



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 189 OF 2014

MUNID OKEMBA LORE.....PLAINTIFF

=VERSUS=

LUCY WANGUI GACHARA.....DEFENDANT

R U L I N G

1. This matter came up for the hearing of the main suit on 11th May, 2016.
2. However, the Defendant's counsel submitted that he was not ready to proceed with the trial because, firstly, parties had not appeared before the case manager for pre-trial directions as contemplated by Order 11 of the Civil Procedure Rules and secondly, that this court should recuse itself from hearing the matter. This Ruling is in respect to those two issues.
3. The Defendant's counsel submitted that he had just been served with the Plaintiff's list of documents that morning and was not therefore ready to proceed with the trial.
4. According to the Defendant's advocate, the matter was not ready for hearing because no pre-trial directions had been conducted by the parties.
5. The Defendant's counsel submitted that this court delivered a Ruling in this matter on 28th November, 2014 in which it made final orders; that the court determined the issues in the suit at interlocutory stage and that having held that the Defendant has no Defence at all, justice will not be seen to have been done if this court was to proceed to hear the matter.
6. The Defendant's counsel submitted that the Court of Appeal having set aside the Ruling of this court after observing that the court dealt with the issues at hand conclusively, the court should recuse itself from hearing the matter.
7. The Plaintiff's advocate submitted that if the Defendant's Application for the recusal of the court is upheld, then the courts will not be hearing matters where they have delivered Ruling in interlocutory Applications; that the mere fact that the court expressed an opinion in a Ruling cannot be a basis for recusal and that there is nothing to infer bias on the part of the court in the Ruling of 28th November, 2014.
8. I have perused the file and noted that indeed no pretrial directions had been undertaken before the matter was fixed for hearing.
9. Order 11 of the Civil Procedure Rules is a provision of the law which is a case management tool that needs to be complied with for the purpose of ascertaining that each and every party is aware of the opponents case.
10. Because of the lack of a case manager who is supposed to be appointed by the Chief Justice, this court has given the mandate of a case manager to the Deputy Registrar to conduct pre-trial directions, and allow for the fixing of a matter for hearing once she is satisfied that the matter is ready for hearing.

11. Having not taken pre-trial directions, I agree with the Defendant's advocate that the matter was not ready for trial, more so considering that the Defendant's advocate was only served with the Plaintiff's documents on the day the case came up for hearing.
12. On the issue of recusing myself on the ground that I had made in what the Defendant believes were final findings in my Ruling of 28th November 2014, I hold the view that that is not a good ground for a Judge to recuse himself.
13. It is trite that the work of a Judge is to express his opinion by way of a Ruling or a Judgment. The opinion expressed by a judicial officer in Ruling or a Judgment is not infallible. Indeed, that is why the right to appeal against a decision of this court is available to a party.
14. It is trite law that while hearing applications for injunction, courts are guided by the Giella case, in which the Applicant has to show that he has a prima facie case with chances of success.
15. Based on the evidence on record, the Judge is required to decide an Application for injunction.
16. It is true that in my Ruling of 28th November, 2014, I held that the Plaintiff is not entitled to take possession of the suit property at that stage "pending the hearing of the suit".
17. It is also true that in the same Ruling, I held that the matter before me was a simple and summary case in which a mandatory injunction should issue.
18. When the matter escalated to the court of Appeal, the Court of Appeal held as follows:-

“We have ultimately come to the conclusion that the learned Judge erred in granting a mandatory injunction at the interlocutory stage in the circumstances of this Appeal.”

19. The Court of Appeal went ahead and set aside the Ruling of this court.
20. It is clear that the Ruling of this Court was given on the basis of affidavit evidence, which evidence had not been tested by way of cross-examination.
21. The mere fact that the court found, at an interlocutory stage, that the case that was before it was a simple case, on the basis of the evidence which was placed before it, cannot prejudice the mind of the court when the matter comes up for trial.
22. In any case, the Court of Appeal found the court to have erred, and therefore the matter has to proceed for hearing before the court on the basis of viva voce evidence, which is distinct, from the evidence that was before the court.
23. Had the matter gone for full trial, and the court found in favour of the Plaintiff, then it would be prejudicial for the same court to hear the matter once the matter is returned by the Court of Appeal for re-trial.
24. Indeed, where that happens, the Court of Appeal always directs that such a matter should be heard by another Judge.
25. Considering that the Defendant's objection is only based on the opinion of this court that was expressed in a Ruling at an interlocutory stage, which opinion was based on affidavit evidence, this court cannot recuse itself from hearing the matter.
26. For those reasons, I direct that the matter be placed before the Deputy Registrar on a date that is convenient to the parties for pre-trial directions and thereafter a date to be fixed for hearing of the suit.

Dated, signed and delivered in Malindi this 13th day of May, 2016.

O. A. Angote

Judge