



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO 111 OF 1973

JOHANA OSURA ONYIEGO.....PLAINTIFF

VERSUS

ALBERT WOGA.....1ST DEFENDANT

NELSON NYANDAT.....2ND DEFENDANT

RULING

1. In their Notice of Motion dated and filed on 28th June 2021, the 1st and 2nd Defendants sought for an order that the court quash the Notice to Show Cause dated 24th May 2021 that was scheduled for hearing on 12th July 2021.
2. The said application was supported by the Affidavit of Elkanah Nyariro Woga, the Administrator of the Estate of the Late Albert Woga, the 1st Defendant herein on his own behalf and on behalf of the 2nd Defendant's family which comprised of over one hundred (100) members. The same was sworn on 24th June 2021.
3. The deponent averred that the Plaintiff's father filed the suit herein against their father, Albert Woga and Nelson Nyadat (both deceased). He pointed out that on 10th September 1986, judgment was entered in favour of the deceased Plaintiff herein against the 1st and 2nd Defendants wherein the court gave the deceased Plaintiff East Gem/Nyandiwa/574 (hereinafter referred to as "the subject land"). He stated that no eviction had been carried out in the last forty five (45) years and that the Plaintiff wanted to rely on a forty five (45) years old decree to evict them from the land which they have occupied for over two hundred (200) years.
4. He invoked Article 50(1) of the Constitution of Kenya, 2010 and pointed out that it was unconstitutional to rely on an expired decree and judgment. He added that they challenged the implementation of that judgment in **Constitutional Petition No 20 of 2018** and the same was determined by Cherere J on 6th December 2018. He stated that they further appealed in **CA No 80 of 2018** and also filed an application for conservatory order in **Civil Application No 3 of 2019** where the Court of Appeal granted the said conservatory orders pending the hearing of the appeal and that the Plaintiff had always been aware of the stay and the appeal as there had been constant written communication.
5. He was categorical that despite the appeal pending and the conservatory orders still in place, the Plaintiff instituted a Notice to Show Cause to evict the Defendants, which amounted to abuse of the court process. He further stated that the delay in hearing of the Appeal herein was caused by the inadequate number of judges in the Court of Appeal.
6. He asserted that if the High Court judgment was executed, they stood to suffer irreparably as they would be evicted without justifiable cause, they would not be able to recover from the losses and that their Appeal would be rendered nugatory. He thus urged this court to allow the present application.
7. In opposition to the Defendants' Application, the Plaintiff filed a Replying Affidavit sworn on 24th September 2021 by his Advocate Gerald Omori Kimanga.
8. He averred that it was over forty five (45) years since judgment was issued but the Defendants had failed to vacate subject land and failed to honor the Decree requiring them to move back to their own land East Nyandiwa/310. He asserted that the Defendants had continued to file all manner of suits, appeals, petitions, applications, reviews and in names of persons who were long deceased and thus incurring losses. He was emphatic that the Defendant's Advocate ought to be condemned to pay the attendant costs personally.
9. He stated that although the Defendants were seeking a stay of execution, they were the ones digging the suit land belonging to the Decree Holders and thus urged this court not to allow the application in the interests of justice.

10. In response to the Plaintiff's Replying Affidavit, Elkanah Nyariro Woga filed a Further Affidavit on 8th October 2021. He reiterated that the subject land was their ancestral land which they had lived on for over two hundred (200) years.

11. He explained that the Appeal had not proceeded because one of the judges who was hearing the case passed away but they were hopeful that the same would now be fast tracked as the bench that was hearing the Appeal was reconstituted.

12. He stated that the Plaintiff's family had been living in Nyaminia where they were given a parcel of land by one of their neighbors called Adhuyo in 1964 where they constructed their home. He added that the subject land was bear (**sic**) and had never been cultivated and that the annexure-photos attached by the Plaintiff only showed mere grass.

13. He emphasised that the matter was still pending at the Court of Appeal and opined that there would be no need to destabilise the status quo.

14. The Defendant's Written Submissions were dated 28th October 2021 and filed on even date while those of the Plaintiff were dated 11th November 2021 and filed on 12th November 2021.

15. The Ruling herein is therefore based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

16. The Defendants submitted that the Plaintiff instituted a Notice To Show Cause (NTSC) despite knowing that there was a stay order at the Court of Appeal. It termed this as bad faith and an abuse of the court process. They urged this court to expunge the said NTSC as it was against the common principle of *stare decisis* which respects the hierarchy of the courts and consequently, the High Court could not purport to sit on appeal of the Ruling of the High Court.

17. In arguing that disputes should be heard on their own merit and that the process that has been resorted to must be fair, the Defendants relied on the cases of **Essanji & Another vs Solanki [1968] EA at 224** and **Graham Rioba Sagwe & 2 Others vs Fina Bank Limited & 5 Others [2017] eKLR** respectively.

18. They placed reliance on Section 60 of the Evidence Act that mandates courts to take judicial notice of all general matters or local notoriety that the Court of Appeal Kisumu had not been properly constituted and hence they could not therefore be blamed for failure to fix the Appeal for hearing.

19. On its part, the Plaintiff submitted that the Defendants had been driven by ill motive and malicious intentions to keep the suit over the subject property pending in court for eternity in order to deny him the fruits of his judgment. He argued that the Defendants lodged the said Appeal at the Court of Appeal in the year 2019 and never set the same down for hearing. He was categorical that it was high time that the court stamped its authority.

20. They pointed out that the Defendants could not be heard to use the courts for their protection when they failed to heed orders emanating from the same courts to wit the decree that was issued more than forty five (45) years ago.

21. There was no dispute that there was a pending appeal in the Court of Appeal **No 80 of 2019** and conservatory orders were issued in **Application No 3 of 2019** at the Court of Appeal at Kisumu on 30th October 2019. The same read as follows:

“The hearing of this application is dispensed with on the following terms:-

(1) Civil Appeal No 80 of 2019 shall be fast tracked for hearing by the Registry.

(2) Status quo currently obtaining with regard to East Gem/Nyadhiwa/574 shall be maintained until the hearing and determination of the aforesaid appeal. (emphasis court).

(3) Costs of this application to abide the outcome of the appeal.”

22. It is trite law that a lower court should follow the decisions of a court higher than it within the vertical application for the reason that it is bound by the decisions of a court superior to it. It is desired for the sake of certainty and consistency that courts do not deviate from decisions and/or orders of the courts that rank higher than them as the decisions from such courts are binding on them.

23. Indeed, the case of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh & 4 Others [2013] eKLR**, the Supreme Court asserted that the rule of precedent promotes predictability, diminishes arbitrariness, and enhances fairness, by treating all cases alike, the doctrine of *stare decisis* holds that decisions of a higher court, unless distinguished or overruled, bear the quality of law, and bind all lower courts in similar or like cases.

24. Further, in espousing on the importance of the principle of *stare decisis*, Njoki Ndungu, SCJ in her concurring opinion in **Evans Odhiambo Kidero & 4 Others vs Ferdinand Ndugu Waititu & 4 Others [2014] eKLR** remarked that **“the principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system.”**

25. Suffice it to state that in view of the fact that there were orders of *status quo* in respect of the subject property from the Court of Appeal,

this court could not take any further step as far as enforcing the decree that was issued more than forty five (45) years ago. The Plaintiff could not purport to obtain a NTSC to arm twist the Defendants to fix their Appeal at the Court of Appeal in Kisumu for hearing. If the Defendants had disobeyed the court orders, the Plaintiff was required to raise the same in the proper forum.

26. Having said so, this court noted the NTSC was being prosecuted in the name of the deceased Plaintiff against deceased Defendants. It was not clear to this court if the deceased persons had been substituted as the pleadings were still instituted and prosecuted in their names. As this was not an issue that was currently before this court, it did not wish to say more on this.

DISPOSITION

27. The upshot of this court's decision was that the Defendants' Notice of Motion application dated and filed on 28th June 2021 was merited and the same be and is hereby allowed in terms of Prayer (3) therein. Costs of this application will be in the cause.

28. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF MARCH 2022

J. KAMAU

JUDGE