



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C CASE NO. 423 OF 2014

LOISE NJERI & 9 OTHERS.....PLAINTIFFS (APPLICANTS)

VERSUS

JOSEPH MAINA.....DEFENDANT (RESPONDENT)

RULING

1. On **8th December, 2014** the applicants filed the notice of motion of even date seeking to, *inter alia*, have the respondent (Joseph Maina) and the Officer Commanding Maragua Police Station committed to civil jail for contempt of court orders issued on **29th October, 2010** and extended from time to time.
2. The application which is brought under **Section 5** of the Judicature Act and **Order 40 Rule (3)** of the Civil Procedure Rules is supported by the affidavit of the **5th** plaintiff sworn and filed therewith and is premised on the grounds that though aware of the orders of the court, the respondent have disobeyed the court orders herein.
3. It is the applicants' case that the respondents in disobedience of the court orders under reference, have continued to issue threats of eviction to the applicants from the suit property. For the foregoing reason, the applicants' urge the court to punish the respondents in order to uphold the dignity of this court.
4. The order in respect of which the applicants seek to have the respondents punished is annexed to the affidavit sworn in support of the application and marked **MG-1**. The deponent of the supporting affidavit has, *inter alia*, deposed that the order was served on the respondent who filed a response in respect thereof. To prove service of the order, the applicants have annexed the said order to the supporting affidavit marked as **MG- 2**
5. It is contended that the respondent, through the OCS Maragua Police Station, has issued several threats to evict the applicants from the suit property. To attest to that fact, the applicants have annexed to the affidavit sworn in support of the application several letters written by their advocate concerning the threats and marked them as **MG-3** and **4**.
6. Maintaining that the actions of respondents are in contempt of the orders of this court requiring that status quo be maintained pending the hearing and determination of the suit, the applicants urge this court to punish the Respondents in order to uphold the dignity of the court.
7. In reply and opposition to the application, the respondent filed the replying affidavit sworn on **4th February, 2015** where he has, *inter alia*, deposed that neither he nor the OCS Maragua Police Station is

in contempt of the court order herein. The respondent contends that the orders that are the subject matter of this application lapsed on 26th September, 2013 after the applicants' advocate failed to attend court and explains that the OCS was obeying an order of this court issued on 27th February, 2013 in Nyeri HCCC No. 252 of 1983.

8. Pointing out that some of the parties to the application were parties to Nyeri HCCC NO. 252 of 1983 which was heard and determined in favour of his predecessor in title's favour, the respondent explains that some of the applicants were evicted from the suit property and that they later went into the suit property with some more people.

9. In view of the foregoing, the respondent contends that the current suit is *res judicata* Nyeri HCCC No. 252 of 1983. The actions of the applicants, in particular the 5th, 8th and 9th applicants are said to be an abuse of the court process.

10. The respondent has also pointed out that some of the applicants have made various attempts to review, stay or appeal the orders made in Nyeri HCCC No. 252 of 1983 aforementioned in vain.

11. Reiterating that the decision of the applicants' to bring the current suit after they were unable to overturn the decree obtained in Nyeri HCCC No. 252 of 1983 an abuse of the court process, the respondent urges the court to dismiss the application with costs.

12. In support of the averments contained in his replying affidavit, the respondent has annexed to the affidavit the following documents:-

a) The Court order issued on 27th February, 2013 authorizing the eviction of the defendants in Nyeri HCCC No. 252 of 1983, their families, servants, agents and anybody claiming interest under them and any property that they may have on the suit land and to put the applicant, his agents and assigns therein.

b) Complaint filed in Nyeri HCCC No. 252 of 1983.

c) The decree obtained in Nyeri HCCC No. 252 of 1983 on 18th day of May, 1999;

d) Letter to the Land Registrar Murang'a dated 10th August, 2011.

e) Ruling in Nyeri Court of Appeal Civil Application No. 230 of 2011, among other rulings and orders issued in Nyeri HCCC No. 252 of 1983.

13. When the application came up for hearing, **Mr. Miano** (holding brief for Mr. Musyoki for the applicants) made reference to the averments contained in the supporting affidavit and submitted that although the applicants were not evicted from the suit property, there is evidence that the defendant has effected developments thereon contrary to the order of the court. He pointed out that there is evidence of service of the order of the court and that the alleged contemptuous conduct of the respondents has neither been denied nor admitted.

14. Counsel for the respondent **Mr. Wachira**, reiterated the averments contained in the respondent's supporting affidavit and in particular the averment that the orders lapsed on 26th September, 2013 after the applicants' counsel failed to attend court. He also reiterated the respondent's contention that the application is *res judicata* the proceedings in Nyeri HCCC No. 252 of 1983 *supra*.

15. Explaining that the applicants had earlier been evicted before bringing the current suit, he explained that the OCS was merely following the earlier orders of eviction. In this regard, counsel urged the court to refer to the order issued on 18th May, 1999 which has never been challenged.

16. Mr. Wachira further submitted that the application for contempt is improperly before court as no leave

was granted for bringing the application as required by law.

17. In a rejoinder, Mr. Miano submitted that **Order 40(3)** of the Civil Procedure Rules allows an application of contempt to be brought without leave.

18. Concerning the existence of conflicting orders in this suit, he submitted that the only remedy available to the parties is to apply for review of the earlier orders.

Analysis and determination

19. From the documents annexed to the respondent's replying affidavit and the uncontroverted averments therein to the effect that the issues raised in the current application were subject of consideration in Nyeri HCCC NO. 252 OF 1983, the following facts are discernable:-

1. That there exist a prior suit in respect of the suit property;
2. That some of the parties to the current suit were parties to the previous suit;
3. That the rights of some of the applicants vis-à-vis those of the respondent to the suit property were determined by a court with competent jurisdiction to hear and determine the dispute;
4. That no appeal was preferred against the decision of the court referred in 4 above;
5. That attempts to stay and/or review the decree issued in favour of the respondent were in vain.
6. That an order was issued in the previous suit for eviction of some of the applicants' and any other persons in occupation of the suit property.

20. Apparently, after some of the applicants were unable to overturn the decree obtained in HCCC NO. 252 OF 1983 they decided to try their luck through the current suit, previously Nyeri HCCC No. 222 of 2012; *Loise Njeri & 9 others v. Joseph Maina*.

21. From the two suits herein (that is Nyeri HCCC No. 252 of 1983 and Nyeri HCCC No.222 of 2012), it is clear that applicants No.5 and 9 (*Mwangi Ngatheyu and Mbuthia Kahiga* respectively) were parties to Nyeri HCCC No. 252 of 1983 wherein orders for their eviction were issued in favour of the respondent.

22. There is evidence that their application (application by 5th and 9th applicant and their colleague *Muiruri Njoroge*) for stay of the decree issued against them was dismissed by the Court of Appeal on 5th July, 2012.

23. Barely three months after issuance of the orders against them, the applicants alongside the other applicants in this application, filed Nyeri HCCC NO. 222 of 2012 contending that the decision in Nyeri HCCC 252 of 1983 did not extend to the parcel of land they are claiming.

24. Having taken liberty to check the proceedings in HCCC No.252 of 1983 and the orders issued therein, I can confirm that the questions raised in Nyeri HCCC NO. 222 of 2012 were substantially in issue in Nyeri HCCC 252 of 1983. By bringing the same matters by way of a fresh suit as opposed to an appeal, the applicant's clearly engaged in abuse of the court process. In this regard see the ruling of the Court of Appeal in Nyeri court of Appeal civil application No. 230 of 2011 where it was observed:-

“...The intended appeal, if any, will not serve any useful purpose, because the judgment complained about was issued in the year 1989; the said judgment ordered eviction of the Applicants and they were duly evicted on 29th December, 1999 but they came back to the land; they thereafter filed an application for review in the year 2000, which they failed to prosecute forcing the respondent to steer its prosecution resulting in its dismissal....the intended appeal is not arguable.”

25. The court record reveals that on 11th July, 2014 the court dismissed the 5th, 8th and 9th applicants application for stay of execution of the order dated 18th February, 2013. The order of 18th February, 2013

sought to be stayed allowed theeviction of the applicants from the suit property.

26. In view of the foregoing, can the applicants some of whom have clearly engaged in abuse of the process of the court be said to have proved their case against the respondent?

27. Being of the view that the current suit was filed to circumvent the orders issued in the earlier suit and there being evidence that the application by the lead players in the current suit to stay execution of the orders of eviction issued against them was refused, I find the applicants' application and the suit on which it is premised to be bad in law and decline to issue the orders sought.

28. Costs of the application are awarded to the respondent.

Dated, signed and delivered at Nyeri this 22nd day of June, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kinuthia h/b for Mr. Musyoki for plaintiff/applicant

Ms Karuga h/b for Mr. Wachira for the respondent

Court assistant - Lydia