REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 108 OF 2017

GITONGA DANIEL MBAABU (Suing as the Administrator of the

Estate of Julius Mbaabu (deceased).....PLANTIFF/RESPONDENT

-VERSUS-

WAMBU WAINAINA ..... 1ST DEFENDANT/APPLICANT

EVANS M. MAABI T/A MURPHY MERCHANTS

AUCTIONEERS ..... 2ND DEFENDANT/APPLICANT

AND

WESTMALL SUPERMARKET LIMITED.....1ST AFFECTED PARTY

PEDESTAL BUSINESS COLLEGE.....2ND AFFECTED PARTY

RULING

1. Westmall Supermarket Limited & Pedestal Business College have moved this Court referring to themselves as affected parties IN their notice of motion application dated 19th July 2017. The application brought under the provisions of Order 45 of the Civil Procedure Rules, section 1A & 1B of the Civil Procedure Act and article 40 & 159 of the Constitution seeks the following orders:

1. Spent

2. Spent

3. That the Court be pleased to review its ruling delivered on 14th June, 2017 in Mombasa ELC Case No. 108 of 2017 and in lieu thereof issue a temporary injunction order restraining the Plaintiff and the Defendants from interfering with the quiet and peaceful occupation of the Affected Parties in building standing on Block Mombasa XVI/154.

4. That costs of this Application be provided for.

2. The application is supported by 12 grounds listed on the face of it and the affidavits sworn by Douglas Mwangi Muteru and Martin Wandie whose contents in brief are that the affected parties took possession of the suit premises on 28th & 29th March 2017 vide a lease executed between themselves and the 1st defendant. That the order of this Court issued on 14th June 2017 requiring the 1st defendant to re-instate the plaintiff to the suit premises will indeed affect the applicants hence need to have the same reviewed. The affected parties annexed copies of the lease agreements in support of their prayers.

3. The 1st defendant vide his replying affidavit sworn on 29th September 2017 supported the prayers sought by affected parties. According to him, the plaintiff had abandoned the suit premises which then became ran over by commercial sex workers and which sex workers the 1st defendant removed on 24.3.2017 and secured the premises. That subsequently he leased the premises to the affected parties and executed a lease in their favour.

4. The application is opposed by the plaintiff by a replying affidavit sworn on 15th September 2017 and filed on the same date. The Plaintiff/Respondent deposed that as at 30th March 2017 when he filed his application, the suit premises was completely sealed with stones & metal grills and inaccessible to all. That the present motion is crafted by the 1st defendant in an attempt not to comply with the orders of the Court issued on 30th March & 13th June 2017. The plaintiff also deposed that by the time the lease was presented for registration on 7th April 2017, the 1st defendant had already been served with the orders of injunction. According to the plaintiff, the registration of the lease was an act of contempt and the Court should not entertain the conspiring entities.

5. The plaintiff proceeded to annex pictures of a signboard with the words *"G. W. Wainaina & Co Advocates"* and *"bar/shop/office to let … call Rose 07********"* to support his averment that the affected parties/applicants are not in occupation of the suit premises. Further, that the case before the Business Premises is still pending which challenges the notice served (the subject thereof was for purposes of carrying out substantial renovations), it is surprising that the same premises has now been leased for a period of five years. The Respondent/Plaintiff also avers that the applicants herein lack locus to bring the application as they are not parties to the suit. He urged the Court to dismiss the application with costs.

6. The parties' advocates filed written submission which I have read and considered. The issues I frame for my determination are as follows:

i) Whether the applicants lack locus to bring this application.

ii) If answer is NO to (i) whether applicants are in possession of the suit premises thus entitled to the orders sought.

7. The applicants argue that the provisions of Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act allow them to bring the present application as the implentation of the orders of this Court issued on 13th June 2017 directly affect them. The opening statement in both section 80 of the Civil Procedure Act and Order 45 rule 1 states thus, "Any person considering himself aggrieved –

(a) By a decree or order from which an appeal is allowed but which no appeal has been preferred."

8. The statement thus leaves the door wide open for <u>any person</u> considering himself aggrieved to bring an application for review. The only requirement for such applicant to do is to satisfy the requirements set under Order 45 before he/they can enjoy those orders. These include;

i) Proof of and or discovery of new & important matters or evidence which after the <u>exercise</u> <u>of due diligence</u> could not be produced.

ii) On account of some mistake or error apparent on the face of the record.

iii) For any other sufficient reason.

9. I have read the two decisions of **JMK vs MWM & Another (2015) eKLR** on the right to be heard and **Presam Ltd vs Public Procurement Administration Review Board & 2 others NBI JR No 201 of 2017** cited by the Affected Parties/Applicants but find the facts obtaining in the two cases to be at variance with the facts of this case therefore I find no value the authorities cited have added to the case.

10. The facts as set out in the pleadings here demonstrate that the applicants contend to have entered into lease agreements with the 1st defendant on 28th & 29th March 2018 respectively which was before this suit was filed. Interlocutory orders were issued on 30th March 2018 and the said orders are averted to have been served on 1st defendant on 4th April 2018. The execution of this order does affect the rights and interests of the Affected Parties if those rights are proved to exist. The 1st defendant in his replying affidavit to the plaintiff's earlier application deposed that he had leased the suit premises to 3rd parties which deposition he has repeated in paragraph 4 – 6 of his replying affidavit to the present motion. The question which then begs answer is why didn't the 1st defendant inform the applicants of this case? If he did, why did they not apply to be joined as parties to the application before it was heard & determination inter partes? In my view the affected parties cannot fault the plaintiff for not joining them because the 1st defendant chose not to disclose their names in his replying affidavit. Secondly, the plaintiff has maintained the premises are still vacant by annexing photographs showing the gate is locked and boulders placed at the entrance. The plaintiff could not have therefore known the existence of lease hold interest of the applicants over the property.

11. For any party to impress upon the Court to exercise its discretion in granting the orders of review, that party must show exercise of due diligence. The affected parties are claiming they have been denied a right to be heard which right accrued to them from the 1st defendant. The 1st defendant was heard on the issues they have raised and a determination made via the impugned ruling of this Court delivered on 14th June 2017. In the present application they have not demonstrated even by pictorial evidence that they are indeed in physical possession of the suit premises or evidence of payment of rents. Annexture ***GDM 3 & 4*** of the plaintiff's affidavit show a contrary position that is being put forth by the applicants and 1st defendant. There was no supplementary affidavit filed to controvert this evidence. Consequently I find no new evidence that would warrant me to review my ruling dated 13.6.2017 and delivered on 14.6.2017.

12. There is also no error or mistake apparent on the face of the record. This Court would have exercised its discretion under the heading *"for any sufficient reason"* had the applicants showed they were in physical possession of the premises. As things stand, I am persuaded by the plaintiff's argument that the lease agreements executed contradict the purpose of the notice served on them by the 1st defendant to vacate the suit premises. The affected parties' application can only be inferred that it is intended to frustrate the plaintiff's claim before the Court. Let the 1st defendant follow due process in recovering his premises from the plaintiff.

13. In conclusion and for the reasons stated I find the affected parties notice of motion dated 19th July 2017 as lacking in merit and is hereby dismissed. Each party to meet their costs of the application.

Dated, signed & delivered at Mombasa this 20th September 2018

A. OMOLLO

JUDGE