



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1111 OF 2016

(FORMERLY HCC NO. 326 OF 1990)

NYAMAIYERA OMAIKO.....PLAINTIFF

VERSUS

JULIUS ONSARE OMBUI.....1ST DEFENDANT

PETER MOMANYI OMBUI.....2ND DEFENDANT

SAMWEL MAKORI OMBUI.....3RD DEFENDANT

OMBIRO OMBUI4TH DEFENDANT

RULING

1. I have before me two applications which I directed to be canvassed together by way of written submissions. Firstly, there is the notice of motion by the defendants dated 18th July 2013 brought under certificate of urgency. The application sought the following orders inter alia:-

- 1. That pending the hearing and determination of the application, the court do issue an order of stay of execution of the court's judgment dated 14th February 1997.**
- 2. That pending the hearing and determination of Kisii HCCC No. 203 of 2011 (OS) the court be pleased to issue an order of stay of execution of the court's judgment dated 14th February 1997.**
- 3. That the court be pleased to issue an order preserving the suit property LR No. Bassi/Masige/634 pending the hearing and determination of Kisii HCCC No. 203 of 2011 (OS).**
- 4. That the court be pleased to order that execution of the court's judgment dated 14th February 1997 without notice to show cause is irregular, null and void and any execution commenced thereof be nullified.**

The application is supported on the grounds set out on the body of the application and the affidavit sworn in support of the application by Julius Onsare Ombui, the 1st defendant/applicant dated 18th July 2013.

2. The second application dated 9th December 2014 was filed by the plaintiff in person on 11th December 2014 also under a certificate of urgency and sought the following orders:-

- (i) That the plaintiff be granted leave to act in person.**
- (ii) That the court do compel the defendants to show cause why they should not vacate the plaintiff's land parcel Bassi/Masige/ 5071.**
- (iii) That in the alternative the court do give the defendants 2 weeks to vacate the plaintiff's land parcel or any other period that the court may direct.**

The application is supported on the grounds set out on the face of the application and on the affidavit sworn in support by Nyamaiyeria Omaiko the plaintiff herein dated 9th December 2014.

3. The 1st application by the defendants came before Okongo, J. on 25th July 2013 when he granted the interim order of stay. The 2nd application dated 9th December 2014 by the plaintiff was filed before the defendants' application had been heard inter partes. On 18th May 2017 I directed that two applications be heard together and the parties argue the same by way of written submissions. The defendants filed their submissions in regard to the applications dated 18th July 2013 and 9th December 2014 on 28th July 2017 while the plaintiff filed submissions in respect of the two applications on 13th February 2018.

4. The brief background to this matter is that the plaintiff vide a plaint dated 6th November 1990 filed the instant suit seeking an order of eviction against the defendants jointly and severally from land parcel **LR No. Bassi/Masige/634** which he claimed to have purchased from the 1st defendant and which had duly been transferred to him. He claimed the defendants had thereafter invaded the land and had the plaintiff and his family evicted from therefrom. That precipitated the suit by the plaintiff against the defendants.

5. The defendants in a joint defence dated 11th December 1990 averred that the plaintiff had fraudulently obtained the transfer of the whole of land parcel **LR No. Bassi/Masige/634** when only a portion of 2 acres of the land had been sold to him by the 3rd defendant. The defendant assertion was that the plaintiff used trickery to misrepresent to the land control board that he had purchased the entire 8 acres. The defendants by way of counterclaim sought an order that the plaintiff re-transfers 6 acres of the land to the defendants.

6. On 22nd September 1993 by consent of the parties the dispute was referred to arbitration under the chairmanship of the D.O Nyamache Division. The dispute was arbitrated and an award made that the plaintiff be awarded four (4) acres and the defendants also be jointly awarded four (4) acres of the land parcel. On 14th February 1995 Mbaluto, J. entered judgment in terms of the award. A decree was issued on the 26th February 1997.

7. The court record shows that the plaintiff on 16th August 2013 filed a Notice of Motion application dated 4th July 2013 through the firm of Josiah Abobo & Co. Advocates where the said firm sought to be granted leave to come on record for the plaintiff in place of Nyairo Orora & Co. Advocates who hitherto had represented him. This application further sought the same orders the plaintiff seeks in his application dated 9th December 2014. In HCCC No. 203 of 2011 (OS) now ELCC No. 514 of 2016 the plaintiff who were the defendants in the instant suit are claiming to have become entitled to land parcel **Bassi/Masige/634** by reason of being in adverse possession. This is the same land that was the subject matter in the present suit and in respect of which judgment was entered and a decree issued requiring the land to be equally shared between the plaintiff and the defendant. The defendant's Notice of Motion dated 18th July 2013 seeks to have the execution of the judgment and decree issued in HCCC No. 326 of 1990 stayed pending the hearing and determination of HCCC No. 203 of 2011 (OS) now ELC No. 514 of 2016.

8. I have considered the application by the defendants dated 18th July 2013 and the plaintiff's application dated 9th December 2014 and the court record and it is clear to me that both the applications are unmerited. As per the record, it is apparent that the judgment of the court in this matter was implemented and/or executed. There is on record a title deed for land parcel **LR No. Bassi/Masige/5071** in the name of Nyamaiyeria Omaiko dated 1st July 2013. Under the proprietorship section, the title shows it was a subdivision of land parcel number **634**. There is also on record a copy of mutation form for land parcel **LR No. Bassi/Masige/634** which shows the land was subdivided into land parcel **5071** and **5072**. This mutation form was registered on 27th June 2013. Thus as at 18th July 2013 when the defendants filed their application the decree had been implemented and the land parcel **634** had been subdivided into two portions namely parcel number **5071** and **5072** and the plaintiff had gotten registered as proprietor of land parcel number **5071**. Presumably the defendants land parcel number was to be **5072**. As per the mutation form each of the parcels measured 1.60Hectares and there was an access road measuring 0.04Hectares. In the premises therefore the court cannot stay execution of a decree which has already occurred. The defendants' application consequently was overtaken by events and cannot be granted. The same is disallowed.

9. Respecting the application by the plaintiff that the court compels the defendants to vacate his portion of land **LR No. Bassi/Masige/5071**, the plaintiff is faced with the obstacle that the court never made an order for any party to vacate any portion of land parcel **634**. The implementation of the judgment/decreed was not court supervised where the court could have made any appropriate consequential orders. Land parcel **LR No. Bassi/Masige/5071** now registered in the plaintiff's name was not the subject of the proceedings before the court and consequently the court cannot properly make orders affecting the same in apparent execution proceedings. The plaintiff may have to initiate fresh proceedings to obtain vacant possession of the portion in respect of which he holds title pursuant to the decree of the court. The plaintiff could alternatively seek to plead a counter claim in HCCC No. 203 of 2011 (now ELCC No. 514 of 2016) where he is sued as a defendant.

10. In the premises, I disallow the plaintiff's application dated 9th December 2014 for the reasons I have adverted to hereinabove. As both the defendants and the plaintiff have been unsuccessful in their applications, I make no order for costs and each party will bear their own costs for the applications.

11. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 20TH DAY of APRIL, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Plaintiff present in person

Ms. Moguche for Nyambati for the 1st, 2nd, 3rd and 4th defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE