



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL SUIT NO. 30 OF 2014

SAMUEL KAMAU MACHARIA.....PLAINTIFF

VERSUS

ALI KHAN MUSES

ESTATE SONRISA LIMITED (wrongly sued as Estate of Sonrisa Limited)

REGISTRAR-KWALE (sued through the Attorney General).....DEFENDANTS

RULING

1. The 2nd defendant moved this Court under Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules and section 1 A, 3 A and 34 of the Civil Procedure Act and section 13 of the Environment and Land Court Act. In this motion, the 2nd Defendant/Applicant sought the following orders ;

1) Spent

2) Abandoned

3) Abandoned

4) That the plaintiff through its servants, agents or any other person be stopped and/or restrained from demolishing and/or continuing with the demolition of any buildings on L.R No Kwale/Galu Kinondo/45 until the conditions and terms of the judgement of this Court is complied with and or beacons between the land parcels Galu Kinondo/50 and 48 is fixed.

5) That the purported execution execution of the judgement exercised by the plaintiff and or actions taken by the plaintiff of demolishing the 2nd Defendant's structures on 25th January 2015 be declared a nullity and/or illegal.

6) Costs of the application be provided for

2. In paragraph 5 of the affidavit in support of the application, the applicant deposed that it was highly aggrieved by the said judgement and they have since lodged an appeal. The applicant deposed that it has not been served with the decree issued by the Court in terms of the judgement. In paragraph 10, the applicant deposed that the plaintiff moved into his plot and began demolition of structures on his plot without a Court Order. The remainder of the paragraphs in this affidavit

- are in support of the application for injunction.
3. The application is opposed by the plaintiff via a replying affidavit sworn by Mr Julius Orege advocate and preliminary objection both dated 2nd February 2015. In the replying affidavit the plaintiff deposes that the beacons of the two plots were already fixed and therefore the condition set in the judgement is an act in existence which the 2nd defendant all along concealed.
 4. In the objection, the plaintiff stated that this application is incompetent and a gross abuse of the Court process. He states that prayer No 5 can only be determined in a separate cause of action where oral evidence is adduced and not through an interlocutory application. Secondly that this Court is *functus officio* and that the applicant is seeking similar orders sought in the Court of Appeal in Civil Application No 51 of 2014. He urged the Court to strike out/dismiss the application.
 5. The advocates rendered oral submissions. Mr Orege submitted that what the applicant seeks is a substantive remedy which can only be made in a substantive suit as oral evidence is required from the parties. Further that the remedy sought are not founded on the pleadings on record hence the Court has no jurisdiction to grant such a remedy. Lastly that judgement gave timelines which were not met due to resistance from the applicant.
 6. Mrs Wambi advocate for the 2nd defendant/applicant submitted that the judgement did not say the 2nd defendant had encroached as the Judge left to the surveyor to fix the beacons that no such fixing was ever done and the reasons why is contained in the correspondences annexed as 1S – 5, 1S – 9 and 1S – 10 in the supplementary affidavit that the plaintiff with the aid of the police demolished the boundary wall and other structures on plot No 48. The applicant submits this execution was illegal.
 7. On the issue of whether the Court is *functus officio*, the applicant relied on section 34 of the Civil Procedure Act and the case of **Yobensa & Another vs Geoffrey Mangera Omwoyo ELC case No 13 of 2001**(unreported). Mrs Wambi submits that this Court has powers to grant the orders sought and urged the Court to allow the application.
 8. Mr Orege in reply submitted that section 34 of Civil Procedure Act supports their objection. That the matter is before the Court of appeal where the applicant has raised the issue that the order to fix the boundaries was made out of jurisdiction yet before this Court, it expects the plaintiff to comply. That if the Court grants the prayer then it amounts to a review yet there is an appeal pending. He accused the applicant of coming to Court with unclean hands. Lastly that the decree is not pending settlement as there is a decree issued by the Court after the applicant refused to approve the draft decrees sent to them. It is therefore not true to say execution was done without a decree. He urged the Court to uphold the preliminary objection and dismiss the application.
 9. Having considered the pleadings filed and the submissions rendered, I deduce there are three issues for my determination ;

i) Whether this Court can adjudicate on this matter based on the fact that there is a pending appeal or

ii) If (i) is yes, can the orders sought be granted in the manner they are presented before this Court. or

iii) If answer is yes to (ii), does the application have merit

10. It is not in dispute that the 2nd defendant/applicant filed an appeal against the judgement that was delivered. That appeal is pending hearing and determination. In the instant case, the applicant is challenging the execution process undertaken by the plaintiff. It does not question the judgement passed in any way. My answer to the first question would be yes. The issue of execution of a decree can only be questioned before a Court that issued that decree.

11. The next question is whether the orders can be granted. Mr Orege submitted the same cannot be granted for the twin reasons that this Court is *functus officio* and that the remedy is substantive thus requiring filing of a separate suit. The applicant sought an order ;

“That the purported execution of this Court's judgement exercised by the plaintiff and or actions taken by the plaintiff of demolishing the 2nd Defendant's structures on 25.1.2015 be declared a nullity and/or illegal.”

12. Can this order be granted in this suit or the applicant ought to have commenced a fresh suit? The applicant states this Court has powers under section 34 of the Civil Procedure Act to grant the orders sought. It also put reliance in the case of **Yobensia Kemunto** quoted *supra* where the environment and Land Court at Kisii questioned whether the defendant is entitled to inter remains of the deceased on the portion of land which after re-survey was found to belong to the plaintiffs fell for determination under section 34. The Judge found that it was not necessary for the plaintiff to file a fresh suit. He did not agree that the Court was *functus officio* as the decree issued by the Court was in the process of being executed.” The Judge went ahead to state that, ***“any issue arising in the process of execution can only be determined by this Court.”***

13. Similarly in the case of **James Wainaina and 6 Others vs Karanja Mbugua & Co advocates & (2012) eKLR** Omondi J struck out the suit filed on the basis that if the plaintiff wished to contest the execution process in that suit then the only open avenue was to challenge that process in the same suit not by filing a fresh suit. She stated that section 34 speaks for itself.

14. The two case law cited and the provisions of section 34 does indeed show that the execution process can only be challenged within the same suit in which the decree being executed was issued. The result of this is my finding that the prayer No 5 is properly filed and the 2nd Defendant/Applicant needed not to have filed a fresh suit to contest whether the execution process was legally taken or otherwise.

15. The last question is on the merits of the prayer. The plaintiff deposed that a draft decree was sent to the applicant's advocate for approval and when they failed to approve, a decree was issued duly signed by the deputy registrar. the Court record, there is a decree issued on 6th January 2015 and signed by the Deputy Registrar. The applicant's case is that no decree was issued as the decree was pending settlement since parties had not agreed. The proceed for obtaining decrees is given under order 21 rule 8 of the Civil Procedure Rules. The applicant did not comply with the provisions of order 21 rule 8 (4) in regard to their dissatisfaction of the draft decree.

16. In a letter dated 22nd October 2014 and annexed as 1S – 6 the plaintiffs wrote to the defendants and annexed a draft decree which they were required to approve within 5 days. The applicant was aware the plaintiff was processing a decree which was subsequently issued by the Court. The decree issued has not been set aside and if the execution process was premised on it, then I have no reason to find that execution process is a nullity or illegal.

17. The applicant has not sought an order to set aside that decree for not conforming with the terms of the judgement. On that basis, I find no merit in the orders sought in prayer 5 of the motion. The same is dismissed with costs to Plaintiff/Respondent.

Ruling dated and delivered at Mombasa this 5th day of July 2016

A. OMOLLO

JUDGE