



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 572 OF 2017

MEPUKORI PERE.....PLAINTIFF

VERSUS

SAMUEL GICHERU.....1ST DEFENDANT

ENDOLVINE INVESTMENT LTD.....2ND DEFENDANT

AND

BENJAMIN MWANGANGI.....OBJECTOR

RULING

What is before me for determination is the Objector's Chamber Summons dated the 22nd March, 2018 brought pursuant to Order 22 rule 51(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and any other enabling provisions of the law.

The Objector seeks the following orders:

1. Spent
2. Spent
3. That the Court be pleased to stay execution of the orders of the Honourable Court made on 27th February, 2018 pending the hearing and determination of this application.
4. That the orders made by the Hon. Justice on 27th February, 2018 be reviewed and set aside.
5. That costs of this application be provided for.
6. That such further and other relief granted to the objectors as this court deems fit and expedient in the circumstances.

The application is premised on the follow summarized grounds that the Court did not consider the contents of the agreement more specifically arbitration clause. There has been the head tenant on land reference number Ngong/ Ngong/ 57649 for a period of more than five years. The lease agreement was between the Head tenant and the Defendants. The objector came to know of this case when the Police and the Plaintiff went to serve him with an eviction notice. The Court failed to consider the contents of the agreement more specifically the arbitration clause in the lease agreement. The Objector has really invested on the land and the structures therein accommodates more than eighty (80) people who will suffer irreparable damage if the order is executed. The Court did not consider that there was no change of user as agreed in the lease agreement between the Plaintiff and the Defendant.

The application is supported by the affidavit of BENJAMIN MWANGANGI the Objector herein where he deposed that on or about 20th some people in the name of auctioneers came to land reference number Ngong/ Ngong/ 57649 Ongata Rongai where their businesses are and threatened to evict all the tenants therein. He avers that the premises belong to him and he has no relations with the judgement debtor. He contends that in the lease agreement the court failed to observe the arbitration clause, which ought to have been dealt with first. He reiterates that they stand to suffer irreparable damage if the eviction order is effected for the reasons that there are around eighty tenants in the aforesaid property. He states that the Plaintiff has no personal relationship with the objector. He insists the Plaintiff's Auctioneers have thus wrongfully issued eviction notice to the Objector in satisfaction of the eviction order.

The application is opposed by the Plaintiff whose advocate LUCAS LEPERES NAIKUNI filed a replying affidavit where he deposed that the Notice of Objection dated the 22nd March, 2018 is malicious, frivolous, vexatious and an abuse of the due process of the law for reasons that Order XX1 Rule 53 of the Civil Procedure Rules is non-existent as the same was repealed; and the Objection has been brought as an afterthought and in bad faith intended to further delay the hearing of the main suit. He insists there is no privity of contract between the Applicant and the Plaintiff herein and if at all there was a Sublease between the Applicant and the Defendant herein, it terminated when the original lease agreement between the Plaintiff and the Defendant expired on 1st June, 2015. He confirms that the Plaintiff together with the Police served the occupants of the suit premises with an eviction notice as they are not in compliance with the Court Order dated the 5th October, 2017. He insists there was inordinate delay in filing the present Application which is seeking a stay of execution, review or setting aside of the Ruling and Order which was made out on 5th October, 2017.

The Plaintiff filed submissions but the Objector failed to do so despite the Court directive of 24th October, 2018.

Analysis and Determination

Upon perusal of the materials filed in respect of the Chamber Summons dated the 22nd March, 2018, the only issue for determination is whether there should be a review, setting aside and or stay of execution of the orders made on 5th October, 2017 and 27th February, 2018 respectively.

Order 22 rule 51 of the Civil Procedure Rules provides that: '(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property. (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached. (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.'

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: 'Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.'

I note the Orders granted on 5th October, 2017 was for a mandatory injunction allowing the Plaintiff to obtain vacant possession of the suit premises from the Defendants since the Lease had expired in June 2015. As for the Order dated the 27th February, 2018, the Police were allowed to oversee the implementation of the Order of the Court dated the 5th October, 2017. The main issue within the Objector's application is one that seeks to review this Court's order on the ground that he is a tenant in the suit premises. I note from the Objector's application he admits that he has no relationship with the Plaintiff. He does not explain how he came to be on the suit premises which is owned by the Plaintiff, since he has no relationship with him. He refers to the arbitration clause in the lease agreement and insists the Court failed to appreciate this before making a ruling on 5th October, 2017. I note that the Lease Agreement between the Plaintiff and the Defendants had expired in June, 2015 and by the time the Court was delivering its ruling in 2017, there was no lease and hence the arbitration clause could not apply.

The Objector seeks a review of a ruling, which was delivered on 5th October 2017 allowing the Plaintiff to proceed to remove the Defendants from the suit premises. The Applicant has not explained why he delayed in lodging objection proceedings. For a Court to grant an order for review there has to be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by the Applicant at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record. From the materials presented, I am unable to identify any new materials presented to the Court to warrant a review of the order of the Court dated 5th October, 2017. It is my considered view that there was inordinate delay by the Applicant to lodge the instant application seeking to review and set aside the orders dated 5th October, 2017 and 27th February, 2018 which delay, has not been explained. It is against the foregoing that I find since the Objector did not have a relationship with the Plaintiff and neither a lease, I am unable to review the orders made on 5th October, 2017 and 27th February, 2018 respectively.

In the circumstances, I find the application unmerited and proceed to dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 11th March, 2019

CHRISTINE OCHIENG

JUDGE