



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 44 OF 2014

FRANCIS TOBIAS AKELLO.....PLAINTIFF/APPLICANT

= VERSUS =

GABRIEL ONYANCHI SUNDIA.....DEFENDANT/RESPONDENT

RULING

1. The Applicant brought the present application under sections 3A and 63 (e) of the Civil Procedure Act and Order 49 Rule 7(b) (x) of the Civil Procedure Rules on the 18th of May, 2021 for orders THAT:

a. spent;

b. the Officer Commanding Station (OCS) Funyula Police Station be and is hereby directed to provide security to M/S Eshikoni Auctioneers during execution of the eviction order issued pursuant to the judgement and decree in this suit;

c. the costs be in the cause.

2. The Application was supported by the affidavit of JOSEPH VITALIS JUMA dated 18th May, 2021 and on the following grounds;

a. That the Court by its judgement delivered on the 20th of February, 2019;

b. That the Defendant was served with the Notice to vacate as decreed but has refused and or neglected to voluntarily vacate the suit land;

c. That the Auctioneers instructed to execute the eviction order as we as the Plaintiff are apprehensive that there could be a breach of peace during the eviction process; and

d. That it is therefore expedient that the Police Officers offer security to the Auctioneers during the eviction process.

3. The Respondent filed his replying affidavit on the 22nd of June, 2021 stating THAT:

a. The judgement in the present suit was delivered on the 20th February, 2019 and being unsatisfied with the same, he instructed his advocate to lodge an appeal against the decision. That the appeal was however struck out on the 19th of March, 2021 for being filed out of time;

b. He instructed his advocate to regularize the position and file an application for leave to file an appeal out of time, which application is still pending for hearing before the Court of Appeal;

c. The present suit and the intended eviction relate to land parcel number SAMIA/LUANDA-MUOMA/3752 which is an amalgamation of the Defendant/Respondent's land parcel SAMIA/LUANDA-MUDOMA/1369 and the Plaintiff/Applicant's land parcel number SAMIA/LUANDA-MUDOMA/693;

d. The Plaintiff's parcel of land no longer exists as it was cancelled vide a valid court order in Busia High Court ELC Petition No. 2 of 2019 and the intended eviction relates to a non-existent parcel of land;

e. The intended appeal has very high chances of success as the parcel in question is no longer in existence. That the Plaintiff was fully aware of the developments in Busia ELC Petition No. 2 of 2019 and even proceeded to lodge an appeal against the said decision;

f. It would therefore be unjust to evict him from a non-existent parcel of land when there exists a court order for the cancellation of the title which is the subject of the eviction order;

g. He was never served with an eviction notice as alleged in total disregard of his constitutional rights and that in the absence of being served with the decree and the eviction notice, the present application ought to be dismissed with costs;

h. He stands to suffer irreparable loss and damage if the Applicant is allowed to proceed with the eviction as his title to the suit parcel has since been cancelled hence the obtained orders are incapable of enforcement;

i. It would therefore be just and fair not to allow the Application as we await the outcome of the intended appeal.

4. The Applicant filed a further affidavit sworn on the 20th of August, 2021 by Francis Tobias Akello and filed on the 26th of August, 2021 where he deposes that:

a) The Respondent only applied for stay of execution when he was threatened with civil jail for non-payment of costs and despite this he has not been regular in the payment of the decretal sum which stands at K.Shs. 38,671/=;

b) The Respondent never applied for stay of execution of the main claim which was the eviction;

c) The present application is for an order authorizing the OCS Funyula Police Station to provide security during the eviction of the judgement debtor;

d) The application to file an appeal out of time has never been served on his advocate and in any event an appeal does not stop execution without the necessary application for stay of execution;

e) The judgement in Busia ELC Petition No. 2 of 2019 does not affect his application for execution in that the court only cancelled the amalgamation of different title numbers.

f) The land of the judgement debtor from which he is to be evicted is well known and that the judgment debtor was given notice vide a letter dated 25th February, 2019 which was served upon him on the 26th of February, 2019;

g) He did not execute earlier because of the appeal but since the same had been struck out there was no impediment to his application for security.

5. Parties agreed to canvass the application by way of written submissions and the Applicant filed his submissions on the 26th of August, 2021. He submitted that the Respondent filed an appeal against him but the same was struck out and he did not make an application for the stay of eviction either in this Court or in the Court of Appeal from the time the judgement was delivered on the 20th of February, 2019. That the ruling in ELC Petition No. 2 of 2019 does not assist the Respondent as it was only cancelling the amalgamation of the plots of land but does not in any way set aside the judgement delivered in this present case which is an order for demolition and eviction.

6. The Respondent filed his submissions on the 27th of September, 2021 and submitted that the intended eviction related to L.R No. SAMIA/LUANDA-MUDOMA/3752 which is an amalgamation to the Defendant/Respondent's LR No. SAMIA/LUANDA-MUDOMA/1369 and the Plaintiff/Applicant's L.R No. SAMIA/LUANDA-MUDOMA/693 which amalgamation was done vide Busia Land Dispute Tribunal Case No. 106 of 2008. That vide the Court Order in Busia High Court ELC Petition No. 2 of 2019 the amalgamation was cancelled and in turn the Applicant's title to L.R No. SAMIA/LUANDA-MUDOMA/3752. That the intended eviction therefore relates to a nonexistent parcel of land.

7. The judgement delivered by this Court on the 20th of February, 2019 was as follows:

“The position still stands that what the Defendant alleged against the Plaintiff was not demonstrated. Allegations of fraud were for instance made but such allegations remain only on paper, with the Defendant having availed no evidence to prove them. Given all this, I find it necessary to allow the Plaintiff's suit to the extent of prayers (i), (ii) and (iv). I hereby grant the said prayers. Prayer (iii) which is for damages, is not granted as nothing was availed to prove it.”

8. The Applicant is right on the fact that an appeal does not stay proceedings in any way. The Respondent has deposed that his appeal was struck out and he has since instructed his advocate to file an application for extension of time to file appeal before the Court of Appeal. Given there is no appeal as and or stay orders at the time this application was filed and argued, parties revert to their status on terms of the judgement.

9. The Respondent further argued that the Plaintiff's title is non-existent yet he has not moved this court to vary and or set aside the judgement sought to be executed. Infact, the Respondent has not challenged the decree neither has he pleaded that there will be peace so that there is no need for the plaintiff to apply for security. I have looked at the judgement in ELC Petition no. 2 of 2019 which the Respondent argues cancelled the Plaintiff's title hence the decree cannot be executed. The Respondent was not a party to the Petition. Secondly, the Court

in that Pet. Cause no 2 of 2019 ordered for cancellation of the Respondent's (now plaintiff) title to allow for equal sharing of the land between the Petitioner's family and the Respondent's (now Plaintiff) family.

10. Thus the Plaintiff/Applicant still has land in the same area save the size may increase/decrease once the decree in that petition is executed. The judgement sought to be executed was entered earlier than the Judgement in the Petition. Yet, despite having this information, the Respondent did nothing to vary or set aside the decree to be executed. The present application is for provision of security during the execution process.

11. In light of the foregoing facts, the application dated 18th May, 2021 is hereby allowed with costs to the Plaintiff/Applicant.

DATED, SIGNED & DELIVERED AT BUSIA THIS 26TH DAY OF JAN. 2022.

A. OMOLLO

JUDGE