



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 597 OF 2014

NASSAR AHMED CHAUDHRY being the Executor

of the Estate of MIRAJ BEGUM (Deceased).....PLAINTIFF

VERSUS

JARED ORANGO EDMOND.....DEFENDANT

RULING

The Plaintiff's Application

This ruling is on the Plaintiff's application filed by way of a Notice of Motion dated 16th May 2014 in which he is seeking the following orders:

1. That an eviction order be issued compelling the Defendant to forthwith give vacant possession and/or move out of the parcel of land known as L.R No. 209/1944 comprised in the Certificate of Grant as I.R 105025/1.
2. That the OCS Pangani Police Station be ordered to assist the Plaintiff in obtaining possession of the suit premises.

The grounds for the application are stated in the said Notice of Motion, and in a supporting affidavit sworn on 16th May 2014 by the Plaintiff. The Plaintiff states in this regard that he is the Executor of the Estate of Miraj Begum now deceased (hereinafter referred to as "the Deceased"), who was at the material times the registered proprietor of the suit property as Lessee from the Government of Kenya. Further, that the Deceased applied for an extension of the lease that was due to expire on 31st January 2003, which extension was duly approved by the Commissioner of Lands in a letter dated 4th November 1998 and by the Nairobi City Council in their letter dated 30th September 1998. The Plaintiff annexed copies of the two letters.

The Plaintiff stated that the Deceased then sent the original Certificate of Title to the Commissioner of Lands by way of a letter dated 3rd July, 2006 to enable a fresh lease to be prepared, which title was issued on 21st February, 2007. However, that the said title was sent to an incorrect address and not that of the Deceased, and hence she never received the same. Further, that as the original title could not be traced, a gazette notice was published on 31st December, 2009 for issuance of a provisional title, which provisional Certificate of Title was issued, and a copy of the same was annexed by the Plaintiff.

The Plaintiff further stated that the Respondent filed a Notice of Motion application dated 4th March,

2011 in **Milimani CMCC No. 433 of 2011 - Jared Orango Edmond vs Mohammed Ibrahim**, seeking inter alia eviction orders against the Plaintiff in respect of suit property. Further, that the said Notice of Motion was heard ex-parte on 17th March, 2011 and a final order was issued on the same date by the Principal Magistrate hearing the said case. Copies of the Notice of Motion and pleadings filed thereto, and of the said order were annexed. The Plaintiff also stated that the said eviction orders were effected on 21st March 2011, and the Defendant took possession of the suit premises.

The Plaintiff being aggrieved by the decision of the Principal Magistrate subsequently instituted judicial review proceedings in **Nairobi Judicial Review Application No. 31 of 2011**, and that judgment was delivered by Gacheche J. on 29th June 2011, who granted an order of certiorari quashing the orders made by Principal Magistrate on 17/03/2011 in **Milimani CMCC No. 433 of 2011**, and an order of prohibition prohibiting the Principal Magistrate from making any further orders in the said case. The Plaintiff averred that the Defendant thereupon filed a Notice of Appeal on 1st July, 2011, and has to date taken no steps to prosecute the appeal and neither are there orders of stay pending appeal issued in his favour. However, that the Defendant is still in occupation of the suit property and has blatantly refused to vacate the suit premises. The Plaintiff annexed copies of the pleadings filed in the judicial review application, the judgment and the Notice of Appeal.

The Defendants' Response

The Defendant filed a replying affidavit sworn on 4th June 2014, wherein he stated that the Plaintiff is by law precluded from bringing the present action or filing a fresh suit asking for a determination of issues which were substantially and directly in issue in a previous action. Further, that the prayers sought are premature and cannot issue at this stage, unless and until the court has heard the parties on their respective claims to the suit property and made a determination as to the rightful ownership of the suit property.

The Defendant averred that the application herein is predicated upon an order issued in **Nairobi High Court Misc. Application 31 of 2011**, which order is presently the subject of an appeal which is yet to be heard and determined, and that any reliefs sought on the basis of that order are premature. Further, that it is also misleading for the Plaintiff to impute that the ruling in **Nairobi High Court Misc. Application No. 31** of 29th June 2011 gave him entitlement to the suit property while the said ruling made no such order.

The Defendant claimed to be the legal and registered owner/proprietor of the suit property having been registered as owner on 19th July 2005, and he annexed a copy of the grant issued to him. He stated that at no point has any finding been made by the court, the National Land Commission or the Registrar of Titles challenging his title to the said property. Further, that the Plaintiff does not appear to have any valid title to the suit property and is the one who has been trespassing on his property, which is what made the Defendant file the proceedings in **Nairobi Chief Magistrate Court Civil Case No. 433 of 2011**.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's Advocate, Archer & Wilcock Advocates, filed submissions dated 25th June 2014, while the Defendant's Advocates, Ongegu & Associates Advocates filed submissions dated 11th July 2014. I have read and carefully considered the pleadings, annexed evidence and submissions made by the parties herein. The issue to be determined is whether the Plaintiff has met the threshold for the mandatory injunction of eviction he seeks to issue.

I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109**, that for a mandatory injunction to issue, there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once. The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in

Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215 as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Plaintiff submitted in this regard that his application is properly before the court and is not an abuse of the court process or in breach of sections 6 and 7 of the Civil Procedure Act. He argued that the orders of the Principal Magistrate in **Milimani CMCC No. 433 of 2011 -Jared Orango Edmond vs Mohammed Ibrahim**, having been quashed, there was no determination of the dispute herein with finality, and that possession of the suit property thereby reverted to the Plaintiff. Further, that the Defendant having taken no steps to prosecute its appeal for over two years, cannot ask this court to continue denying the Plaintiff access to and enjoyment of the suit property.

The Defendant on the other hand submitted that the lower court’s decision restored the rightful ownership of the suit property to the Defendant, and that the parties ought to establish, and the court to conclusively determine the issue of ownership at the hearing of this suit. Therefore, that the draconian orders sought by the Plaintiff cannot be granted at this juncture.

I note that the Plaintiff in the Plaintiff filed herein dated 16th May 2014 is seeking prayers of eviction of the Defendant from the suit property, and orders for special damages and mesne profits. The Plaintiff has brought evidence that the suit property was registered in his deceased mother as lessee from 1965, and of the processes of renewal of the lease. He also brought evidence of a provisional title issued to him after renewal of the lease. To this extent I find that he has established a *prima facie* case.

As regard whether this is thus a clear case for a mandatory injunction of eviction to issue, this Court notes that the Defendant has also produced a title to the suit property. However, this Court also notes that the Defendant’s possession of the suit property arose from a court orders given in **Milimani CMCC No. 433 of 2011 -Jared Orango Edmond vs Mohammed Ibrahim**, on 17th March 2011 which *inter alia* declared the Plaintiff occupation of the suit property unlawful and a trespass, and ordered that he be evicted from the suit property.

These orders of the lower court have since been quashed by the judgment of Gacheche J. in **Nairobi Judicial Review Application No. 31 of 2011 – R vs The Principal Magistrate, Chief Magistrate’s Court Milimani Commercial Court Nairobi ex parte Meraj Begum W/O Mohamed Ibrahim s/o Ghulam Ghouse** delivered on 30th September 2011. I might therefore point out at this stage that the issue of whether the Plaintiff’s suit and application are *sub judice* or *res judicata* cannot arise as the orders of the lower court given in **Milimani CMCC No. 433 of 2011 -Jared Orango Edmond vs Mohammed Ibrahim**, are legally not in existence and the said court was prohibited from continuing with any further hearings in that suit.

It is therefore my finding that as a result of the quashing and prohibition orders given by Gacheche J. the status of the suit property with regards to its possession can only revert to the position obtaining before the orders of the Principal Magistrate in the lower court were given, which is that it was the Plaintiff who was in possession. In addition the outstanding issue of who is the legal owner of the suit property can still be canvassed during the full hearing of this suit.

As regard the argument put forward by the Defendant that there is an appeal from the judgment of Gacheche J. pending in the Court of Appeal, this court notes that a Notice of Appeal is evidence of an appeal being filed only for purposes of stay of execution proceedings brought under Order 42 Rule 6(4) of the Civil Procedure Act. In all other civil appeals from the High Court to the Court of Appeal, it is provided in Rule 82 of the Court of Appeal Rules of 2010 that an appeal shall be instituted by lodging the memorandum of appeal and record of appeal in the appropriate registry, within sixty days of the date when the notice of appeal was lodged.

The Defendant has not brought any evidence of a memorandum of appeal that has been registered in the Court of Appeal. This Court therefore finds that there is no evidence of a pending appeal in the Court of Appeal from the decision of Gacheche J. in **Nairobi Judicial Review Application No. 31 of 2011 – R vs The Principal Magistrate, Chief Magistrate’s Court Milimani Commercial Court Nairobi ex parte Meraj Begum W/O Mohamed Ibrahim s/o Ghulam Gause.**

I am therefore of the view that special circumstances exist in this application to warrant the grant of the mandatory injunction sought of eviction. This finding notwithstanding, I appreciate the fact that the Defendant have been in possession of the suit property, and may therefore require adequate notice and time to remove their property therefrom.

The Plaintiff’s Notice of Motion dated 16th May 2014 is accordingly allowed and it is hereby ordered as follows:

1. That the Defendant, by himself, his agents, legal representative and/or any other persons claiming under him shall within thirty (30) days of service by the Plaintiff of the orders granted herein give vacant possession and/or move out of the parcel of land known as L.R No. 209/1944. Eviction orders shall issue upon default.
2. The Plaintiff shall serve the Defendants with the orders herein within fourteen (14) days of the date of this ruling.
3. The Officer Commanding Station (OCS), Pangani Police Station shall supervise and ensure compliance with, and enforcement of the orders given herein.
4. The costs of the Plaintiff’s Notice of Motion dated 16th May 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE