



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 501 OF 2013

AHMED IBRAHIM SULEIMAN & ANO.....1ST PLAINTIFF

YUSUF IBRAHIM JUME 2ND PLAINTIFF

VERSUS

NOOR KHAMIS SURUR.....DEFENDANT

RULING

The Defendant by a Notice of Motion dated 16th July 2014 and expressed to be brought under sections 1A,1B, 2 3A and 63 (e) of the Civil Procedure Act, Order 1 Rule 10(2), Order 22 Rule 22 (1)(2), Order 40 rule 1, 2 and 7 of Civil Procedure Rules seeks orders that this Honourable court do set aside, rescind, vacate and/or vary the order dated 20th June 2014 pending the hearing of the application interpartes and final determination thereto.

The application is also praying for a stay of the order and an order of injunction against the plaintiffs and further seeks the joinder of **Jemia Hayat Ismail & Zainabu Khamis** as parties to the suit.

The application is based on the grounds appearing on the face of the application and the supporting affidavit by the Defendant shown to have been sworn on 24th July 2014 but is filed in court on 16th July 2014.

The Plaintiffs have equally filed a Notice of Motion dated 8th October 2014 expressed to be brought under article 40 of the Constitution, order 40 Rule 1 & 2, Order 51 of the civil Procedure Rules, Sections 1A, 1B and 3B of the Civil Procedure Act and seeks orders:-

- i. That the court do issue an order of eviction against the Defendant from land parcel **Nairobi/Block 61/69** that belongs to the plaintiffs pursuant to the court order dated 20th June 2014.
- ii. That the OCS Kilimani do supervise the said eviction to ensure peace prevails.
- iii. That a permanent injunction do issue against the Defendant to restrain him from interfering or in any way dealing with the suit property that belongs to the plaintiffs.

The plaintiffs application is supported on the grounds that appear on the face of the application and on the supporting affidavit of **Ahamed Ibrahim Suleiman** the 1st Plaintiff/Applicant.

The court on 23rd October 2014 directed that both applications be heard together and that the parties canvass both applications by way of written submissions. The Defendant filed his submissions dated 3rd September 2014 while the plaintiffs filed their submissions dated 13th November 2014 on the same date.

The Defendant's application dated 16th July 2014

The application by the Defendant was provoked by the ruling by this court of 31st October 2013 following the hearing of an application by the plaintiffs dated 25th April 2013 where inter alia the plaintiffs sought an order of eviction of the defendant from land parcel known as **Nairobi/Block 61/69** and an order of a mandatory injunction to compel the Defendant to give vacant possession to the plaintiffs of the land parcel known as **Nairobi/Block 61/69**. This application was heard inter partes. The court after reviewing the facts during the hearing of the earlier application by the plaintiffs observed as follows

“It is my considered view that the plaintiffs case herein passes the tests outlined in the above authorities referred to for the grant of a mandatory injunction. On the facts of this case the plaintiffs case is plain and clear. They are the registered owners and their title is indefeasible. The Defendant in my view cannot have an answer to the plaintiffs claim as he had no role to play in the sale and purchase of the suit property and his claim for a trust against his mother who was the vendor at best would be far fetched and it is unsubstantiated. There are special circumstances in the plaintiffs case in that the plaintiffs following the acquisition of the property have charged the property to Krep Bank Ltd and are servicing the Bank Loan. The Defendant cannot occupy the suit property yet they are servicing a loan on the property yet they are not receiving a benefit out of it. The suit property constitutes security for the loan and the Defendant is in occupation of the suit premises as a trespasser and the plaintiffs are entitled to have him evicted if he does not vacate voluntarily”.

The Defendant in the present application argues that the court ought not to have awarded what amounted to final orders as it did. The court in an appropriate case can and should grant mandatory orders even if that may mean finally really disposing of the matter. In the earlier application the court went to some length to explain in what circumstances a court would grant a mandatory injunction as it did. The court relied on the cases of Kenya **Breweries Ltd –vs- Washington Okey (2002) IEA 109, Local bail International Finance Ltd –vs- Agro-Export & Another (1986 I ALL ER 901, Shariff Abdi Hassan –vs- Nadhif Jama Adan (20060 e KLR and JAJ Super Power Cash and carry Ltd –vs- Nairobi City Council & 20 others (Civil Appeal NO. 111 of 2002)** all referred to and cited with approval in the earlier ruling of this court. On the basis of the facts and material placed before the court, I was satisfied the conditions for the grant of a mandatory injunction were met and in summing up my ruling in the said earlier application I rendered myself thus:-

“The plaintiffs case is plain and clear and in my view no purpose will be served by not determining the issue whether or not the Defendant is a trespasser in the premises at this stage rather than delaying the Defendant's day of reckoning. The delay in determining the question will only serve to delay meting justice to the plaintiffs who have in my view demonstrated they are the rightful owners of the suit premises. I will not allow the Defendant the luxury of delaying justice to the plaintiffs when it has become clear to me that the Defendant is in trespass in the plaintiff's property. The court is enjoined under the Constitution, the Civil Procedure Act and even under the Environment and Land court Act to administer justice in a just, expeditious proportionate and cost effective manner to all litigants. The justice of this matter demand that I make a determination at this stage”.

The Defendant in the present application complains the ruling and order was unjustified, detrimental, disturbing, harsh and absolutely conclusive in nature and further that it did disregard material facts pertinent to Islamic Law touching on succession and ownership of property. The Defendant does not set out what the new important and material facts which were not considered are. The earlier application as earlier stated was heard inter partes and was not ex parte and the Defendant was given a fair hearing. I see

no basis whatsoever upon which the ruling and order could be set aside. The option open to the Defendant if he was aggrieved by the decision/ruling was to appeal which he apparently did not do. There really is no basis on which I can set aside the ruling and order and in reality the Defendant is asking me to sit on appeal on my own ruling which I cannot do. Even if it was to be assumed the Defendant's application is one for review, the same would be unsustainable as there is no discovery of any new and important evidence that was not available at the time the earlier application was heard, and/or that there is any error or mistake apparent on the face of the record of the proceedings. There would be no sufficient cause to justify a review of the ruling and/or order.

The Defendant's prayer for stay of execution of the order of 24th June 2014 is equally without merit as stay would only be available pending the determination of the application in which it is sought or pending the hearing and determination of an appeal if an applicant satisfies the conditions for grant of stay pending appeal. The Defendant has not filed any appeal and would therefore not be entitled to a stay under that head.

The Defendant in the same application has applied for joinder of new parties to the suit. The test in applications for joinder is whether the party sought to be joined has an interest in suit and is a necessary party to enable the matters in issue to be finally and completely be adjudicated by the court.

The persons the Defendant seeks to be enjoined in the suit are his mother and the sister. The mother is the one who sold the suit property to the plaintiffs and the sale was, as it were, completed and the plaintiffs were registered as the owners of the suit property. I do not see in what manner the persons sought to be enjoined have an interest in the present suit. If the applicant has any claim against his mother and/or his sister such claim is separate and unrelated to the plaintiffs claim against the Defendant.

In the premises and having reviewed and considered the application by the Defendant I find no merit in the Defendant's notice of motion dated 10th July 2014 and I order the same to be dismissed with costs to the plaintiffs.

The plaintiffs application dated 8th October 2014.

Having disallowed the Defendants application seeking to set aside, vacate and/or vary the order issued was in favour of the plaintiffs on 24th June 2014 following the court's ruling of 31st October 2013 it follows there is nothing that should stand in the way to prevent the execution of the order. The court has already held and made a finding that the Defendant is a trespasser. The court made an order that the Defendant do vacate the suit premises within 30 days from the date of being served with the order and failing which an eviction order was to issue against him on application by the plaintiffs.

In the absence of any pending appeal and/or an order of stay of the order of 24th June 2014 the plaintiffs are entitled to enjoy the benefit of the order issued in their favour. The Defendant should give way to the plaintiffs who the court has held to be lawfully entitled to the suit property by reason of being the registered owners. The Defendant should vacate the suit premises as ordered.

In the premises I find the plaintiffs application dated 8th October 2014 has merit and I grant the orders prayed for in terms of prayer (ii) and (iii) of the application and I award the costs of the application to the plaintiffs.

Order accordingly.

Ruling dated, signed and delivered this...12th...day of...**March**.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiffs

..... For the Defendant