the defendant, the said process server, Peter Andani Ondika was summoned by the court for cross-examination on his affidavit of service. He attended court and was duly cross-examined. In his cross-examination, the process server maintained that he served the defendant with the application and other court process. His statements in the affidavit of service and oral evidence were not shaken in any material respect by the defendant. Having considered all the evidence before the court, I am satisfied that the defendant was served with the application dated 13th May, 2016. The orders that were granted by the court on 23rd May, 2016 were therefore regular. With that finding, what I need to determine is whether there exist good grounds to warrant the setting aside of the said orders of 23rd May, 2016 so that the plaintiffs' application dated 13th May, 2016 can be heard a fresh.

It was not disputed that the suit property was registered in the name of the plaintiffs and that the defendant was not claiming any proprietary interest in the property. The interest which the defendant had in the suit property was that of a tenant. It was also common ground that following the order of 23rd May, 2016, the defendant was forcefully evicted from the suit property which was thereafter taken over by the plaintiffs. I am of the view that due to passage of time and change in the circumstances, it would not be appropriate to set aside the orders that were made herein on 23rd May, 2016 which will have the effect of reinstating the defendant in the suit property. The eviction order was given in an interlocutory application. The suit is yet to be heard. All is not lost for the defendant. The defendant still has an opportunity to prove at the trial that his eviction was not justified and in that case he would be entitled to damages for lost tenancy.

In conclusion, I find no merit in the defendant's application dated 22nd June, 2016. The application is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 17th day of January 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Nyende for the Plaintiffs

Mr. Ombwayo for the Defendant

Catherine-Court Assistant