Marc v Nduta (Environment & Land Case E076 of 2021)
[2024] KEELC 3783 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3783 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND CASE E076 OF 2021

AE DENA, J

APRIL 26, 2024

BETWEEN

KAREL BRUNEL MARC ..... PLAINTIFF

AND

JOAN MUTHONI NDUTA ..... DEFENDANT

RULING

1. The brief facts of this suit according to the Plaintiff are that he is the bonafide owner of property known as Kwale/Diani Complex/695 (hereinafter referred to as the suit property) having purchased the same sometime on 17/5/2014. The property is however registered to the Defendant which, according to the Plaintiff, is as a result of the Defendants misrepresentation of facts to the Plaintiff that he could not own land in Kenya being a foreigner.

2. The Plaintiff further alleged that he single handedly developed the property by constructing three apartment blocks with three floors and three units. The first apartment block was sold in 2015 and the funds sent to the Defendant's account. On account of an agreement dated 9/2/2018, the Plaintiff alleges that it was agreed he was the sole owner of the suit property with the developments thereon to the exclusion of the Defendant despite the same being registered in her names.

3. The Plaintiff stated that to his dismay the Defendant has breached the terms of the agreement and claims ownership of the property and forcefully gaining entry to the same as from May 2018. These facts inform the suit before court and the prayer by the Plaintiff to be declared the bonafide owner of the suit property together with a permanent injunction against the Defendant. The Plaintiff further seeks vacant possession and execution of transfer documents of the suit property to his name.

4. The suit is contested. The Defendant filed a defence dated 15/8/2018 stating that she purchased and developed the suit property despite the Plaintiff contributing to the same. That he was however paid/refunded for the amount he had contributed and has no claim to the suit property.

5. What is before court for now however is not a determination of ownership of the suit property but an application filed by the Plaintiff/Applicant. The same has been filed pursuant to the provisions of order 51 of the *Civil Procedure Rules*, section 3A of the *Civil Procedure Act*, section 13 of the *Environment and Land Court Act* and all other enabling provisions of the law. The Applicant seeks for the following orders;

    1. Spent

    1. Spent

    3. That pending hearing and determination of this suit, the tourist police, Officer Commanding Diani Police Station or an officer under his/her command do ensure compliance with the orders of the court issued on 28/1/2020 barring the defendant from selling, advertising, renting or in any way dealing with the property known as Kwale/Diani Complex/695.

    4. That such further and other relief be granted to the Applicant as this court deems fit.

6. The application is set upon the grounds on its face and which state that the court sitting in Mombasa on 28/1/2020 issued orders;

    a. That the Defendant shall not advertise, rent or sale the property known as Kwale/Diani Complex/695.

    b. That the Plaintiff be at liberty to visit the property once every month for purposes of inspection by himself, his lawyer or a representative agreed upon after giving 14 days' notice to the Defendant's lawyer.

7. It is alleged that the Defendant is in violation of the above orders and is renting out the suit property for air bnb business contrary to the orders of the court. The application is further supported by an affidavit sworn by the applicant Karel Bruneel Marc. He reiterates the history over the suit property as stated above herein and states that the orders issued have been disregarded by the Defendant. That the continued use of the suit property has led to the deterioration of the same and hence necessitating this suit.

8. According to the Applicant this suit has been placed in abeyance pending the hearing and determination of Mombasa Civil Appeal No 8 of 2020 and which is pending at the Court of Appeal. That in order to prevent the further deterioration, it is necessary for the orders sought to be granted.

9. In response to the application, the Respondent filed a replying affidavit on 12/7/2023. The same outlined the following;

    1. That the application by the Plaintiff is entirely baseless. The same is vexatious incompetent and an abuse of the process of the court.

    2. That the allegations that the Defendant is currently renting the property and using the apartment on the property for air bnb business is baseless and not true.

10. On 3/7/2023, this court directed the application be dispensed by way of written submissions. The Plaintiff/Applicant's submissions were placed on record on 17/10/2023. It is urged that since the Defendant has denied that she is renting the property, she should not have a problem with the orders sought in the application. That court orders have to be respected in order to maintain the dignity of the court. Further that the court has a duty to ensure that its orders are complied. Reliance was placed on the case of *Burchell v Burchell*, and *Trusted Society of Human Rights Alliance v, Cabinet Secretary for Devolution and Planning & 3 others* (2017) eKLR.

11. The Defendant's submissions were filed before court on 9/11/2023. The Defendant's main contention is that there is no evidence of breach of the said orders. That the order sought are not anchored in the *Civil Procedure Act* and *Rules*. The court is referred to the dictum of Kwach J.A in *Kamau Mucuha v Ripples Limited* (1993) eKLR.

Determination

12. The main issue for determination is whether the orders sought should issue.

13. The application has been brought under section 3A of the *Civil Procedure Act* and section 13 of the *Environment and Land Court Act*. The former provisions embody the inherent jurisdiction of the court. Section 13 outlines the jurisdiction of the ELC court and the nature of reliefs it can grant. Section 13(7) of the *Environment and Land Court Act* 2011 provides that in exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

    (a) interim or permanent preservation orders including injunctions; (b) prerogative orders;

    (c) award of damages;

    (d) compensation;

    (e) specific performance;

    (g) restitution;

    (h) declaration; or

    (i) cost.

14. The court has been tasked with ensuring enforcement of the orders earlier issued by the court in Mombasa on 28/1/2020 before the file was transferred to Kwale. I took time to review the proceedings. I noted that on 11/11/2019 the matter was fixed for the hearing of the Plaintiff's application dated 17/10/2019. Mr. Omolo counsel for the Defendant was unwell and Mr. Adoli counsel for the Plaintiff suggested the same be dispensed by way of written submissions. The court obliged and fixed the same for interpartes hearing on 28/1/2020. On the said date both counsels attended. Justice S. Munyao invited counsels to negotiate and the following orders were recorded pursuant thereto.

    a. That the application dated 17/12/2019 be withdrawn with no orders as to costs.

    b. That the Plaintiff or his Counsel or any representative agreeable to the Defendant be allowed to visit the premises not more than once every month upon giving 14 days mention to the Defendant's Counsel.

    c. Mention 11/6/2020.

15. Based on the above the orders barring the Defendant from advertising, rent or sale of the property known as Kwale/Diani Complex/695 were not orders made under the above proceedings. From my perusal of the proceedings the said orders were issued on 5/12/2018 by A. Omollo J. Under order No.1 therein pending the hearing and determination of the suit herein granted a temporary injunction restraining the Defendant and or her agents from advertising, selling, renting, selling, alienating, transferring or in any way dealing with the suit property. It is therefore not correct to state that the orders of injunction were issued on 28/01/2020.

16. There is nothing therefore to be enforced under the orders issued on 28/1/20 except the inspection of the suit premises by the Defendant upon notice. This is not an issue raised in the current application except that I see an attempt to extend the involvement of the Tourist Police in the enforcement of the orders for injunction which was only invoked for purposes of ensuring the Defendant's safety during the inspection.

17. The court has been moved under the provisions of section 13 of the *ELC Act* which I have already highlighted above. While the Court has powers to grant orders of injunction and whose objectives are to preserve the suit property from wastage, it is noteworthy that orders of injunction were already issued on 5/12/2018 pending the hearing and determination of this suit. In any case the rest of the reliefs listed under section 13 of the *ELC Act* can only be given in the finality and not at interlocutory stage. The inherent jurisdiction of the court is being invoked as well, however the court has not been seized of evidence. The application does not bear any evidence indicating the current happenings on the suit property and the said deterioration has not been shown.

18. Let me add that I see the instant application as an attempt to revive the application for contempt. I say so because the depositions made by the Plaintiff in the affidavit in support of the application for contempt including the grounds echo the depositions in the present application. A look at the authorities cited by Counsel for the Plaintiff in his submissions in support of the present application are basically in support of an application for citing on contempt of court where it is emphasised court orders must be complied with it. But even if this were so the court cannot move in the absence of evidence as already highlighted above.

19. The upshot of the above is that I find no merit in the application dated and I proceed to dismiss it. Costs shall be in the cause.

    Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 26TH DAY OF APRIL 2024.

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A.E DENA

JUDGE

Mr. Adoli for the Plaintiff/Applicant.

Mr. Omollo for the Defendant/Respondent

Mr. Daniel Disii – Court Assistant