



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 174 OF 2012(OS)

JULIUS NDUNDI THE THE.....PLAINTIFF

VERSUS

NAJMUDIN NOORALI MOHAMMEDALI (As legal representative of

the estate of Mohamed Essajee Bhaijee and the Estate of Noorali M.E. Bhaijee)

THE ESTATE OF MANIKLAL PALATHBHAI DALAL....DEFENDANTS

RULING

1. By a Notice of Motion Application dated 21st July 2016, the Defendant prays for Orders:-

2. That there be a stay of further proceedings and delivery of Judgment herein pending the hearing and determination of the application;

3. That the Honourable court be pleased to set aside the entire proceedings herein, and the matter do commence de novo;

4. That the costs of this application be provided for.

2. The said application is premised on the grounds that:-

i. The Defendant is the registered owner of all that Plot No. 78 Mambrui CR 5485 measuring 72 acres or thereabouts by virtue of being the holder of the letters of administration intestate in the two causes which were filed in Mombasa High Court being Succession Cause No. 112 of 2013 and Succession Cause No. 113 of 2013 which were confirmed to him by the Court on 7/4/2014.

ii. That vide Originating Summons filed on 15/11/2013, the Plaintiff sued the Defendant seeking inter alia, entitlement to registration as the owner of the said parcel of land by adverse possession;

iii. That no personal service was effected upon the defendant hence no appearance was entered yet the Plaintiff purportedly continued to effect service or process and other pleadings on the firm of M/S Nyabena & Company Advocates and thereafter on the firm Apollo Muinde & Ngonze Advocates while knowing that none of these two firms was validly on record in this matter for the period ending 27/06/2016;

iv. That directions herein under Order 37 Rule 16 of the Civil Procedure Rules, 2010 were taken on 25/2/2014 by which directions the Honourable Court directed that the two matters related hereto, to wit; this suit and Land Case No. 174 of 2012(O.S) proceed by way of Affidavit evidence for one day in Malindi and no orders were applied for as no directions allowing for the adducing of evidence viva voce have ever been given;

v. That the matter herein erroneously proceeded as though consolidated with Malindi ELC Case No. 174/2012(O.S), and the Court reserved its Judgment for delivery on notice.

vi. That there is therefore real and imminent danger of the Judgment herein being delivered at any moment now, which situation would not only constitute a nullity, but would also greatly embarrass the Honourable Court whilst grossly prejudicing

the defendant.

vii. *The defendant herein has a good defence in that this second suit is filed in outright abuse of the process of the Court and as such offends the express provisions of Section 6 of the Civil Procedure Act, 2010 and hence the same ought to be stayed to abide the outcome of Land Case No. 174 of 2012(O.S).*

viii. *That in the interest of justice, fairness, equity, constitutionalism, the rule of law and the rules of natural justice that this application be allowed.*

3. On 22nd July 2016 when the file was placed under Certificate of Urgency before the Honourable Justice Angote, the Learned Judge confirmed the matter was urgent and granted an order of stay of further proceedings and/or delivery of Judgment pending the hearing and determination of the application. The Learned Judge further ordered that the application be fixed for hearing inter-partes on a priority basis thereafter.

4. As it were, the application was neither served nor fixed for hearing thereafter for more than one year. On or about 19th December 2017, the Plaintiff filed Notice of Grounds of Opposition together with a Replying Affidavit, pursuant to the Orders of the Court made on 13th December 2017 in which he refuted a number of issues raised by the Defendant in the application.

5. According to the Plaintiff, the 1st Defendant was properly served and he accepted service on 15th July 2013 and thereafter entered appearance through an advocate who appeared for both himself and the 2nd Defendant. Thereafter, directions on the matter were taken and the case was ordered to proceed to hearing, alongside a related file, without any affidavit evidence in reply, or any other opposition to the claim.

6. The Plaintiff further avers that when the two matters came up for hearing on 28th September 2015, the Advocate appearing for the defendants walked out on the Court after an application for adjournment was refused. It is his case that no explanation has ever been given why the defendants never filed their defence or reply to the Originating Summons despite the fact that they were served on 15th July 2013 and all along were represented by Counsel.

7. It would appear that the failure to serve and/or fix the application dated 21st July 2016 for hearing was partly caused by the fact that the parties were considering an out-of-Court settlement. When it became apparent that the negotiations had failed, this Court made an order on 13th December 2017 for the Plaintiff to file a response thereto and directed that the application be heard on 26th March 2018.

8. The matter did not however proceed on the said date and was subsequently fixed for hearing on 17th April 2018. On the said date Messrs Apollo Muinde & Company Partners Advocates applied to cease from acting for the Defendant on account that the Defendant had neglected to furnish them with further instructions. The said application was allowed and Mr. SM Kimani, Learned Counsel for the Plaintiff then moved the Court to dismiss the application dated 21st July 2016.

9. As it were the Court declined to dismiss the application. Instead, Counsel for the Plaintiff was directed to take another date and to serve the Defendant in person. The matter was then fixed for hearing on 14th June 2018.

10. On the said date the Defendant was not in Court. Instead, a gentleman who identified himself as Edward Mbura and who claimed to be an employee of the Defendant appeared and told the Court that the Defendant was requesting for more time to instruct an Advocate. Upon inquiry by this Court as to whether he had any documentation and/or approval to appear for the Defendant, the gentleman responded in the negative. Being satisfied on the basis of the Plaintiff's Affidavit of Service filed herein on 14th June 2018, the Court allowed the Plaintiff to proceed and to argue his objection to the application.

11. I have considered the application and the response thereto. I have equally considered the oral submissions made before me by Mr. S.M. Kimani, Learned Counsel for the Plaintiff herein.

12. The two applications filed herein and in ELC 174 of 2012 (OS) were both filed by the Defendant in his capacity as the representative of the Estate of Mohamedali Bhajjee and that of Noorali ME Bhajjee. In the main, the Applicant has succeeded to stay the proceedings herein from 22nd July 2016 to-date.

13. It is to be noted that as at the time the Honourable Justice Angote granted a stay herein the two matters were pending Judgment. The applications therefore arrested the Judgment which was pending and the same is yet to be delivered. The prayer pending before this Court is the one seeking to set aside the proceedings that were taken on 28th September 2015.

14. From the record, it is clear that when this matter came up for hearing, a Mr. Ambwere Advocate held brief for Apollo Muinde and applied for an adjournment on the basis that Mr. Muinde was supervising exams at 'KU' on that day. The application for adjournment was opposed. Having considered the history and circumstances of the matter before him, the Learned Judge declined the application for adjournment and directed that the matter would proceed at 10.15 a.m. At the appointed hour however, the said Mr. Ambwere Advocate went missing and the matter proceeded ex parte. The Defendant cannot therefore blame anyone for his misfortune when his Counsel walked away in an attempt to circumvent the orders of the Court.

15. Responding to the application before me, the Plaintiff refuted the claim by the Defendant that there was no service upon him. From the record it is evident that Messrs Mathew Nyabena & Company Advocates came on record for the Defendants on 18th July 2013. Subsequently by a Notice of Change of Advocates dated 5th February 2015 and filed herein on 6th February 2015, Messrs Apollo Muinde &

Company Advocates came on record for the Defendant instead of the said Mathew Nyabena & Company Advocates.

16. I concur with Learned Counsel for the Plaintiff that the two firms of Advocates could not have filed papers to represent the Defendant if there was no service upon the Defendant. Otherwise there would have been no basis for the Defendant to instruct counsel to represent him in Court.

17. I have considered the two suits herein. ELC 174 of 2012(OS) was filed by an Administrator of the Estate while this suit is filed by the deceased children who claim a cause of action accrued to them. In the absence of any assertion on the contrary I did not find anything to justify the Defendant's contention that the latter is an abuse of the Court process.

18. In light of the foregoing and given that the Plaintiff's submissions herein were uncontroverted, I am of the considered view that the Defendant's application dated 21st July 2016 is misconceived and lacking in merit. The same is dismissed with costs.

19. As a similar application was made in ELC 174 of 2012(O.S) the same stands equally dismissed with costs in light of the directions given by this Court in relation to these two matters on 25th February 2014.

20. As the stay was granted when these matters were pending Judgment, the Deputy Registrar of this Court is hereby directed to place the two files before the trial Judge Honourable Justice Angote as soon as possible in Machakos for preparation of a Judgment and/or further directions.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE