



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 209 OF 2011**

**THE PUBLIC TRUSTEE (Suing as the Administrator of the Estate of**

**GIDEON MGANGA MWANDEBE.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**PIUS M. KATAMBO.....DEFENDANT/APPLICANT**

**RULING**

1. For determination is the amended notice of motion application dated 24<sup>th</sup> January 2018 brought under the provisions of articles 10, 50 and 159 of the Constitution, Order 42 of the Civil Procedure Rules and section 1A, 1B & 3A of the Civil Procedure Act seeking the following reliefs:

**1. Spent**

**2. That this Honourable Court be pleased to grant the plaintiff and the beneficiaries/heirs of the deceased's estate and their agents, employees, hirelings, representatives, heirs or any other person whomsoever from occupying, possessing, developing, selling or having any dealings with the suit land howsoever pending hearing and determination of this application.**

**3. That this Honourable Court be pleased to set aside the consent dated 29<sup>th</sup> August, 2017 executed by the firm of Oddiaga & Co. Advocates and Kadima & Co. Advocates and filed in Court on 1<sup>st</sup> September, 2017.**

**4. That this Honourable Court be pleased to restrain the plaintiff and the beneficiaries/heirs of the deceased's estate and their agents, employees, hirelings, representatives, heirs or any other person whomsoever from occupying, possessing, developing, selling or having any dealings with the suit land howsoever pending hearing and determination of the appeal.**

**5. That the Defendant/Applicant be put back into occupation and possession and use of the suit land or in the alternative the plaintiff and the heirs of the deceased do give security for the financial loss which the Defendant/Applicant has suffered in the sum of Kshs. 4,522,000/= as a result of demolishing of the premises and properties and loss of properties.**

**6. That pending hearing and determination of the appeal Eliud Wachira who is a tenant on the suit land be ordered to remit to the Defendant/Applicant and/or deposit in Court the sum of Kshs. 15,000/= being monthly rent.**

**7. That the orders of the Court herein be registered against the Title.**

**8. That costs of this application be provided for.**

2. The application is supported by the grounds listed on the face of it and the supporting affidavit sworn on 24.1.2018, and the further affidavit sworn on 18<sup>th</sup> March 2018.

3. The application is opposed by the Plaintiff/Respondent vide the replying affidavit sworn on 2<sup>nd</sup> February 2018 and the further affidavit sworn on 23<sup>rd</sup> February 2018. The parties agreed to argue the motion by way of written submissions.

4. The Defendant/Applicant filed his submissions on 6.3.18 while the Plaintiff/Respondent filed his on 19<sup>th</sup> March 2018. The gist of the application is that the defendant's instructions to Kadima & Co advocates to file an application for stay was not fully complied with. That

instead the said law firm entered into a consent that the defendant be given time to vacate peacefully. Secondly that the plaintiff proceeded to evict the applicant despite the pendency of the defendant's application and the appeal contrary to the doctrine of lis pendens. That it is in the interest of justice that the application be allowed.

5. The Respondent on his part deposes that the application is devoid of merit since the application has been overtaken by events given that the orders have been executed. The Respondent also stated that the eviction was conducted in accordance with the law by a competent Court bailiff and the claims of loss by the applicant are unfounded and denied. The Respondent also stated that the doctrine of lis pendens is not applicable as there is neither a pending suit nor appeal against the judgment of 25.5.2017. Further that the applicant has not disputed the fact that he instructed the firm of Kadima & Co advocates to represent him and no evidence has been annexed that Kadima acted contrary to the instructions given.

6. On 1<sup>st</sup> September 2017, a consent letter dated 29<sup>th</sup> August 2017 duly signed by Kadima & Co advocates for the defendant and J. E Maliro State Counsel appearing for the plaintiff was filed in Court (*annex PT – 2 b* to the supporting affidavit). The counsels agreed that the Defendant was to give vacant possession of the suit premises after 60 days in default execution to follow. The said consent wholly settled the application dated 26<sup>th</sup> July 2017 that was seeking stay of execution of the judgment.

7. It is this application dated 26.7.17 that the present application is brought to amend to introduce new prayers by replacing the orders initially sought. The first issues taken up by the plaintiff and I think rightly so is whether there was an application to be amended and whether leave of the Court was required before carrying out any such amendment. The application dated 26<sup>th</sup> July 2017 was indeed determined when the consent signed between the parties. The consent was specific as it stated thus:

*“By Consent the notice of motion dated 26<sup>th</sup> July 2017 be allowed in the following terms:*

*i) The defendant/applicant granted a stay of sixty (60) days with effect from 1.9.2017.*

*ii) The defendant/applicant to give vacant possession of the suit plot on or before 31<sup>st</sup> October 2017.”*

8. The defendant cannot therefore seek to set aside the consent order and in the same breath be amending the application which was settled by the said consent set to be set aside. The applicant's option in my view was to file a fresh application to set aside the consent before he can argue the motion of 26.7.17.

9. Secondly was the leave of the Court necessary assuming the application of 26.7.2017 was capable of being amended? Order 8 rule 1 provides for the amendment of pleadings without leave any time before pleadings are closed. Order 8 rule 3 provides for instances where leave of the Court is required and the same can be done at any stage of the proceedings on such terms as to costs or otherwise as may be just. Order 8 rule 3 (2) requires that an application be made to the Court for leave to make an amendment as is mentioned in sub rule (3), (4) or (5). The plaintiff/respondent on 21<sup>st</sup> August 2017 filed a replying affidavit opposing the application of 26.7.17. That application dated 26.7.2017 filed under certificate of urgency came before the Court on the same day. The same was certified urgent and a stay of execution given for 36 days.

10. The said application was then set down for inter parties hearing on 5<sup>th</sup> September 2017 and ordered to be served. By virtue of the application being given a hearing date and a replying affidavit having been filed in my opinion implies that the pleadings in respect of that application were closed. Therefore if the applicant wished to amend the application of 26.7.2017 then leave of the Court had to be obtained first. There is no prayer for leave among the orders sought in the current amended notice of motion nor was an oral application for leave made on behalf of the applicant. For this reason, I make a finding the amendment carried out was not properly done and on this account the amended notice of motion out to be expunged from the Court records as it is done in contravention of the rules of procedure put in place to create order and fairness.

11. For the twin reasons that the application of 26<sup>th</sup> July 2017 was determined in terms of the consent letter of 29.8.2017 and secondly that the amendment was undertaken without leave of the Court, I find the amended notice of motion dated 24<sup>th</sup> January 2018 as void ab initio & misconceived thus a candidate for striking out. Although the applicant cited article 159 of the Constitution, the defect herein cannot be treated as procedural technicality. Consequently I hereby strike it out for being an abuse of the Court process. I make no determination on the merits of the orders sought because the Court has been inappropriately moved. The costs of this application is awarded to the plaintiff/respondent.

**Dated, signed & delivered at Mombasa this 20<sup>th</sup> June 2018**

**A. OMOLLO**

**JUDGE**