



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & LC. NO.56 OF 2021**

**MARTIN WAMALWA BARASA.....PLAINTIFF/APPLICANT**

**VERSUS**

**PETER OKABIERA OMWENGA.....DEFENDANTRESPONDENT**

**RULING**

*[NOTICE OF MOTION DATED 3<sup>RD</sup> NOVEMBER 2021]*

1. The Applicant approached the court by way of the notice of motion dated the 3<sup>rd</sup> November, 2021, seeking for orders that the “Honourable court be pleased to issue a temporary order of injunction restraining the Defendant/Respondent whether by himself, his agents, servants or any person whomsoever from evicting, demolishing structures, erecting any structure or otherwise interfering with the Plaintiff’s quiet peaceful, actual and exclusive possession of that parcel of land known as **NZOIA/MOI’S BRIDGE BLOCK 1 (NZOIA SISAL) 3852** pending hearing and determination of the main suit,” and that costs be provided for. The application is based on the four (4) grounds on its face and is supported by an affidavit sworn by Martin Wamalwa Barasa, the Applicant, on the 3<sup>rd</sup> November 2021. His deposition is that he is the registered proprietor of the parcel of land known as NZOIA/MOI’S BRIDGE BLOCK 1 (NZOIA SISAL) 3582, measuring 0.0230 hectares, which he has developed, and on which he carries out a petrol station business; that on the 29<sup>th</sup> October 2021, he was served with warrants to give possession of land by Femfa Auctioneers, that were issued in Eldoret CMCC No. 1454 of 2004, in which he was not a party; that the parcel subject matter of that case was Nzoia/ Moi’s Bridge Block 1 (Nzoia Sisal) 3406, and that is not the land he is in occupation of; that he has never had a suit with the Respondent over any property and that his right to be heard had been violated. He therefore argued that on the balance of convenience, he should be granted the interim injunctive orders sought as there shall be no adequate remedy if the Respondent proceeded with what he termed as an illegal injunction.

2. The application is opposed by the Respondent through the replying affidavit sworn by Peter Okiabera Omwenga on the 10<sup>th</sup> November 2021. It is his case that the application was an abuse of process of court; that the land the Applicant claims to be his falls within Nzoia/Moi’s Bridge Block 1 (Nzoia Sisal) 3406, and it does not exist on the ground; that the developments the Applicant claim are the same ones that were subject matter in Eldoret CMCC No. 1454 of 2004, Eldoret ELCA No. 66 of 2015 and Eldoret CACA No. 46 Of 2015; that the Applicant was unsuccessful when he sought for stay in the Eldoret ELCA No. 30 of 2020 and has not preferred an appeal; that the application was an abuse of process of court as the Applicant’s title was illegally acquired and that he ought to have appealed against the order issued in ***Eldoret ELC Appeal No 30 of 2020***; that the copy of the surveyor’s report that he attached demonstrated the land the Applicant claimed was within his (Respondent’s) land; that the Applicant had unsuccessfully attempted to challenge the execution through ***Eldoret ELC Appeal No 30 of 2020***, and that he has always been aware of the lower court’s proceedings. He therefore urged the court to find that the application was brought in absolute bad faith.

3. The court issued directions on filing and exchanging of the submissions on the 11<sup>th</sup> November, 2021. That thereafter, the learned counsel for the Applicant and the Respondent filed and served their submissions dated the 24<sup>th</sup> November, 2021 and 14<sup>th</sup> December, 2021 respectively.

4. The following are the issues for the court’s determinations;

- a. Whether the Applicant has established a reasonable case with a probability of success for the injunction order he seeks to be issued at this interlocutory stage.
- b. Who pays the costs of the notice of motion.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the submissions by both counsel, the superior courts decisions cited and come to the following determinations;

a. That this application revolves around Order 40 Rule 1 of the Civil Procedure Rules which provides that:

“Where in any suit it is proved by affidavit or otherwise—

(a) **that any property in dispute in a suit is in danger of** being wasted, damaged, or alienated by any party to the suit, or **wrongfully sold in execution of a decree;** or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, **the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the** wasting, damaging, alienation, **sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.**” (emphasis added)

That indeed, a court of law is empowered to stay any intended attachment and sale that is alleged and proven to be subject of wrongful execution. In this case, the Applicant claims that the execution threatened is wrongful as he was never a party to ***Eldoret Chief Magistrate’s Court Case No. 1454/2004***, between ***Samuel Nyabiba Nyakeri vs Peter Okiabera Omwenga***, from which the warrants to give possession served upon him were in respect of. The Applicant has not claimed that these warrants to give possession were wrongfully obtained in ***Eldoret CMCC 1454 of 2004***, but only that they cover the wrong property. Essentially, it is a challenge that the property he occupies is not subject matter of the property in ***Eldoret CMCC 1454 of 2004***. Therefore, properly speaking, the Applicant essentially seeks to stay the execution of the decree in ***Eldoret CMCC 1454 of 2004***, to determine whether it covers his property.

b. That in the court’s view, the allegation that Applicant’s property, being land parcel reference number NZOIA/MOI’S BRIDGE BLOCK 1 (NZOIA SISAL) 3582, is wrongfully covered by the decree in ***Eldoret CMCC 1454 of 2004***, does not preclude him from challenging the decree, and the intended execution in ***Eldoret CMCC 1454 of 2004***, or in the final Appellate Court’s decision that resulted in the decree being issued as it were. The court has taken note of the Respondent’s deposition that remains unchallenged, or rebutted, that the decision in ***Eldoret CMCC No. 1454 of 2004*** was appealed in ***Eldoret ELCA No. 66 of 2015***, and further in ***Eldoret CACA No. 46 of 2015***, before the execution the Applicant herein seeks to be stopped commenced. That being the case, the Applicant should have challenged the execution, and sought for stay of the decree that was the basis of issuance of warrants to give possession in litigation that cleared the way for it to be issued, and not commence a fresh suit.

c. The provision of Order 22 of the Civil Procedure Rules that provides for execution of decrees and orders provides at Rule 51, that deals with objection to attachment, as follows:

“51. (1) **Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree** may at any time prior to payment out of the proceeds of sale of such property **give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.**

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.”

That as the Applicant is essentially objecting to execution of the decree in ***Eldoret CMCC No. 1454 of 2004***, as appealed in ***Eldoret ELC Appeal No. 66 of 2015*** and further in ***Eldoret CACA no 46 of 2015***, the Civil Procedure Rules require him to give a notice of objection of execution, but he has not done so.

d. That in any event, the Applicant also had the route of seeking stay of execution, which option he reportedly tried through Eldoret ELCA No. 30 of 2020, based on the very same grounds that are the basis of this application, i.e. wrongful attachment of his parcel of land, but was evidently unsuccessful. The copy of the Applicant’s Amended Notice of Motion and Further Supporting Affidavit dated and sworn on the 11<sup>th</sup> January, 2021 respectively in Eldoret ELCA No. 30 of 2020, are attached to the Respondent’s replying affidavit, and at prayer 2A of the application he sought for the order:

“2A. That pending the hearing interparties and thereafter the hearing and determination of the Appeal filed herein, this court be pleased to stay execution of the eviction order issued on 12/11/2020 in respect of Plot number NZOIA/ MOISBRIDGE BLOCK 1(NZOIA SISAL) 3582 measuring 0.0230 hectares.”

The Applicant’s depositions at paragraphs 2, 4, 5, 7 and 9 of his further supporting affidavit in support of his application in ***Eldoret ELCA No. 30 of 2020*** states as follows:

“2. **THAT** I operate a petrol station at Matunda township adjacent and bordering plot number Nzoia Sisal/ Moi’s Bridge Block 1/ 3406 ...

4. **THAT** initially as rightly argued by Mr Momanyi in the Court of Appeal proceedings in civil Appeal number 46 of 2015 between Peter Omwenga vs Samuel Nyabibi Nyakeri at pg 10 of the judgment, the petrol station before demarcation was on Plot number 54

5. **THAT** after survey and demarcation my plot was registered as Nzoia/ Moi's Bridge Block 1 (Nzoia Sisal) 3582 as per the annexed title.

7. **THAT** on 23/12/2021 when this matter was in court I was summoned to police at Matunda where I found the Respondent in the OCS office where the OCS informed me that I was required to pay rent to the Respondent by 31<sup>st</sup> December, 2020 or be forcefully evicted from the premises.

9. **THAT** initially the eviction order in respect of plot 3406 was served upon me and I informed Mr. Nyakeri about the same."

That in the instant application the Applicant has also claimed that the warrants of attachment are not in respect to his property, and he therefore seeks to stall their execution. That from the contents in the extracts of the Applicant's documents filed with his stay application in **Eldoret ELC Appeal No. 30 of 2020**, and those filed in support of the instant application, it is obvious they relate to the same circumstances and set of facts. The only difference is that whereas the court in **Eldoret ELCA No. 30 of 2020** had a right to consider the application as it was set in the context of an intended appeal in **Eldoret CACA No. 46 of 2015**, over the decision in **Eldoret ELCA No. 66 of 2015**, that had been an appeal from **Eldoret CMCC No. 1454 of 2004**, from where the warrants he challenged had originated, this court does not. That according to Order 22 Rule 51 of the Civil Procedure Rules, the jurisdiction to challenge execution vests in the court that issued the decree. This court on the other hand lacks jurisdiction to stay the execution of the decree and warrants to give possession flowing from it as it is not the court that issued the decree, and thus it is not placed in a good position to determine the propriety of setting the decree aside. The Applicant has claimed in this application, as he had earlier done in **Eldoret ELCA No. 30 of 2020**, that he was not a party to those cases, but as shown above, stopping execution of the decree is not a right only exclusive to parties to a suit. The Applicant was not barred from halting execution though the suit where the same was ordered, and therefore purely on a question of jurisdiction, this court must disallow the application.

e. The stay application in **Eldoret ELCC No. 30 of 2020**, which was before the court with jurisdiction in the matter, and the instant stay application, are about the same subject. That the fact that the Applicant's application for stay was disallowed in **Eldoret ELCA No. 30 of 2020** clearly shows the instant application is an attempt to defeat a proper finding of the court without following the lawfully prescribed route. The Applicant's stay issue has been conclusively determined, after he was given a forum to plead that his property was wrongfully captured in the decree issued in **Eldoret ELC CMCC No. 1454 of 2020**. The Applicant's application is therefore an abuse of process of court.

f. The Applicant has claimed to have never participated in any civil matter with the Respondent but this is obviously a lie. He had participated in an attempt to halt the very thing subject matter in the instant application in **Eldoret ELCA No. 30 of 2020**. That in the case of *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR*, the court held that:

"In the case of *Beinosi v Wivley [1973] SA 721 SCA*, the South African Court of Appeal stated with regard to abuse of process that in general terms, **abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous to that objective**. The Supreme Court of Nigeria observed in the case of *African Continental Bank PLC v Damian Ikechukwu Mwaigwe 82 Others SC 35 of 2001 (14th January 2011)* **that abuse of court process arises where two or more similar processes are issued by a party against the same party/parties in respect of the exercise of the same right and same subject matter or where the process of the court has not been used bon fide and properly**. In *Muchangi Industries Limited v Safaris unlimited (Africa) Limited and 2 others* the Court of Appeal stated that the person who abuses process is interested only in accomplishing some improper purposes that is collateral to the proper object of the process and that offends justice. And in *Governors Balloon Safaris Limited vs Attorney General & 2 others (supra)* the Court stated that **"It is an abuse of the court process to institute several proceedings in order to challenge the same action and the court has inherent jurisdiction to prevent such abuse**. Bearing in mind the above jurisprudence, it is not in doubt that the petitioner filed this petition after he failed in his quest in **HCC No. 433 of 2003** and wanted to try his luck in this Court...This is clearly an abuse of the court process that should never be tolerated." (Emphasis added)

Similarly, in this application, the Applicant herein is pursuing the same reliefs under the same heading against the same party, knowing fully well these orders have previously been refused by a court of competent jurisdiction. The effect of this litigation is to delay the Respondent's right to the property that he has already acquired by virtue of previous successful litigation and appeal spanning from the lower court, this court and the Court of Appeal. The Applicant has had his day in court over this matter, and failed to convince the trial and appellate courts to halt execution. Therefore, the filing of this application is indeed an abuse of process of the court.

g. That as jurisdiction is everything and the court has concluded it is without jurisdiction in the instant matter, then there is no need to proceed to determine whether or not the grounds for grant of an interim injunction order have been satisfied.

h. That as the Applicant has failed in his application, then under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, he is to pay the Respondent's costs.

6. That flowing from the above, the court finds it is without jurisdiction in the issues raised in the application as they have already been determined in **Eldoret ELCA No. 30 of 2020**. The application is further an abuse of the court's process and is therefore dismissed with costs.

**DATED AND VIRTUALLY DELIVERED THIS 23<sup>rd</sup> DAY OF MARCH, 2022**

**S.M.KIBUNJA,J.**

**ELC ELDORET.**

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF/APPLICANT: .....Absent

DEFENDANT/RESPONDENT: ...Absent

COUNSEL: .....Mr. Mathai for the Plaintiff

Mr. Momanyi for the Defendant...

COURT ASSISTANT: ONIALA

**S.M.Kibunja,J.**

**ELC ELDORET**