



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CIVIL APPEAL NO. 15 OF 2015

KIMANI MUNGAI JOSEPH (Suing as the

Legal Representative of the

Estate of JOHN GAI THO – Deceased.....APPELLANT

-VERSUS-

CECILIA M. SPENCER.....RESPONDENT

RULING

1. The present motion is dated 18th December 2017 & brought under the provisions of order 40 rule 7 and order 24 rule 5 of the Civil Procedure Rules, Rule 3 (1) of the High Court (Practice & Procedure) Rules and Judicature Act Cap 8. The Respondent/Applicant asks for orders:

1. Spent

2. Spent

3. That the Honourable Court be pleased to set aside, discharge and/or vary the Orders of injunction issued on the 27/7/2015 in as far as they relate to Sub-plot No. 18 on Plot No. 27 Section 1/MN Mombasa.

4. That the Honourable Court be pleased to stop and/or bar the Appellant/Respondent from collecting rent and/or proceedings in any other form from the tenants/lessees of Sub-plot No. 27 Section 1/MN Mombasa pending the hearing and determination of this Application and the Appeal subject hereof.

5. That costs of this application be provided for.

2. The application is premised on the grounds inter alia that the Appellant/Respondent did not serve the application dated 24.4.2015 upon the law firm of Gachiri Kariuki who were on record for the deceased Respondent. Secondly that the application of 24.4.2015 was a nullity as it was brought against a deceased party. That the interested party is aware of an attempt to secretly dispose of the estate of the deceased and withhold the income. That the estate of the deceased will suffer loss unless the orders are granted.

3. The application is opposed by the appellant's replying affidavit sworn on 23rd February 2018. Paragraphs 3 – 10 refers to actions relating to the Primary Suit which forms the subject of this appeal and thus not relevant to the matters raised in the application. In paragraph 11, the Respondent states that the present applicant commenced construction on the suit property in an attempt to alter the substratum of the appeal. The Applicant Respondent admits serving the motion dated 24.4.2015 by way of registered post and through an email address yet in paragraph 15 he goes ahead to state that the firm of Gachiri Kariuki has all along these proceedings been representing the Respondent/Applicant.

4. In the case of **Municipal Council of Meruvs National Housing Corporation and 54 others– (unreported)** the Court of Appeal observed that the discretion of the Court to set aside default judgement is unfettered and the primary concern of the Court is to do justice between parties; that the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error; but is not designed to assist a person who deliberately sought to obstruct or delay the course of justice. This was the same holding in the case of **Shah vs Mbogo (1967) E A 116**.

5. In the instant application, the Appellant has not denied that he was aware that the Respondent in the appeal was deceased. He himself has

conceded that MsGachiriKariuki advocate was always aware of the ongoing proceedings but does not explain why the said advocate was not served with impugned the application on behalf of the Respondent. From this background, it is quite clear that the application dated 24.4.2015 was allowed as unopposed in error as the application was not properly served.

6. It is not in dispute that there is pending an appeal from the decision of the learned magistrate. It is therefore incumbent that the suit property be preserved so as not to render the appeal nugatory. However while preserving the suit property, one party should not be allowed to enjoy accruing benefits from the said property to the detriment of the other. Consequently I shall allow the present motion dated 18th December 2017 but on the following terms:

(a) The order of injunction is not set aside but it is varied to remain in force to restrain both the Appellant and the Respondent or their agents or persons claiming through them from constructing, wasting or in any other manner dealing with the suit property subplot No 18 on plot No 27 so as not to alter the substratum of the suit property pending the hearing and determination of the appeal.

(b) The rents due from the suit property to be collected effective from the date of this ruling and the said monies to be held in the joint account to be opened in the names of the parties' advocates on record within 10 days of this date. In the event no account is opened within the stated period, the rents to be deposited in Court.

(c) Each party to bear their respective costs.

Dated, signed & delivered at Mombasa this 28th June 2018.

A. OMOLLO

JUDGE