



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 9 OF 2013

MASJID KAIRAT (MOSQUE) & OTHERS.....PLAINTIFFS/RESPONDENTS

-VERSUS-

1. MUNICIPAL COUNCIL OF MOMBASA

2. THUREYA BAKARI

3. JIBILI BAKARI

4. SAADA ARAN BAKARI.....DEFENDANTS/APPLICANTS

RULING

1. The 4th Defendant/applicant moved this Court vide notice of motion dated 15th September 2016 seeking for orders:

i) That this application be certified as urgent and service be dispensed with in the first instance.

ii) That this Honourable Court be pleased to set aside/vary the Orders issued on 5th May, 2016 and in particular that the Plaintiffs continue paying rent to the 4th Defendant and not to the Court as ordered by the Court.

iii) That costs of this application be in the cause.

2. The application is not opposed by the plaintiff and the 1st defendant. Except the plaintiff pointed out that the order annexed by the applicant is a forgery as it is not the order issued by the Kadhi's Court. Instead he annexed a ruling of the Kadhi delivered on 12th March 2015. The 2nd Respondent in opposing the application said the orders of this Court issued on 5th May 2016 should not be varied as the plaintiffs are paying rates and not ground rents.

3. The parties filed their respective submissions which I have read and considered. The order which the 4th defendant/applicant seeks to be reviewed granted her permission to collect ground rents from the occupants of the suit plot except the 23 plaintiffs in this suit pending hearing and determination of the suit. Part of the ruling also read that, ***“The applicants (plaintiffs) shall continue paying rent into the Court until the 2nd – 4th Respondents shall have agreed on who should receive rent.”***

4. The 4th defendant/applicant deposed that she did not know she was to place before this Court the order emanating from the Kadhi's Court in Civil Case No 82 of 2011 for the Court to make a just determination of the then application. The 2nd defendant in paragraph 2 of his replying affidavit deposed thus, ***"That I am aware that before the Kadhi's Court we agreed to have SAADA AMRAN deal with the ground rent defaulters but not rate defaulters."***

5. The plaintiffs vide a replying affidavit sworn on their behalf by Ali Mohamed Shee deposed in paragraph 3 that previously they used to pay ground rent as the beneficiaries which monies the beneficiaries used without making remittances to the County government. Mr Shee continued that due to the confusion which existed concerning the administrator of plot No 76/MN/Sec II, they began paying rates directly to the County government for the entire plot and which has become burdensome for them to shoulder anymore. This confirms the position that the plaintiffs should also be paying ground rent which the Court directed them to be depositing in Court pending an agreement between the 2nd – 4th Respondents on who should be receiving the rents. The matter of payment of rates was therefore not for determination in the application whose orders herein review is sought.

6. Order 45 rule 1 of the Civil Procedure Rules allows for review of orders *or decree by any person aggrieved upon the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The application should also be made without unreasonable delay.* None of the parties have raised the issue of delay. This application was made in September of the same year four months after the order issued, which cannot be said to be unreasonable delay.

7. I have noted from the Court records that the application dated 29th October 2015 whose order is sought to be reviewed was argued on 8th March 2016 and ruling deferred for 29th April 2016. The ruling was subsequently delivered on 5th May 2016. The decision of the Kadhi was made on 12th March 2015. Consequently it is clear the information was within the knowledge of the 4th defendant/Applicant at the time the impugned application was filed and heard. The applicant was then acting in person.

8. It is true the Kadhi's Court in cause No 82 of 2011 did not appoint an administrator going by the contents of the ruling in respect to an application dated 7.1.15 as per copy annexed by the plaintiffs. The Kadhi's Court advised the beneficiaries to agree on appointment of an administrator and it is unfortunate that until now no administration has been agreed upon. It appears however that subsequent to the decision of the Kadhi delivered on 12th March 2015, this applicant/4th defendant filed another motion dated the same date of 12.3.2015. The Kadhi in considering that application in the presence of the 2nd & 3rd defendants herein issued an order **certifying the applicant as the trustee to collect rents from the lessees and tenants of the estate.** No wonder the 2nd Respondent conceded the existence of such an agreement. The plaintiff's annexure however refers to the decision of the Kadhi on an earlier application.

9. The 4th defendant therefore having been authorized to collect ground rent, there is no reason why the plaintiffs should continue paying their ground rents into Court. I am therefore satisfied that sufficient cause has been shown by the applicant why the order requiring rent to be deposited in Court should be reviewed. Accordingly I do so and direct that the plaintiffs shall henceforth pay their ground rents to the 4th defendant until the order of the Kadhi dated 12th March 2015 is varied and or set aside or an appointment of an administrator of the estate and or pending further orders from any Court on application of the parties. The issue of payment of rates was not placed before me for determination at this stage. I shall say nothing on it. In any event it comprises part of the plaintiffs' prayers in the main suit. In conclusion therefore the application dated 15th September 2016 has merit and is allowed. Each party to bear their respective costs.

Dated, signed & delivered at Mombasa this 26th July 2017

A. OMOLLO

JUDGE