REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.108 OF 2012

DANIEL BERNHARD REINHARD

ELIZABETH BERNHARD REINHARD...PLAINTIFFS

(Suing through their Attorney JOYCE REINHARD)

VERSUS

1. DAMARIS NTHENYA

2. GIOVANNI OZZI...DEFENDANTS

RULING

1. On 19th July 2018, Judgment was entered herein for the Plaintiffs as against the two Defendants. Besides awarding the Plaintiffs mesne profits of Kshs 20,000,000/- an order was also issued against the Defendants requiring them to vacate the suit premises within 30 days in default of which eviction orders were to be enforced against them by the Court Bailiff without any further application to the Court.

2. It is however apparent that the Plaintiffs attempts to execute the said Judgment ran into some headwinds and as a result, four applications have been filed by various parties before me seeking a variety of orders.

3. In the first application filed by the 1st Defendant-Damaris Nthenya and dated 5th September 2018, she prays for an order of stay of execution of the decree emanating from the Judgment pending an intended appeal to the Court of Appeal.

4. The Second application dated 12th September 2018 has been filed by one Alfred Andreas Keller seeking to be enjoined as a Defendant in this suit on the basis that he is the lawful owner of one of the suit properties. He also prays for a stay of execution of the Judgment.

5. The third application dated 18th September 2018 is filed by the Plaintiff-Joyce Reinhard (aka Joyce Jepleting) in person seeking an order that the Inspector General (of the Police), County Commander, Kilifi County, the Officer Commanding Police Division Malindi and the Officer Commanding Station, Watamu Police Station be directed to enforce the Court orders dated 20th August 2018 on the ground that the Court Bailiff has failed to do so.

6. The fourth and last application filed for my determination is dated 11th October 2018. In the said application, the 2nd Defendant-Giovanni Ozzi prays that there be a stay of the Judgment and that this Court be pleased to review the same and set it aside to enable him file his defence and to defend the suit.

7. I have considered the four applications and the various responses thereto by the other parties. I have equally considered the written submissions by the Learned Advocates for the respective parties as well as the authorities to which they referred me.

8. I will first consider the application dated 12th September 2018 by the Intended Defendant-Alfred Andreas Keller. In his Supporting Affidavit sworn on the same day, the Intended Defendant avers that he came to learn of the Judgment of this Court on 10th September 2018 when he was served with a warrant by the Court Bailiff to give vacant possession of what he calls his property.

9. It is his case that he is the lawful owner of one of the suit properties having acquired proprietary interest through a Sale Agreement dated 18th January 1999 between himself and one Stoop Herman. He has annexed three Sale Agreements between various parties in support of his case.

10. Order 1 Rule 10(2) of the Civil Procedure Rules provides that:-

> ***"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 as 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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."***

11. This suit was filed in the year 2012 and Judgment was delivered as aforesaid on 19th July 2018. The Intended Defendant relies on copies of agreement signed with third parties to lay a claim to the suit premises. In the Sale Agreement dated 18th January 1999 between himself and one Stoop Herman, the property sold is described at paragraph 2 thereof as follows:-

> ***"WHEREAS the vendor is possessed of land or otherwise entitled to ALL THAT house at Watamu situate next to the house of one DANIEL HEFTI and more particularly described as a holiday house in an agreement dated 13th March 1986 between the said DANIEL HEFTI's of the one part and HUNTINGER ERNST PETER of the other part…."***

12. It was not clear to me from a perusal of the said and 2 other Agreements attached by the Intended Defendant in which parcel of land the property sold to him falls. All that is clear is that the property was situated next to Daniel Hefti's house. From the record herein Daniel Bernhand Hefti was originally the registered owner of Plot Nos. 588, 589 and 654 Watamu. He died in 1999 and the Plaintiff herein acquired the same by way of transmission following a Confirmation of a Grant for his estate issued on 18th June 2009.

13. The Intended Party did not enclose a copy of the Agreement said to have been executed by Hefti on 13th March 1986 and it was difficult for this Court to discern what that agreement was about.

14. As it were, following Hefti's death in 1999, there has been serious contestation as regards who is entitled to his estate and in particular the suit properties herein. This suit was itself in Court besides others since the year 2012. I am not persuaded that the Intended Defendant was not aware of the same during all that period. Even if it were to be found that he had interest in any of the suit properties, he was clearly guilty of laches having come to Court to file his application very late in the day.

15. As was stated by ***Nyamweya J in Lillian Wairimu Ngatho & Another –vs- Koki Savings Co-operative Society Ltd & Another(2014)eKLR***:-

> *"The provisions of Order 1 Rule 10(2) state that joinder can be made "at any stage of the proceedings". "Proceedings" are defined in Black's Law Dictionary Ninth Edition at Page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of Judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the Court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the Court has already made the findings on the issues arising….*

16. In the circumstances I did not find any merit in the Intended Defendant's application and the same is dismissed with costs.

17. The next application that I now turn to consider is the 2nd Defendant's application dated 11th October 2018. By that application he urges the Court to review the Judgment herein and/or to set it aside to enable him file his defence and to defend the suit. In the alternative, he prays for leave to file his defence and tender evidence.

18. The 2nd Defendant's application is premised on his contention that he was not aware of the presence of this suit and was never served with summons to enter appearance. In his Supporting Affidavit sworn on 11th October 2018, Giovanni Oss avers that he was sued in HCCC No. 12 of 2012 and not in this matter. It is his case that together with the 1st Defendant, they engaged lawyer Maurice Kilonzo of Kilonzo & Aziz Advocates to represent them in the suit after he was assured that they had a good defence.

19. The 2nd Defendant asserts that he had a subsisting tenancy with the 1st Defendant and that he was later assured by their Advocate that the suit against them had been dismissed and he did not therefore take part in any subsequent proceedings.

20. Order 45 Rule 1(1) of the Civil Procedure Rules provides that:-

> ***"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 on 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."***

21. As it were the 2nd Defendant does not claim ownership of the suit properties. His claim is based on a tenancy agreement executed between himself and the 1st Defendant on the purport that the 1st Defendant was the owner of the suit premises. Their interests with the 1st Defendant were intertwined and that must be the basis upon which they settled on a common advocate with the 1st Defendant.

22. That advocate who still represents the 1st Defendant in these proceedings entered appearance and filed a joint Statement of Defence and Counterclaim in which they sought to have the Plaintiffs' case dismissed. He was fully represented in these proceedings until the end by Counsel that he admits to have instructed at the initial stage. He now claims that his calls to the said Advocate after the Judgment herein was rendered and he became aware of the same through a third party, went unanswered.

23. This Court refuses to be drawn into an inquiry as to whether he instructed Counsel who remained on record throughout the pendency of the suit prior to the Judgment. At any rate the argument that he stands to suffer prejudice and irreparable loss for the renovations allegedly done to the premises cannot stand. His claim if any is against the 1st Defendant and no useful purpose would be served in granting the orders he is seeking herein.

24. As it were, he continues to occupy, run a business on, and gain profits from the suit property at the expense of the rightful owner thereof. At any rate, this matter has been actively in Court since 2012 and he can only blame himself if all that time, he was unaware that the ownership of the premises rented to him were in dispute and pending in litigation.

25. As was stated by Turner J centuries back in ***Bellemy –vs- Sabine (1857)I Dej 5661 584:-***

> "*Where a litigation is pending between the Plaintiff and the Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding not only on the litigating parties but also on those who derive title under them by alienating pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the proceedings would ever end….."*

26. Those principles were echoed by our own Court of Appeal in ***Mawji –vs- US International University & Another(1976) KLR 185,*** where the Court stated that:-

> ***"Every man is presumed to be attentive to what passes in the Courts of justice of the State of Sovereignty where he resides. Therefore purchase made of a property actually in litigation pendent lite for valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the Judgment or decree in the suit."***

27. Thus while the 2nd Defendant may not have purchased the suit property, the agreements and expenses he purports to have incurred arose during the existence of this suit. He will be bound by the decision of this Court in the same manner as his co-defendant, the 1st Defendant herein.

28. Suffice it to say that I did not find any merit in the said application and the same is dismissed.

29. Finally, I will deal with both the 1st Defendant's application dated 5th September 2018 and the Plaintiff's application dated 18th September 2018. In her application, the 1st Defendant prays for an order of stay of execution of the decree emanating from the Judgment pending an intended appeal to the Court of Appeal. The Plaintiff on the other hand prays for orders directing the Police to execute Orders of eviction against the Defendants.

30. The 1st Defendant's application was certainly brought as a stop-gap measure in apprehension of an imminent execution. At paragraphs 5 to 9 of the Supporting Affidavit of Damaris Nthenya, she states as follows:-

> ***"5. That the Court in its Judgment made a declaration that I have no right or interest in the suit premises and an eviction order issued against me seeking to evict me from the suit premises being Portion Numbers 588, 599 and 654 Watamu within the next 30 days from the date of the Judgment which days have already lapsed. I am apprehensive that the Plaintiffs are likely to execute the decree from the said Judgment at any time considering that my advocates on record have already been served with a certified copy of the decree which I annex and mark as "DN-4".***
>
> ***6. That my advocates on record have prepared an application dated 27th August 2018 for stay of execution of the decree emanating from the Judgment dated 19th July 2018 at the Court of Appeal. I annex a Copy of the substantive application dated 27th August 2018 and mark it as "DN-5".***
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> ***7. That my advocates on record informs me that they wrote a letter dated 28th August 2018 to the Deputy Registrar of the Court of Appeal in Malindi requesting that my substantive application be heard in Nairobi due to the current period of vacation of the Court of Appeal Judges. I annex a Copy of the letter dated 28th August 2018 and mark it as "DN-6".***
>
> ***8. That my advocates on record advise me which advise I verily believe to be true that there is no single Court of Appeal Judge in Nairobi during the current vacation to determine my application which I filed at the Court of Appeal.***
>
> ***9. That this has necessitated me to instruct my advocates to file an application for stay of execution of the decree in the Environment & Land Court at Malindi."***

31. More than eleven months have elapsed since that application was filed in the Court of Appeal. As it is, it is not clear to me whether the Appellate Court has since dealt with the application one way or the other. Whatever the case, this Court would be loathe to proceed to consider a matter which is substantively pending before a superior Court for hearing and determination.

32. As it were I did not think it was proper for the 1st Defendant to file this application seeking similar orders to those in what she describes as a substantive application pending before the Court of Appeal. In my mind the 1st Defendant ought to have made an election as to which Court she wants his application heard and determined. To file parallel applications in two Courts as she has done herein is tantamount to abusing the process of the Courts.

33. At any rate an application for stay under Order 42 Rule 6(2) of the Civil Procedure Rules can only be allowed if the Court is satisfied that:-

> ***(a) That the application has been made without unreasonable delay; and***
>
> ***(b) Substantial loss may result to the Applicant unless the order is granted;***
>
> ***(c) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.***

34. The impugned Judgment was delivered on 19th July 2018 in the presence of Counsel for the 1st Defendant. While the said Judgment gave the Defendants 30 days to comply with the terms thereof or stand evicted, no formal application of stay was made until some 45 days later. Indeed from the record, even the application before the Court of Appeal was made outside the 30 days period that was granted. That delay has not been explained in the application before me.

35. Again while an allegation of substantial loss is made in the application, I was not persuaded that the Plaintiff is a person of straw who may not make good the loss where the Intended Appeal were to succeed.

36. From the Plaintiff's application dated 18th September 2018 and various affidavits filed in response to the three applications filed by the Defendants herein, it is evident that the Defendants continue to occupy the suit premises and have frustrated her efforts to execute the decree herein. While the 1st Defendant and the Honourable Attorney General opposed the application on the basis that there was no proof of the Plaintiff's claims, I take note that in her application dated 5th September 2018, the 1st Defendant avers that she resides on the suit property and will not come out thereof as she has no other home. She further admits that she has rented the same for business to the 2nd Defendant.

37. Indeed the 2nd Defendant confirms that position in his application dated 11th October 2018 wherein he states that he is on the suit property and running a business pursuant to a tenancy agreement with the 1st Defendant. It is now a year since the impugned Judgment and I am persuaded that in the absence of a stay order from the Court of Appeal where a similar application for stay was filed, the Plaintiff deserves to be assisted by the National Police Service to evict the Defendants and/or their agents from the suit premises. I did not therefore agree with the Attorney General that this is a matter in which police presence is not required.

38.. Accordingly and for the avoidance of doubt, I make the following orders:-

> ***(i) The application by one Alfred Andreas Keller seeking to be enjoined as a Defendant in these proceedings and dated 12th September 2018 is dismissed.***
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> ***(ii) The 2nd Defendant's application dated 11th October 2018 is dismissed.***
>
> ***(iii) The 1st Defendant's application dated 5th September 2018 is dismissed.***
>
> ***(iv) In the absence of any stay order from the Court of Appeal, the Plaintiff's application dated 18th September 2018 is allowed in regard to the OCS Watamu who is hereby directed to enforce the orders of 20th August 2018 forthwith.***
>
> ***(v) The Plaintiff shall have the costs of all the four applications.***

39. Orders accordingly.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

<u>JUDGE</u>