



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO 12 OF 2012

ABDULLA MOHAMED ABDULLA ALI.....PLAINTIFF

VERSUS

ALI MOHAMED ABDULLA.....1ST DEFENDANT

SIMON KIRIMI IMATHIU.....2ND DEFENDANT

EVERALD NDOGO GATUTHU.....3RD DEFENDANT

RULING

1. The Notice of Motion dated 27th August 2013 seeks the following orders:-

1. Spent.

2. THAT this Honourable Court be pleased to issue an order of temporary mandatory injunction to compel the plaintiff, his agents, servants, employees or anybody else acting under names and instructions to open the building on plot No. MERU TOWN BLOCK 1 / 4 and release to the 1st defendant / applicant his properties comprised of inter alia:-

(a) Gas cooker.

(b) Cylinder.

(c) Jiko.

(d) Medicine, insulin and syringes.

(e) Personal and court documents.

(f) Cooking utensils.

(g) Water tanks.

(h) Table and 3 chairs.

(i) 3 pairs of shoes.

(j) Tuck load of vehicle spare parts. Pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to issue an order of stay of execution of the exparte judgement and Decree issued on 18/7/2013 and signed on 25/7/2013 and all subsequent orders in this case pending the hearing and determination of the application and the suit.

4. THAT the annexed draft statement of defence and counterclaim by the 1st defendant be deemed as duly filed upon the payment of the requisite court fees.

5. THAT this Honourable Court be pleased to issue such further orders as may be necessary for the ends of justice in this case.

6. THAT the costs of this application be provided for.

2. The application is based on the following grounds:-

(a) The suit was heard and judgement was entered against the defendants on 18/7/2013, where all defendants were condemned unheard as they were never served with summons to enter appearance, plaint or any other pleadings in this case.

(b) The plaintiff obtained the exparte judgement from this Honourable court fraudulently and illegally, where by the affidavit of service of the summons to enter appearance and plaint is false and the same was filed without the consent of the court process server.

(c) The plaintiff deliberately failed to disclose to this Honourable Court that the dispute over suit premises to wit MERU TOWN BLOCK 1 / 4 I the subject of the proceedings in Nairobi High Court Succession Cause No. 408 of 1982 and Meru CM'S Criminal Case No. 788/11 and the tenancy of the said plot is seriously contested by the family members.

(d) The 1st defendant / applicant is sickly and suffers from diabetes.

(e) The 1st defendant/applicant personal properties, documents and drugs have been locked in the building on Plot No. MERU TOWN BLOCK 1 / 4 where he has been operating business for a considerable long time.

(f) The suit plot belongs to the estate of MOHAMED ABDULLA ALI.

(g) No notice of Intention to Sue was ever served upon the defendants for reasons well known to the plaintiff.

(h) The 1st defendant / applicant will suffer irreparable loss and damage if he is evicted from the suit premises.

(i) The 1st defendant has been treated with cruelty and inhumanly.

(j) It is only just and fair that the orders sought herein be granted in the interest of justice and fairness and to avoid the abuse of court process.

3. There is a lengthy affidavit filed by the applicant who is the 1st defendant where he is basically reiterating what is stated in the application.

4. The response by plaintiff / respondent is captured in an equally very lengthy affidavit. He states that he is the lawfully registered owner of the suit land.

i) That he knows the process server – Stanley Mworira who operates from the applicant's Advocates' offices and even shares the same postal address with the Advocates for Applicant and which depicts that indeed the said process server is not a person above reproach and or that he is

otherwise out to unjustly and illegally shield and protect the applicant with a view to defeating justice in this matter. Annexure “AM2a &b” are documents reflecting the process server’s physical and postal address and that of the applicant’s Advocates as one and the same.

ii) That on 28th February 2012, Respondent accompanied the said process server – Stanley Mworira to Riverland – Meru town where the Respondent pointed out the 1st defendant and hence the process server was able to effect service of the court summons.

iii) That Respondent paid Kshs. 4,000/= to the process server – Stanley Mworira where after he swore an affidavit of service on 7/3/2012.

iv) That even as of the date of the said service Mr. Mworira was well known to the Respondent as he had interacted with him before at a personal level.

v) That to clear the air and to erase any doubts, the Respondent decided to request the Government Documents Examiner through his Advocate’s letter dated 9th April, 2014 to examine and generate a report on both the signature and stamp impressions appearing on the disputed affidavits of service by Stanley Mworira. Report thereof is an annexure.

vi) That in view of the findings of the Government Documents’ Examiner, the process server Stanley Mworira can only be a liar as relates to annexure “AMA2” and that the contents thereof are falsehood.

vii) That following the Government Documents’ Examiner’s above report, Respondent made a complaint to the police at Meru Police Station against the said process server – Stanley Mworira via OB NO. 52/30/4/2014.

viii) Respondent states that he is ready to have the Government’s Documents’ Examiner summoned to court to shed light on the signatures and stamp impressions of the process server- Stanley Mworira.

ix) That Respondent indeed does not keep the said process server’s official stamp and he should be called upon to explain how his stamp got its way onto the affidavit of service if indeed he insist on having not signed and or executed the disputed affidavit of service.

5. Respondent further states that he had served a Hearing Notice upon the defendant through another process server called Mutai and this is something the applicant has not denied.

6. In essence, the Respondent’s averments are that the process server, Stanley Mworira was compromised to swear a false affidavit.

7. The other aspect of the respondent’s averment is that the decree has already been executed and cannot be reversed.

8. Way back on 15.5.14, directions were given for the application to be dealt with by way of written submissions. Submissions were filed but this was done after a very long period.

9. I have considered all the averments raised herein and the cited cases. I find that there are 3 issues for determination.

1. Whether service of summons to enter appearance were served upon the 1st defendant/applicant.

2. Whether the defence raises a triable issues.

3. Whether the orders sought for can be granted.

Service of summons to enter appearance

10. It is the applicant's submissions that they were not served with the summons to enter appearance and that the court has been urged to see the affidavit of Stanley Mworira, the alleged process server dated 27.8.2013 where he denied having ever effected service.

11. I have keenly analysed this issue. In particular, the court has seen that the respondent has given minute details of who Stanley Mworira is. The respondent has gone to the extent of reporting the matter to the forensic document examiner and to the police. It is the applicant who is alleging that he was never served with summons to enter appearance. As such, it was incumbent, upon the applicant to file a further affidavit to counter what has been raised in the respondent's affidavit. Better still, applicant could have requested to have the process server summoned for cross-examination on his two affidavits.

12. I am inclined to believe that service of summons had been effected and hence the application fails on this point.

Does the defence raise triable issues?

13. Applicant has annexed a draft defence where he states that the respondent is not the sole registered owner of the suit property. He states that the land belongs to the respondent and the applicant's father (who died in 1982). Applicant avers that the plaintiff obtained the registration of the suit property into his name illegally and fraudulently and he therefore has no good title. He further states that the land is part of the estate of their deceased father and is a subject matter in Nairobi High Court Succession Cause No. 408 of 1982.

14. Respondent on the other hand avers that he is the lawfully registered owner of the suit land and this fact has not been challenged.

15. I find that the certificate of lease annexed to the respondent's affidavit as annexure AM1 shows that respondent is the registered owner of the suit land vide the certificate of lease issued on 9.9.1983. The applicant on the other hand doesn't have any documents of ownership of the suit land.

16. If indeed applicant's claim is that the Respondent had obtained registration of the suit land into his name by fraud, then he ought to have prayed for cancellation of the said lease in his draft statement of defence. There is however no such a prayer in the draft defence.

17. Further, I find that the quoted Succession Case No. 408 of 1982, is a very old matter. Applicant ought to have updated the court as current status of the case. For instance, whether the case has been concluded or not?. In absence of further particulars regarding this Succession Cause, then I find that its existence has no bearing on the present case. As for the criminal case, the applicant has not stated the relevance of the case in these proceedings.

I am of the view that 1st defendant's defence doesn't raise triable issues hence the cited cases do not favour him.

Can the court grant the orders sought for?

18. I find that the main prayer in the plaint was an order of eviction and a prayer for permanent injunction restraining defendants from entering and remaining on the suit land. The decree was issued way back on 26.7.13 (which is more than 4 years ago). Even by the time the respondent was swearing his affidavit on 5.5.15, the decree had apparently been executed. This contention has not in any way been rebutted. It is therefore an exercise in futility to grant a stay of execution where execution has already occurred.

19. With regard to the items mentioned in clause 3 of the application, the court cannot make an order of specific performance for return of the goods as these issues were not raised during trial.

20. The upshot of my findings are that the application is unmerited. The same is dismissed with costs to the 1st Respondent.

DELIVERED, DATED AND SIGNED AT MERU THIS 24TH DAY OF OCTOBER, 2017

IN THE PRESENCE OF:-

C:A Janet

Miss Mammu H/B for Ndubi for Plaintiff present

Kithinji H/B for Kiogora Arithi for Defendant present

Hon. L.N. MBUGUA

ELC JUDGE