



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 15 OF 2014

PETER KARIUKI NJERU.....DECREE HOLDER/APPLICANT

VERSUS

ERASTUS GILBERT KIMANI.....1ST JUDGEMENT DEBTOR/RESPONDENT

MURIITHI FRANCIS KIMITA.....2ND JUDGEMENT DEBTOR/RESPONDENT

RULING

1. What is before the court for determination is a notice of motion dated 24th February 2021 filed by the plaintiff on 25th February 2021. The Application is expressed to be brought under **Sections 1A, 1B, 3A and of the Civil Procedure Act, Order 22 Rule 48(1) & Order 40 of the Civil Procedure Rules 2010, Section 19 of the Environment and Land Court Act of 2011, Section 68 of the Land Registration Act and under Articles 159(2) of the Constitution of Kenya.**

APPLICATION

2. The Applicant is **PETER KARIUKI NJERU** who is the plaintiff in the suit, while the Respondents are **ERASTUS GILBERT KIMANI and MURIITHI FRANCIS KIMITA** who are the defendants.

The motion came with five (5) prayers but prayers 1 & 4 are spent. The prayers for consideration are therefore three (3) – prayers 2,3, and 5 – and they are as follows:

Prayer 2: That the 1st Defendant/Respondent, being a judgment debtor, be prohibited from transferring or charging the property, identifiable as KYENI/MUFU/2386, in any way and all persons be prohibited from taking any benefit from any purported transfer or charge.

Prayer 3: That a copy of the prohibitory order, referenced in the second prayer hereinabove, be registered against the title of the property being KYENI/MUFU/2386 until so removed by an order of this court.

Prayer 5: That costs of this application be in the cause.

3. The application was supported by grounds, inter alia, that it is in the interest of justice to allow the applicant's intention to attach the referenced property not to be an exercise in futility. It is pleaded that the respondents had declined to settle the debts despite the knowledge of the court orders to settle them. According to the applicant, failure to grant the prohibitory order would render the attachment process an academic exercise without alternative recourse to enforce court orders. It was finally pleaded that no prejudice would be occasioned to the respondents by grant of the said order.

4. The applicant filed a supporting affidavit on 25.02.2021, in which he claims to have been the plaintiff in the suit herein and the defendant in CMCC Award No. 59 of 2011. It is his assertion that judgment was rendered in his favor in both matters and he was awarded cost of the suits. He alleges to have served the defendant's counsel with copies of the orders on 30.6.2020 for payment but did not receive any response. It is his averment that he conducted a search on 22.10.2020 on property Kyeni/Mufu/2386 and established that the property was owned by the 1st respondent. According to him, he should be allowed to recover costs through attachment of the property as he is apprehensive that it may be disposed off to defeat the purpose of attachment. He further states to have appointed an auctioneer who he claims to have advised him to seek prohibitory orders to preserve the estate.

5. According to him, he had adduced reasons for grant of the orders and any prejudice suffered by defendants will not be unfair. The court was urged to grant the orders sought to ensure justice is served and to bring the matter to finality.

RESPONSE

6. The application is defended by way of replying affidavit filed on 3.11.2021 and sworn by the 1st respondent. He confirms that cost of suit in both suits was awarded to the applicant. However, it is his contention that there are other matters between the parties on the subject property which are pending determination. He avers that in Embu CMCC ELC No. 16 of 2018, he was awarded cost of the suit together with the 2nd respondent as against the applicant.

7. He argued that the applicant had appealed against the ruling vide EMBU ELCA No. 3 of 2020 which he alleges to be pending before this court for determination. His position is that the application for execution is premature considering there is a dispute between the parties that is yet to be determined. According to him, he stands to suffer great prejudice if the application to attach and sell his property at this juncture is allowed. The court was urged to disallow the orders sought in the application.

SUBMISSIONS

8. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 16.11.2021. He submitted to having intentions to execute by way of sale land parcel Kyeni/Mufu/286 to clear an amount owed of Kshs. 104,520/= pursuant to two decrees issued against the respondents. According to him, the outcome of the application ought to be pegged on whether the 1st respondent had demonstrated sufficient cause to allow the honourable court deny him his entitlement to the fruits of judgment. He argued that the averments in his application had not been controverted save for a claim that the 1st respondent would suffer prejudice.

9. It is however disputed that the extent of the prejudice alluded to by the 1st respondent had not been pleaded and it was argued that if any prejudice would be occasioned, it would be in the course of delivery of justice for payment of cost of suit which was due. On the application being premature for reason that there was a dispute between the parties, the applicant argued that there were two judgments which were unchallenged and questioned what further action ought to be taken save for the court to assist him in enjoying the fruits of his judgment. In support of this the applicant relied on the case of **Michael Nthouthi Mithu Vs Abraham Kivondo Musau (Civil Appeal E052 of 2021)** and the case of **John Kiroria Uvoro & another Vs Rosemary Mucogo Mbui [2021] eKLR**.

10. The applicant further submitted that Section 19 of the Environment and Land Court Act empowered the court to grant orders sought under Section 68 of the Land Registration Act, which is about the court's power to grant an inhibitory/prohibitory order in the interest of justice. Ultimately, the court was urged to allow the application as according to the applicant, the respondent had failed to demonstrate sufficient cause why the applicant should be denied the fruits of judgment in his favour.

11. The respondent on his part filed his submissions on 30.11.2021. He submitted that there had been a prolonged dispute between the parties. He gave a narrative that the applicant had instituted a case in Embu District Land Tribunal case No. 6 of 2011 against the 1st respondent and the 2nd respondent's husband, whose award was adopted in Embu CM'S Award No. 47 of 2011. It is submitted that the respondents were dissatisfied with the outcome of the case and lodged an appeal before the Eastern Provincial Land Dispute Appeal Committee in Appeal case No. 40 of 2011. The appeal is said to have overturned the decision. However, the award is said to have been presented through Embu Award No. 59 of 2021 but was never adopted as the court determined that it ought to have proceeded under the initial file Award No. 47 of 2011.

12. An application for consolidation of the two awards is said to have been declined and an appeal to that decision dismissed. It is stated that costs sought by the applicant are for the award in Embu CM's Award No. 59 of 2011 and the present appeal to which the applicant seeks to dispose of the 1st respondent land's which is argued not to have been subject of this suit. The respondents submit that the applicant filed several applications seeking to modify the award in the initial dispute which applications were dismissed with costs to the respondents. It is further submitted that there is an appeal in Embu Appeal No. 3 of 2020 pending for determination before the court and it is argued that there is still a dispute between the parties to which either party can be awarded costs. The applicant is said not to have presented any evidence to prove that the respondents are incapable of settling the costs and the court has been urged to exercise its discretion to disallow the application.

ANALYSIS AND DETERMINATION

13. I have considered the application, the response made, the rival submissions and the material on the court record in general. The applicant has filed this suit seeking orders to attach suit parcel **KYENI/MUFU/2386** registered in the name of the 1st respondent. The parties to the suit have been in a protracted litigation and the applicant was awarded costs in CMCC Award No. 59 of 2011 and the present suit ELC CASE NO. 15 OF 2014.

14. The respondents duly acknowledge that the applicant was awarded costs of suit but according to them the said application is premature for reason that the parties still have pending cases which are yet to be determined before the court and either party stand to be awarded costs of suit. Further, it is argued that there is a pending appeal filed before the court herein being ELC Appeal No. 3 of 2020. There is also the argument by the respondents that the suit parcel of land sought to be attached was not subject of this suit.

15. The application before the Court seeks prohibitory orders and is brought under the provisions of Order 22 Rule 48 of the Civil Procedure Rules which provides that

“Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property”.

16. The purpose of a prohibitory order was stated in the case of **Ogembo Ondieki V Samwel Bosire Angwenyi & 2 Others [2020] EkLR** in **Kisii ELC Case No. 942 of 2016**

“A Prohibitory order is an order obtained from the Court prohibiting a Judgment debtor from effecting any dealings in relation to his or her landed properties or interest in land held by him or her. Where judgment is obtained for the payment of money, in the event that a judgment debtor refuses or neglects to comply with the judgment made by the Court, the judgment creditor can proceed to obtain a Prohibitory Order, where the properties of the judgment debtor involves land”.

17. From the facts of the case it is not in dispute that the applicant holds a valid decree against the respondents. The applicant in his pleadings states that he served the respondents counsel with copies of the decree for payment of the decretal amount but claims not to have received any response. The applicant has now sought for the court to prohibit dealings against property owned by the 1st respondent and a search dated 22nd October 2020 has been annexed to the application as prove of such ownership. The applicant has expressed his intentions to commence execution of the decree and states that he is apprehensive that the property may be disposed off to defeat the purpose of the attachment. The essence of the prohibition order is to ensure that the property is not transferred, charged or dealt in any manner until the court issues a further order.

18. The respondents have not denied knowledge of existence of the two decrees or the fact that the 1st respondent owns parcel Number KYENI/MUFU/2386 but argue that the applicant has failed to prove that the respondents are not in a position to satisfy the decree. I note that despite this argument the respondents are yet to satisfy the said decrees. The respondents have also argued that there are other suits in which either party can be awarded cost of suit. The suits alluded to therein are yet to be determined and when that happens then the successful party shall be at liberty to move the court to seek similar prayers as those sought herein. In my view, the presence of the other suits does not act as a bar to prevent the court from awarding the applicant the prayers he has sought in this application.

19. The respondents have also contended that there is a pending appeal before the court and the application herein is premature. On this I will rely on the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provide that:

“No appeal or second appeal shall operate as a stay execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such order or decree, and whether the application for such stay shall be granted or refused, by the court appealed from, the court to which such appeal is preferred shall be at liberty , on application being made, to consider such application and to make such order thereon as it may deem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

In view of the provisions of Order 42 Rule 6 of the Civil Procedure Rules an appeal does not operate as stay and in the absence of a stay of execution order then the plaintiff has every right to proceed with execution.

20. As alluded to above, the applicant is in possession of two valid decrees which are yet to be satisfied by the respondents and the property in which the applicant seeks to prohibit dealings against is owned by the 1st respondent. A cursory look at the search shows that the property is not encumbered and as such it is available for execution. The respondents have argued that the property sought to be attached in this case was not subject to the suit. I wish to state that the property need not have been subject of the suit. One has the liberty to attach and seek to prohibit dealings on any property provided it is owned by the Judgment debtor. In view of the foregoing, I find that there is no valid reason to deny the applicant the orders for prohibition sought in this application.

21. Further in the supporting affidavit the applicant has relied on the provisions of Section 68 of the Land Registration Act. The said section provides as follows;

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

An inhibition shall not bind or affect the land, lease or charge until it has been registered”.

22. In the case of DORCAS MUTHONI & 2 OTHERS...VS...MICHAEL IRERI NGARI (2016) EKLR in EMBU ELC CASE NO. 324 OF 2015, the court held that *"An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off.*

23. I however note that inhibition though discussed in the pleadings was not a specific prayer sought in the application. That notwithstanding, as in the above decided case, both orders for inhibition and prohibition serve the purpose to preserve the property until further orders are issued by the court. Section 38(1) of the Civil Procedure Act grants courts power to enforce execution. The said section provides that;

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

(b) by attachment and sale, or by sale without attachment, of any property;

(c) by attachment of debts;

(d) by arrest and detention in prison of any person;

(e) by appointing a receiver; or

(f) in such other manner as the nature of the relief granted may require

24. The said provisions of Section 38 of the Civil Procedure Act grant courts such powers to order execution of a decree. The applicant has expressed his intentions to attach land parcel Kyeni/Mufu/286 to satisfy the decrees. It is evident that the orders sought are merely for preservation of the property as the applicant commences the execution process of attachment of the said property.

25. It is trite law that courts shall not unnecessarily stand in the way of a decree holder to enjoy the fruits of his judgment. The applicant being a decree holder has every right to execute the decree granted by the court and the orders sought are aimed at facilitating such execution. I find that the court has such powers to grant the orders sought.

26. The upshot of the foregoing is that the application has merit and the same is allowed in terms of prayers 2, 3 and 5.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF JANUARY, 2022.

In the presence of M/s Njenga for Rose Njeru for J/debtor/respondent and Okwaro for Kazi for J/creditor/applicant.

CA: Leadys

A.K. KANIARU

JUDGE

25/01/2022