



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 142 OF 2018**

**PRIME BANK LIMITED.....PLAINTIFF**

**VERSUS**

**D. J LOWE & COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**GUARDFORCE SECURITY (K) LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The determination is in respect to the notice of motion dated 25<sup>th</sup> October 2018 brought by the 1<sup>st</sup> defendant/Applicant. The application seeks the following orders:

**1) Spent**

**2) Spent**

**3) That pending the hearing and determination of this application the defendants be reinstated in the property known as Sub Division Number 1280 Section 1, Mainland North situated at Nyali in Mombasa and the plaintiff together with its agents, particularly one Winstar Security Guards Limited be restrained from interfering with the defendants quiet and peaceful occupation therein.**

**4) That pending the hearing and determination of the application dated 24<sup>th</sup> August, 2018 the plaintiff together with its agents, particularly one Winstar Security Guards Limited be restrained from interfering with the defendants quiet and peaceful occupation of the property known as Sub Division Number 1280 Section 1, Mainland North situated at Nyali in Mombasa.**

**5) That the warrants of eviction dated 22<sup>nd</sup> October, 2018 be recalled for purposes of being cancelled and/or be declared null and void.**

**6) That costs of this application be provided for.**

2. The application is opposed by the affidavit dated 12<sup>th</sup> November 2018 sworn by Hasu Silveira. Mr Silveira deposed inter alia that:

**(i) That the application and the affidavit in support of the application dated 25<sup>th</sup> October, 2018 sworn by RUSKANA KHALIL ABDULKARIM on behalf of the 1<sup>st</sup> defendant do not**

disclose reasonable or plausible reasons to set aside the proceedings and order issued on 23<sup>rd</sup> July, 2018 or to recall the Warrants of Eviction which have been fully executed. To do so would amount to an injustice to the plaintiff who is the legal owner of the suit property and is entitled to enjoy its constitutional right to its private property which the defendants have no right whatsoever to occupy.

(ii) That the defendants have failed to explain their indolence and failure to take the steps to protect their alleged rights given that they started receiving notices to vacate the suit property in February 2018. The present application appears to be a belated attempt to unreasonably fetter the plaintiff's right to its property, which we urge this honourable Court not to allow.

(iii) That it is on record that the plaintiff purchased the suit property in a Public Auction sometimes in March 2011 and in spite of the fact that it did not take possession of the same due to various matters pending in various Courts and in the Registry of Titles at the behest of the 1<sup>st</sup> defendant, its title to the same has not been challenged. The defendants' allegations herein that the said title is suspect is an attempt to canvass matters which have been determined by this honourable Court in a lawful judgement delivered on 25<sup>th</sup> April, 2017 in Mombasa ELC Misc. Civil Application No. 29 of 2016, which has not been set aside on appeal.

3. The Plaintiff/Respondent filed a supplementary affidavit dated 26<sup>th</sup> November 2018 in which it is deposed further that the 1<sup>st</sup> defendant has no plausible defence because;

(a) Mombasa HCCC No. 235 of 2010 – D. J. Lowe & Company Limited vs Credit Agricole Indosuez, Bank of Africa Kenya Limited, The Registrar of Titles, Mombasa & Prime Bank Limited. The suit was struck out with costs on 29<sup>th</sup> November, 2011.

(b) Court of Appeal (Civil application No. 45 of 2014 – Prime Bank Limited vs D. J. Lowe & Company Limited) seeking to have the 1<sup>st</sup> defendant's Notice of Appeal dated 1<sup>st</sup> December, 2011 struck out against the Order of striking out made in the above suit, HCCC No. 235 of 2010. The said application was allowed on 29<sup>th</sup> May 2015 and the Notice of Appeal was struck out.

(c) Mombasa HCCC No. 35 of 1997 – D. J. Lowe & Company Limited vs Banque Indosuez. The suit was dismissed with costs on 19<sup>th</sup> March, 2018, because of the failure of the 1<sup>st</sup> defendant to comply with a Court Order for it to deposit security for costs.

(d) The issue of registration of the plaintiff as owner of the suit property is *res judicata* and cannot be the subject of this suit, the same having been the subject of this honourable Court's judgment delivered on 25<sup>th</sup> April, 2017 in Mombasa ELC Judicial Review Application No. 63 of 2016.

4. On 28<sup>th</sup> February 2019, the Court delivered a ruling in respect to the motion dated 24<sup>th</sup> August 2018. The gist of that ruling is that it set aside the *ex parte* judgement that had been entered against the defendant and gave the defendants leave to defend the suit. The 1<sup>st</sup> defendant is asking for reinstatement to the premises pursuant to the orders being sought in the present application.

5. The 1<sup>st</sup> defendant is described as a limited company. In the affidavits in support of the motion, Ms Ruksana Khalil questioned the mode of how the eviction exercise was carried out. Further in an affidavit referred to as "*replying affidavit*", Ms Farrah Bhaljee deposed that she is a niece to Ms Ruksana Khalil who is a director of the 1<sup>st</sup> defendant. Ms Farrah deposed that she is the one who has been in occupation of the suit premises with authority of Ms Ruksana for the past 26 years.

6. I have considered the issues raised by both sides. To begin with, I wish to restate the plaintiff's

position that at the time the eviction exercise was undertaken, the Court order used was valid. This is supported by documents annexed by the plaintiff to show that the eviction process was carried out by a Court bailiff.

7. The plaintiff has also demonstrated the existence of previous suits between her and the defendant where certain orders were made. Without prejudicing the defence to be raised by the 1<sup>st</sup> defendant, the Court takes note that one of the orders issued in the earlier suits as deposed in paragraph 8 of the supplementary affidavit was for deposit for security. The plaintiff stated that the applicant's suit ELC Judicial Review No 63 of 2015 was struck out for non – payment of the security as ordered.

8. Consequently taking all the issues raised by the parties; noting that the eviction exercise was undertaken pursuant to a Court order and that the plaintiff is the party currently holding titles as the registered owner, I am hesitant to order for re – instatement of the defendants or their representatives to the premises. The 1<sup>st</sup> defendant did not annex a draft defence to her application that sought setting aside of the exparte judgement. At the time of writing this ruling, no statement of defence had been filed thus making it harder for the Court to grant the order of restatement.

9. Accordingly I decline to grant any of the orders sought in the application dated 25.10.18 at this stage. The 1<sup>st</sup> defendant is at liberty to reapply once there is a defence on record. The application is thus dismissed with an order for parties to bear their costs of this motion.

**Dated, signed & delivered at Mombasa this 5<sup>th</sup> April 2019**

**A. OMOLLO**

**JUDGE**