



**Murigi v Sauer & 2 others (Miscellaneous Succession Cause
432 of 2010) [2017] KEELC 2303 (KLR) (30 May 2017) (Ruling)**
Lucy Wangari Murigi v Klaus Willis Lutkemier & 2 others [2017] eKLR
Neutral citation: [2017] KEELC 2303 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS SUCCESSION CAUSE 432 OF 2010

CK YANO, J

MAY 30, 2017

BETWEEN

LUCY WANGARI MURIGI PLAINTIFF

AND

ANN SAUER 1ST DEFENDANT

KLAUS WILLIS LUTKEMIER 2ND DEFENDANT

PETER MICHAEL GESSLER 3RD DEFENDANT

RULING

1. The plaintiff/applicant moved the court vide the Notice of Motion dated 14th July, 2016 brought under sections 1A, 1B, 3A and 63 (b), (C) and (e) of the [Civil Procedure Act](#) and Order 40 Rule 7 of the [Civil Procedure Rules](#). The applicant seeks the following orders: -
 1. Spent.
 2. That pending the hearing and determination of this suit;
 - a. That a valuer be appointed by the court to determine the monthly rent for the house standing on sub division No.3336 (Original Number 1139/1) Mtwapa.
 - b. The 4th defendant be compelled to vacate and leave the suit property being Sub Division No.3336 (Original Number 1139/1) Mtwapa together with the development thereon to facilitate its leasing thereof and the proceeds therefore be held in an interest earning joint account of counsels for the plaintiff and for the 4th defendant, or



- c. The 4th defendant be compelled to pay monthly rent determined in (a) above since 1st September, 2014 to date and thereafter to an interest earning joint account of counsel for the plaintiff and for 4th defendant.
 3. That costs of this application be in the cause of the suit.
2. The application is based on the several grounds listed on the face of it and the affidavit of Lucy Wangari Murigi, the plaintiff/applicant. It is the applicant's case that on 12th July 2013, Mukunya, J directed that the suit premises herein be rented out and the rent proceeds be deposited in joint interest earning account of the parties advocates. According to the applicant the said court order could not be implemented because the 4th defendant, who was not a party to the suit at the time the order was issued, was found to be in occupation of the suit premises. The 4th defendant is now a party to these proceedings and has filed his statement of defence in which he has pleaded that he is an innocent purchaser of the suit property for valuable consideration without notice. The plaintiff's claim is for ownership of the suit property as a wife to the 1st defendant as set out in the further amended plaint. On his part, the 4th defendant is claiming an interest in the same property having purchased it from the 1st defendant who was attorney of the registered owner, the 2nd defendant. It is the 4th defendant who is in possession and occupation of the suit property and was already in occupation by the time the order of 12th July 2013 was made.
3. The applicant has deposed that the order of 12th July 2013 should be implemented with variations as sought in the application. The applicant also deposed that the 4th defendant is a foreigner working in Kenya and that should circumstances change regarding his residential status, he may leave the country, exposing the applicant to immense loss in terms of being unable to recover the value of the suit property for the duration the 4th defendant has been in occupation. The applicant would like the suit premises to be let out, in the alternative the 4th defendant to settle all the arrears of mesne profits for the duration of his occupation and continue to make monthly payment until the suit is determined.
4. Parties filed written submissions in arguing the application and also made brief oral submissions to highlight the same. Mr. Muniyithya, learned counsel for the applicant reiterated the contents of the application, the Supporting Affidavit and the pleadings. He addressed two main issues, namely: -
 - a. What is the recourse of a party who holds an order of the court which has not been discharged or varied but the same has been rendered impossible to enforce?
 - b. Whether the applicant has an overriding interest over the suit property to warrant granting the prayers sought.

On the first issue, the learned counsel submitted that where a court has issued an order, the same subsists unless it has been reviewed or set aside by way of appeal. He cited cases where the courts have held that court orders cannot be issued in vain.

It was submitted on behalf of the applicant that the order issued by Mukunya, J on 12th July 2013 is still in force and has not been set aside and the applicant is seeking to have it varied in view of the 4th defendant's recent occupation of the suit property. Mr. Muniyithya submitted that the order issued on 12th July 2013 had also restrained the 1st and 2nd defendants from selling the suit property but the 1st and 2nd defendants went ahead to sell it to the 4th defendant. He further submitted that the order was issued after the court considered the fact that the 1st and 2nd defendants were foreigners who could abscond from the jurisdiction of the court, and that, indeed, the 1st defendant has disappeared and is being looked for. The applicant is apprehensive that the 4th defendant, also being a foreigner, may relocate. On the 4th defendant's contention that he was not aware of the court order, it was submitted



that knowledge by the 4th defendant of the court order was not necessary since the order was an order in rem and the 4th defendant was bound by it, notwithstanding that he was not privy to the proceedings. It was further submitted that the doctrine of lis pendens operates to give notice to the 4th defendant and counsel relied on the case of *Bernadatte Wangare Muriru v National Social Security Board Of Trustees & 2 Others* (2012) eKLR.

On the overriding interests, it was submitted that the 1st and 2nd defendants were aware and subject to the order of the court issued on 12th July 2013 and still purported to transfer the property to the 4th defendant. That the applicant has not been able to execute contempt proceedings because the 1st defendant has fled the court's jurisdiction. The applicant is seeking for the implementation of the said order.

5. In opposing the application, the 4th defendant relied on the submissions filed. Mr. Mogaka, learned counsel for the 4th defendant submitted that by the time the 4th defendant purchased the suit property, the applicant was not residing thereon. He submitted that the 4th defendant carried out due diligence, purchased the property and immediately took possession and occupation and had been in occupation since December 2013 as an innocent purchaser for valuable consideration without notice, and not as a tenant. It was further submitted that the order of the court came to the 4th defendant's attention after he had taken possession and was already in occupation. Counsel further submitted that there is no tenancy relationship between the parties and the court should not create one as the applicant seems to suggest in the application. It was also pointed out that the 4th defendant was enjoined into the proceedings after almost one year after he had taken possession, and the present application about two years and eight months later. According to the 4th defendant, this was inordinate delay which has not been explained. In addition, Mr. Mogaka submitted that what the applicant is seeking is for the grant of mandatory injunction directing vacant possession, valuation and compelling payment of rent. He submitted that the law on mandatory injunctions is settled to the effect that they should be granted only on special or exceptional circumstances in clear cases where the court feels a high degree of assurance that at the trial it could appear that the injunction had rightly been granted. He cited several authorities.

Regarding the court orders of 12th July 2013, learned counsel submitted that the 4th defendant was not a party when the same was issued and that it is a cardinal principle of law that a person or party should not be condemned unheard. It was also submitted that the plaintiff's claim against the defendants is not established and in any event it is capable of quantification by way of valuation and settlement in monetary terms. Counsel also submitted that the orders issued on 12th July 2013 have lapsed, the suit having not been determined within twelve months as required by the provisions of Order 40 Rule 6 of the Civil Procedure Rules. He urged the court to dismiss the application with costs.

6. In his brief response, the plaintiff's counsel submitted that on the issue of delay, time could only be counted from the time the 4th defendant became a party to the suit.
7. I have carefully considered the plaintiff's application dated 14th July, 2016 together with the affidavit in support and the annexures. I have also considered the submissions and authorities by both the advocates for the applicant and for the 4th defendant.

I note that the application is brought under Sections 1A, 1B, 3A and 63 (b) of the *Civil Procedure Act* and Order 40 Rule 7 of the *Civil Procedure Rules*. The application is seeking an order that a valuer be appointed by the court to determine the monthly rent for the suit premises. It also seeks an order that the 4th defendant be compelled to vacate and leave the suit property to facilitate its leasing and the proceeds to be held in an interest earning joint account of counsel for the plaintiff and the 4th defendant, or the 4th defendant be compelled to pay a monthly rent at the rate that would have been determined



by the valuer from 1st September 2014 to date and thereafter to an interest earning joint account of counsel for the plaintiff and for the 4th defendant.

I have perused the further amended plaint dated 1st April 2015 and note that it seeks, inter alia, a mandatory injunction compelling the 4th defendant to vacate the house on sub-division No.3336 (original No.1139/1), and an assessment for mesne profit from December, 2013 until the date of vacant possession.

There is also an alternative prayer that the suit property be valued and 50% of the value be paid to the plaintiff.

8. The issue for determination is whether in the circumstances of this case the plaintiff would be entitled to the reliefs sought which indeed are in the nature of a mandatory injunction which, when granted, would virtually dispose of the suit as against the 4th defendant wholly or substantively at the interlocutory stage.
9. The principles governing grant of a temporary mandatory injunction are well settled. In the case of *Kenya Breweries Ltd And Another v Washington Okeyo* (2002) eKLR, the Court of Appeal had occasion to discuss and consider those principles and held that the test for grant of a mandatory injunction was as correctly stated in Vol. 24 *Halsbury's Laws Of England* 4th Edition Paragraph 948 which reads: -

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

Also in *Locabail International Finance Ltd v Agroexport And Others* (1986), ALL ER 901 AT PG 901 it was stated :-

“a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

In the case of *East African Fine Spinners Ltd (in Receivership) & 3 Others v Bedi Investments Ltd* Civil App Nai.72/94(ur) Gicheru , JA (as He Then Was) Cited *Shepherd Homes Ltd v Sandahm* (1971) I CH. 34 which stated in part: -

“...it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation”



Referring to the application of those principles, the Court of Appeal in *Kenya Airport Authority v Paul Njogu Muigai & 2 Others*, Civil Application No.nai.29/97 (UR) stated: -

“... An order which results in granting a major relief claimed in the suit, which may not be granted at the final hearing, ought not to be granted at an interlocutory stage. Again referring to the principle in the Shepherdhomes Case (supra) As Adopted In The Case Of *Locabial International Finance Ltd v Agroexport* (1986) I ALL ER 901 MUSTIL LJ said at page 906:

“the matter before the court is not only an application for a mandatory injunction, but it is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case...”

10. The plaintiff is claiming a beneficial interest in the suit property by virtue of her being a wife to the 1st defendant. On the other hand, the 4th defendant is claiming an interest in the same property as a purchaser for valuable consideration without notice. The 4th defendant is the one in possession and has been in occupation of the suit property since December 2013 as a purchaser and not as a tenant. In her application, the plaintiff has conceded that at this moment, neither the plaintiff nor the 4th defendant can predict with accuracy what the final orders of this court would be. I totally agree with the plaintiff on this.
11. In my considered view, and having taken into consideration the principles outlined for the grant of a mandatory injunction, and having applied them to this case, the plaintiff's case herein does not pass the tests outlined. From the facts of this case as elaborated in the further amended plaint, the defences, the Notice of Motion together with the Supporting Affidavit and annexures, it is apparent that this not a case that one can regard as plain and clear and which the court can decide at once. Both the applicant and the 4th defendant are claiming the suit property. Ordering the 4th defendant to vacate from the suit premises at this stage or ordering him to pay rent will be tantamount to making a final decision in the case before evidence in the main suit is heard, or the suit is otherwise determined in summary manner. In my view, granting the orders sought at this stage would leave nothing further to await in the main suit. The applicant is also seeking for an order for payment of rent. This is quantifiable and an order for payment in monetary terms can be made at the appropriate time should the plaintiff's claim on that ground succeed.
12. In the circumstances, I decline to grant the orders sought and order that the motion dated 14th July, 2016 be and is hereby dismissed with costs to the 4th defendant.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF MAY 2017.

C. YANO

JUDGE

