



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 132 OF 2017

ISSA KAZUNGU MWENI.....PLAINTIFF

VERSUS

1. KARISA KAINGU

2. CHARO KANGWANGU

3. SAMMY NYAMAWI

4. MWANGALA MBANGO.....DEFENDANTS

RULING

1. Before me for determination is a Notice of Motion application dated 19th July 2018. By the said application Mwangala Mbango (the 4th Defendant) prays for orders: -

1.

2. *There be a stay of execution pending the hearing and determination of the application; and*

3. *That the consent Judgment and all consequential orders in the suit herein be set aside and the 4th Defendant be granted unconditional leave to file his defence.*

2. The said application which is supported by the 4th Defendant's affidavit is premised on the grounds: -

i) That the 4th Defendant was not served with summons to Enter Appearance or any other documents relating to this case;

ii) That the 4th Defendant only received an order of eviction on 6th July 2018 when his wife received the same from a motorcyclist;

iii) That the 4th Defendant never instructed the firm of Katsoleh to represent him in these proceedings and the consent Judgment dated 23rd November 2017 was entered into without his knowledge and/or authority.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 14th September 2018, Issa Kazungu Mweni (the Plaintiff) denies that the 4th Defendant was not served with the Court papers as stated in the application. He asserts that the consent order is genuine and was duly signed by the 4th Defendant's Advocate. It is further the Plaintiff's case that the eviction orders have already been effected and there is therefore nothing to be stayed by this Court.

4. I have perused and considered the application as well as the response thereto. I have equally considered the submissions by Mr. Lughanje, Learned Counsel for the 4th Defendant/Applicant and those made by Mr. Katuga, Learned Counsel for the Plaintiff/Respondent.

5. This suit was instituted by the Plaintiff on 19th June 2017 vide a Plaint wherein he sought an order of a permanent injunction to issue against the four Defendants restraining them from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging or in any way interfering with all that parcel of land known as Kilifi/Ngerenyi/632 (the suit property).

6. Filed together with the Plaintiff was an application dated the same day seeking interim orders of injunction. When the application was placed before Hon. Yano J in Mombasa on 27th June 2017, the Learned Judge certified the matter as urgent and directed that it be fixed for hearing on a priority basis. An order of injunction was later granted on 18th September 2017 in the absence of the Defendants.

7. Subsequently on 6th February 2018 the Advocates for the parties appeared in Court and urged the Court to record and adopt a consent which had been filed earlier on 23rd November 2017. Accordingly, by the said consent the matter was marked as settled in the following terms: -

a) That the Defendants to hand over vacant possession of the property being title No. Kilifi/Ngerenyi/632 within thirty (30) days from the date of this consent and

b) In default, execution to issue.

8. It is apparent that there was default and by another application dated 14th March 2018, the Plaintiff sought an order of eviction against the Defendants to be enforced by the OCS Kilifi Police Station. When that application came up on 10th April 2018 for hearing, the Defendants were again absent and the said application was allowed as prayed. The enforcement of those eviction orders prompted the filing of the application presently before me.

9. I have carefully considered the application. It is the 4th Defendant's case that he was never served with any documents in relation hereto prior to the execution and that he had never instructed Mr. Obaga Advocate and/or the firm of Katsoleh & Company Advocates to act for him in this matter.

10. The Defendants are said to have been served with the initial application dated 19th June 2017 by one Alois Kitsango Mwandeka, an authorized process-server of this Court. In reliance to his Affidavit of Service filed herein on 5th July 2017, that application was allowed. I have however taken a fresh look at the said Affidavit. At paragraph 3, thereof, the Process Server states as follows: -

“3. That on the same day (22nd June 2017) I proceeded to the 1st, 2nd, 3rd and 4th Respondents' place of residence in different houses situate at Ngerenyi Area in Plot No. Kilifi/Ngerenyi/632, along Kilifi-Malindi Road where I was received at the compound by the 1st, 2nd and 3rd Respondents and I introduced myself in the different houses and explained my purpose of visit to them. At about 11.30 a.m. and served (sic) the documents mentioned at paragraph 2 above by tendering copies thereof to them and required them to sign at the reverse of my principal copy. They accepted service by receiving and signing my principal copy and attach as a proof of service. I return herewith duly served upon the 1st, 2nd, 3rd and 4th Respondents.”

11. I take note while the Affidavit indicates that the Process Server was only received by the 1st, 2nd and 3rd Defendants, it is also purported that the 4th Defendant was served. From the Supporting Affidavit to his application before me, the 4th Defendant explains that on the said date, he was in the course of his duties as a Police Officer far away in Kisumu and the Process Server could not have found him at the house in Ngerenyi. That in my view explains the reason the Process Server states that he was only received by the 1st, 2nd and 3rd Defendant. Clearly he could not have served the 4th Defendant who was away.

12. I also take note that from the record herein while this matter was filed through Messrs Katuga & Company Advocates, it is Mr. Obaga Advocate who held their brief on 12th July 2017 and 18th September 2017 when the application dated 19th June 2019 was allowed. Mr. Obaga was still holding brief for Mr. Katuga for the Plaintiffs on 6th November 2017 when the matter came up for pre-trial before the Deputy Registrar of this Court the Honourable J.N Wandia. On that date, the matter failed to proceed as there was no proof of service upon the Defendants.

13. Subsequently by a Notice of Appointment of Advocates filed herein on 23rd November 2017, Messrs Katsoleh & Company Advocates came on record for the 1st, 2nd, 3rd and 4th Defendants. A month later on 18th December 2017, Mr. Obaga Advocate appeared before me now acting for the Defendants and seeking to record a consent. The consent could not be recorded on that day due to the absence of Mr. Katuga Advocates for the Plaintiff.

14. Eventually on 6th February 2018, Ms Mwanja Advocate held brief for Mr. Katuga and with Mr. Obaga Advocate purportedly acting for all the Defendants, the impugned consent was recorded and adopted as an order of this Court.

15. The 4th Defendant vehemently denies having instructed Mr. Obaga Advocate to represent him in these proceedings and from a perusal of the record this Court is persuaded that the conduct of Mr. Obaga Advocate representing both sides in these proceedings was questionable and could lead to an inference that the said Counsel was not instructed by the 4th Defendant to compromise the suit as per the consent.

16. From the material placed before me, it was however not clear if these present proceedings were brought to the knowledge of the said Advocate and I would say no more in regard thereto.

17. The upshot is that I find merit in the 4th Defendant's application dated 19th July 2018. The same is allowed in terms of Prayer No. 3 thereof.

18. The costs of the application shall be in the cause.

Dated, signed and delivered at Malindi this 20th day of September, 2019.

J.O. OLOLA

JUDGE