Kigathi & another v Attorney General & 4 others; Housing Finance Company Limited (Interested Party) (Environment & Land Petition 968 of 2012) [2024] KEELC 1065 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1065 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 968 OF 2012

AA OMOLLO, J

FEBRUARY 29, 2024

BETWEEN

JAMES MICHAEL NDUNGU KIGATHI .... 1ST PETITIONER

EMMAH WANGU KIGATHI .... 2ND PETITIONER

AND

ATTORNEY GENERAL .... 1ST RESPONDENT

P.S. MINISTRY OF INTERNAL SECURITY .... 2ND RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF DEFENCE .... 3RD RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF LANDS .... 4TH RESPONDENT

COMMANDER OF THE AIR FORCE .... 5TH RESPONDENT

AND

HOUSING FINANCE COMPANY LIMITED .... INTERESTED PARTY

RULING

1. The Petitioners/Applicants filed notice of motion dated 21st June 2023 seeking for the following orders;

    1. Spent

    2. Judgment on liability be entered in favour of the Applicants as against the 3rd and 5th Respondents.

    3. Any other relief that this Honourable Court may deem just and fit to grant.

4. The Costs of this Application and the Petition be borne by the Respondents.

2. The motion was supported by an affidavit sworn by James Michael Ndungu Kigathi on 21st June 2023 and based on the grounds that the Applicants were the registered proprietors of L.R No.209/12047 Eastleigh, Nairobi herein after referred to as the suit property. That after obtaining all the requisite documentation and approvals erected a building on the suit property which building was constructed and completed on or about 1996 without any objection from any of the Respondents.

3. The Applicants stated that fifteen years later at around 5:30 am on 22nd November 2011 without any prior notice and despite their protest and those of their tenants and members of the general public, military officers said to be acting on the instructions of the 3rd and 5th Respondent demolished the building causing the Applicants tremendous loss, damage, stress, pain, suffering and psychological trauma.

4. The Applicants contended that since the demolition, they have tried to fence the suit property but have to date been barred by the 3rd and 5th Respondents from accessing it. They added that the 3rd and 5th Respondents admitted the responsibility for undertaking the demolition and destruction of the suit property on the basis that the building plan was not approved which assertion is denied by the Applicants and evidenced by the approval of the building plans by the then Nairobi City Council which is attached to the Petition.

5. Further, the Applicants contended that the 3rd and 5th Respondents acted illegally and in contravention of Section 56 and 57 of the *Civil Aviation Act* which provisions are mirrored in Sections 9 and 10 of the repealed *Civil Aviation Act* (Chapter 394 of the Laws of Kenya) because;

    i. No order prohibiting the construction of the Suit property was published in the Gazette by the Cabinet Secretary in question,

    ii. No notice was published, informing the Applicants of a proposal or intention to make an Order requiring or authorizing either the Applicants herein or their tenants causing the alleged obstruction or any person acting on behalf of the Director - General, to enter upon the suit property and carry out such work as is necessary to enable the reduction of the alleged obstruction,

    iii. The Director — General did not provide the Applicants herein with an opportunity to make any representations within the statutory period of 2 months concerning any proposed Order affecting the property

    iv. The Applicants herein were never compensated for the demolition of the suit property and consequent losses suffered by them.

6. The Hon. Attorney General vehemently opposed the application vide grounds of opposition dated 29th September 2023 stating that the 3rd and 5th Respondents have at no time admitted the claim of demolition of the building and destruction of the suit property as alleged by the Applicants. They relied in Order 13 Rule 2 of the *Civil Procedure Rules*, 2010 under which the Applicants sought entry of judgment on admission and which provides that, any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties and the court may upon such application make such order, or give such judgment as the court may think just.

7. That the Application is a non-starter full of misrepresentation of facts and falsehoods and that the grant of the Order sought is discretionary which the Applicants have not satisfied thus is an abuse of the Court process, un-procedural and lacks merit and should be dismissed with costs.

Submissions

8. The Applicants and Hon. Attorney general filed submissions both dated 3rd November 2023.

9. The Applicants submitted that the issue for determination is whether this Honourable Court ought to enter Judgment on liability in favour of the them as against the 3rd and 5th Respondents. They stated that Court has the power to enter Judgment on liability and in support cited the case of *Intraspeed Logistics Ltd & 15 others v Commissioner of Police & another* [20181 eKLR where the Honourable Court entered Judgment on liability in favour of all the Plaintiffs against the Defendants jointly and severally and also in the case of *Ideal Ceramics Limited v Suraya Property Group Ltd* [2017] eKLR where the Court held that an admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made).

10. The Applicants submitted that they have applied for Judgment on liability based on the admissions contained in the Replying Affidavit of Vincent Pera sworn on 6th March 2013 particularly at paragraph 33 where the 3rd and 5th Respondents formally admitted responsibility for undertaking the demolition and destruction of the suit property as follows:

> " That it is just and for the protection of the Kenyan aviation industry that the said building be demolished and facilitate the safety of the Kenyan air space."

11. They added that 3rd and 5th Respondents in their Replying Affidavit alleged that the suit property was demolished because the building plan was not approved. However, at pages 5 and 6 of the documents in support of the Petition, the Applicants have produced evidence of the approval of the building plan by the then Nairobi City Council. The Applicants also submitted that the destruction and demolition of the suit property was carried out contrary to Section 56 and 57 of the *Civil Aviation Act*, which provisions are mirrored in the repealed *Civil Aviation Act* (Chapter 394 of the Laws of Kenya) and in particular, sections 9 and 10 thereof.

12. In support of their position, the 3rd and 5th Respondents did not make any admission as to demolishing and destroying the suit property, they cited the Court of Appeal decision in the *Choitram v Nazari* (1984) KLR 327 which captured the provisions of Order 13 Rule 2 of the *Civil Procedure* 2010 under which the Applicants have sought entry of judgment on admission. They aver that admission have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgement being entered. That they must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning and that much depends upon the language used.

13. The Respondents also cited the principles underlying entry of judgment on admission as elucidated by Justice John M. Mativo (as he then was) in *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* [2021] eKLR and in line with the decision in *Simal Velji Shah v Chemafrica LimitedL61* the court cited *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [2014]eKLR which stated the principle applicable in judgment on admission is; the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the *Civil Procedure Rules* is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible.

14. The Respondents submitted that the scope of the rule is that in a case where admission of fact has been made by either of the parties in pleadings whether orally or in writing, or otherwise, the judgment to the extent of the admission can be granted on the application or as the court may think just. They further submitted that the relief under Order 13 Rule 2 is discretionary as it is not a matter of right. That Order 13 Rule 2 is enabling, discretionary and permissive and it is neither mandatory nor is it peremptory since the word "may" has been used. Thus it is not incumbent on the courts to pass judgment on admissions and in order to succeed under Order 13 Rule 2 the admission has to be clear and unequivocal.

15. Counsel invited the court to take note of the Respondents Replying Affidavit sworn by Vincent Pera on 6th March, 2013 for its full tenor submitting that it could not be deemed as an admission. They also cited the case of *Cassam v Sachania* [19821 KLR 191 where the court held that granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal. The Respondents submitted that in view of the circumstances of this case, there is no valid law supporting the process followed by the Applicants, hence the application should be dismissed for being bereft of merit and being an abuse of the Court process with costs to the Respondents.

Determination:

16. I have considered the elaborate submissions rendered in support of and against the granting of the relief of judgment on admission of liability. Both parties have referred to the provisions of order 13 rule 2 of the *Civil Procedure Rules* which state as hereunder;

> "Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

17. From the cases cited herein above by the Respondents, it has been discussed that the admission must be plain, clear and unequivocal. The Petitioners/Applicants are relying on the replying affidavit sworn by Vincent Pera which affidavit runs into 35 paragraphs but the Applicants are interested more in paragraph 33 which they have quoted hereinabove. I have taken time to also read through the entire Replying affidavit to be able to understand whether it amounts to admission as pleaded and submitted by the Petitioners. The mere fact that I have to search for the admission means it is not plain and unequivocal.

18. The Respondents explained in the paragraphs prior to 33 the reasons why buildings around the Moi Air Base are restricted and in paragraph 27 Vincent deposed that previously the Nairobi City County would consult them before issuing any building approvals around the airbase for security reasons and in compliance with International Chicago Convention on Aviation Safety Standards (ICAO). He deposed that any building done contrary to chapter 4 of ICAO annex should be demolished to facilitate the safety of the Kenyan airspace. The gist of the replying affidavit which I get is that any buildings within a radius of 1km from the Runway Touchdown area should not be more than two floors and one within a radius of 2kms should not be more than 4 floors.

19. Thus, a reading of the Replying affidavit generates some these questions; whether the Respondents were to be contacted before the approvals were issued by the Nairobi City County; or if the Petitioners buildings were within the radius of 1-2Kms from the Runway Touch Down and if not whether the

Respondents exceeded their mandate in demolishing the structures complained of. It is not admitting liability on the face of it but rather they are defending their actions.

20. The Applicants pleaded that the Respondents averments that they (Petitioners) did not have approvals is not true since at page 5 and 6 of their bundles, they produced approved plans. The Applicants also accused the 3rd and 5th Respondents of contravening the provisions of section 56 and 57 of the *Civil Aviation Act* which accusation require proof before this court can render a determination. In essence, the Applicants are inviting the court to consider evidence before hearing on contested matters. For instance, Mr Pera has deposed in paragraphs 26 and 27 of the replying affidavit that buildings around MAB used to seek the approval of Kenya Airforce in addition to that of the City Council.

21. Therefore, what I am able to see are many triable issues that can only be dispensed with during the hearing of the main Petition. There is no admission of liability visible however much I read the pleadings before me. Even the grounds made in support of the application affirms the absence of admission e.g. the burden on the Petitioners to prove that the 3rd and 5th Respondents contravened the cited sections of the *Civil Aviation Act*.

22. In conclusion, I find no merit in the application and proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH FEB., 2024

A. OMOLLO

JUDGE