



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO.61 OF 2018

SAMUEL MBUGUA MWANGI.....PLAINTIFF

=VERSUS=

BUFFET PARK LIMITED.....DEFENDANT

JERRI INTERNATIONAL LIMITED.....INTERESTED PARTY

RULING

1. This is the Notice of Motion dated 20th December 2018 brought under Section 3, 13(7), 18 and 19 of the Environment and Land Court Act (No. 19 of 2011) Order 1, Rule 10(2), Order 40 and 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. It seeks orders

(1) Spent.

(2) Spent.

(3) Spent

(4) That this honourable court be pleased to grant leave to the Intended Interested party to be joined to the current proceedings as an Interested Party.

(5) That the decree issued by the court on the 8th of October 2018 corollary to a consent order between the parties be set aside and/or discharged in its entirety for material non-disclosure.

(6) That the suit herein be re-opened for hearing and determination on merits.

(7) That a mandatory injunction do issue directed to the plaintiff to reinstate, restore, re-open and/or grant the Intended Interested Party vacant possession of the suit premises.

(8) That the plaintiff Samuel Mbugua Mwangi and the directors of the defendant herein Buffet Park Limited be ordered/directed to personally appear in court for purposes of cross examination.

(9) That this honourable court do visit the suit premises No. 37/366/1 situate at Nairobi West, Nairobi County and conduct "locus in quo".

(10) That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (l).

4. The application is supported by the affidavit of Peter Kimani sworn on the 10th December 2018 and a supplementary affidavit sworn on the 17th December 2018..

5. The application is opposed. There is a replying affidavit sworn by Frankline Gitonga Gathua, a director of the defendant/respondent

sworn on the 31st January 2019. There is also replying affidavit sworn by Samuel Mbugua Mwangi, the plaintiff/respondent herein sworn on the 17th July 2019.

6. On the 13th May 2019, the court directed that the application be canvassed by way of written submissions.

The Intended Interested Party's/Applicant's submissions

7. The applicant was evicted from its business premises by goons who were armed with crude weapons despite the fact that there was no court order directing its eviction. The applicant is a tenant in the premises built on LR No. 37/366/1. It filed a reference at the Business Premises Rent Tribunal being case No. 635B of 2017 and an order was issued against the defendant herein.

8. There is no evidence that the suit premises have been sold to the plaintiff or any other party. There was no valid eviction order issued. Section 152G of the Land Act provides for mandatory procedure during evictions. The directorship of the defendant have not changed. It has relied on the case of **China Young Engineering Co vs L. G. Mwacharo & Another Nairobi HC Civil Suit No. 81 of 2011**.

9. The applicant is a necessary party in the current proceedings and its application for joinder ought to be allowed. It has been in occupation of the premises built on the suit premises and ought to be protected. The issues raised by the applicant can only be determined by re-opening the suit and hearing all the parties before a determination is made. It has relied on the case of **Francis Kariuki Muruatetu & Another vs Republic & Others Petition NO. 15 of 2015 as consolidated with No. 16 of 2015**. The applicant prays that the application be allowed with costs.

The Plaintiff's/Respondent's submissions

10. There is no proof of contract between the plaintiff and the applicant herein. He has relied on the case of **Kenya Women Finance Trust vs Bernard Oyugi Jaoko & Others Migori HCCC Appeal No 111 of 2017** where the court relied on the case of **Savings & Loans (K) Ltd vs Kanyenje Karangaita Gakombe & Another (2015) eKLR**.

11. The applicant ought to file a suit against the defendant and seek damages as there is no cause of action between the plaintiff and the applicant in this case. Courts were reluctant to interfere with consents lawfully entered. He has also put forward the case of **Rising Star Commodities Ltd vs Hohmed Igbal Mohhamed MSA ELC No. 92 of 2018** where the court relied on the holding in **Flora Wasike [1988] 1KAR 256**. The consent herein was lawfully entered and the applicant was not a party. He prays that the application be dismissed with costs.

12. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the affidavit in reply, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether this application is merited.

(ii) Who should bear costs?

13. I have gone through the said notice of motion. The applicant seeks leave to be enjoined in these proceedings **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 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

There are no pending proceedings before this court. A consent judgment was entered on 18th September 2018, hence this court is *functus officio*.

14. In the case of **Enock Muhonji vs Hamid Abdalla HC Civil Case No. 58 of 2012**, it was held that:-

“Inviting the court to decide a matter it has already substantially adjudicated upon is a waste of the court's time as the matter is res judicata. The court is functus officio”.

15. The applicant herein seeks that the consent judgment of 18th September 2018 be set aside and/or discharged. In the case of **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd, Githinji J** (as he then was) while relying on the holding in the case of **Hirani vs Kassam [1952] 19EACA 131** held thus:-

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled, which are not carried out.....”.

The applicant seeks to set aside the consent judgment yet it was not a party to these proceedings.

16. In the case of **Kenya Women Finance Trust vs Bernard Oyugi Jaoko & Others [2018] eKLR** the court then relied on the holding in **Savings & Loan (K) Ltd vs Kanyenje Karangaita Gakombe & Another (2015) eKLR** where the court observed;-

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.....”.

The applicant has stated it was a tenant of the defendant in the suit premises. Such a relationship only exists between it and the defendant. If the applicant has any claim it should be against the defendant. This can be done by filing a different suit altogether.

17. In conclusion, I find no merit in this application and the same is dismissed. I order each party to bear own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 16th day of October 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant