



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 127 OF 1993

FRANCIS OSORO MARKO PLAINTIFF

VERSUS

JOHNSON KEMONIDEFENDANT

AND

NYAGWAKO OGORA

alias KENNEDY KEMONI BWOOGORA INTERESTED PARTY

RULING

1. What is before me is the plaintiff's application brought by way of Notice of Motion dated 14th January 2013 in which the plaintiff has sought the following main prayers:

(i) That this court do order and/or direct the Officer Commanding Police Station (O.C.S), Rioma Police Station and Officer Commanding Police Division (O.C.P.D), central Kisii Police Division to appear before the court and show cause why they cannot provide reasonable security to M/s Homeland Auctioneers to evict the defendant from Plot No. 19 "B" Nyakoe Market and demolish all buildings and other structures located thereon, in line with the eviction order granted herein on 12th April 2010.

(ii) That the court be pleased to issue appropriate and suitable directions to enable the said eviction order issued on 12th April 2010 to be fully implemented, enforced and/or executed.

(iii) That the court do make such further and/or other orders as the court may deem fit.

2. The plaintiff's application was brought on the grounds that; the plaintiff brought this suit against the defendant on 5th April 1993. The defendant entered appearance and thereafter filed his statement of defence to the plaintiff's claim. The plaintiff's claim against the defendant was that the defendant had caused a portion of the plaintiff's parcel of land known as LR No. West Kitutu/Bogeka/222 (hereinafter referred to as "Plot No. 222") measuring 50 feet by 50 feet to be excised and added to the defendant's own parcel of land known as Plot No. 19B which now increased in size from 25feet by 100 feet to 75

feet by 150 feet. The plaintiff sought a declaration that the plaintiff is the owner of the portion of Plot No. 19B measuring 50 feet by 50 feet and a permanent injunction restraining the defendant by himself or through his agents from trespassing on the said portion of Plot No. 19B. The defendant denied the plaintiff's claim in its entirety and contended that the same was incompetent misconceived and bad in law.

3. On 7th October 1994 the issues that were in dispute herein between the plaintiff and the defendant herein were referred to arbitration by Nyakoe Market Committee (hereinafter referred to only as "the committee"). The committee rendered its award on 13th June 1994 and the same was filed in court on the same day. The defendant's application to set aside the said award was dismissed by the court. In its award, the committee awarded the plaintiff the disputed portion of Plot No. 19B measuring 50 feet by 50 feet. The committee's said award was adopted as a judgment of the court by Mbaluto J on 9th November 1994 and a decree issued in accordance therewith on 7th March 1995. On 28th June 1995 the court on application by the plaintiff ordered the defendant to appear and show cause why he should not be evicted. Following this order, a warrant of eviction was issued and successfully executed against the defendant.

4. While the process of execution was ongoing, the interested party herein who is a son to the defendant sought to be joined in this suit as an interested party and also prayed for; a declaration that the portion measuring 50 feet by 50 feet of Plot No. 19B that the plaintiff claimed from the defendant and in respect of which he obtained judgment did not extend to Plot No. 24"A" Nyakoe market which is owned by the interested party, and an order declaring the eviction of the interested party's tenants in Plot No. 24"A" Nyakoe market illegal, null and void. The interested party had contended that the plaintiff had directed the eviction order that had been issued in his favour against the defendant to the premises situated on Plot No. 24"A" Nyakoe market (hereinafter referred to as "Plot No. 24A") owned by the interested party and had in fact evicted the interested party's tenants on the said plot and was now in the process of demolishing the said premises. The interested party's application was heard and dismissed by Sitati J. on 7th September 2012.

5. Before instituting the said application, the interested party had lodged two civil suits against the plaintiff over the same subject matter. The first suit was Kisii HCCC No. 502 of 1997, Nyagwako Ogora –vs- Francis Osoro Marko. In this suit, the interested party sought; a declaration that he is the owner of Plot No. 24, general damages for trespass and an injunction restraining the plaintiff herein from interfering with the interested party's quiet possession of Plot No. 24. In this suit, the interested party had contended that the plaintiff had in purported execution of the eviction order that was issued herein proceeded to demolish structures that the interested party had put up on Plot No. 24. It is on account of this that the interested party had sought general damages for trespass and an injunction to restrain the plaintiff from continuing with the destruction aforesaid.

6. This suit was head by H.P.G Waweru J. who dismissed the same on 2nd August 2001. In his judgment, H.P.G Waweru J. made a finding that the structures that were demolished by the plaintiff during the execution undertaken herein were situated on the plaintiff's parcel of land LR No. West Kitutu/Bogeka/222 ("Plot No. 222") and were neither on Plot No. 24 as claimed by the interested party nor on Plot No. 19B. The court concluded therefore that the interested party had not suffered any loss and as such was not entitled to the reliefs that he had sought in that suit. The interested party appealed against H.P.G Waweru J's judgment to the Court of Appeal was dismissed on 11th June 2014 in Kisumu Court of Appeal Civil Appeal No. 271 of 2001, Nyagwoka Ogora alias Kennedy Kemoni Bwogora –vs- Francis Osoro Marko.

7. Apart from the said case that was heard by H. P.G Waweru J. the interested party brought yet another suit against the plaintiff herein on the same subject matter. This was in Kisii HCCC No. 126 of 2010, Nyagwoka Ogora alias Kennedy Kemoni Bwogora –vs- Francis Osoro Marko. In this suit again the interested party contended that the buildings that were brought down by the plaintiff in execution of the warrants of eviction that were issued herein were on Plot No. 24A owned by the interested party. The interested party also sought similar reliefs as he had sought in Kisii HCCC No. 502 of 1997 that he lost in the High Court and the Court of Appeal namely; injunction to restrain the plaintiff from interfering with

quiet possession of plot NO. 24”A” and damages. This second suit by the interested party was struck out by Sitati J. on 7th July 2011, on the ground that it was *res judicata* having regard to the previous findings by this court (H.P.G Waweru J.) and the Court of Appeal.

8. The plaintiff has averred that while the various suits and applications by the interested party mounted to challenge the eviction of the defendant were going on, the defendant and/or the interested party went back to the portion of Plot No. 19B from where the defendant had already been evicted and reconstructed the buildings that had been demolished in the process. In the circumstances, it became necessary for the plaintiff to apply for a fresh warrant of eviction against the defendant after the interested party had lost the suits aforesaid. The fresh warrants were issued on 21st December 2011 to Homeland Auctioneers for execution upon the defendant with the assistance of the OCS Rioma Police Station. The said OCS was directed by the court to provide sufficient security to the said auctioneers during the execution of the said warrant.

9. The plaintiff has contended that when the said auctioneer together with the OCS Rioma Police Station proceeded to the ground to execute the said eviction order a dispute arose between the plaintiff and the defendant on the location of the premises on which the eviction order was to be executed. The plaintiff pointed to the auctioneer a building which he claimed to be standing on Plot No. 19B for demolition. On his part the defendant contended that the said building was on Plot No. 24A and not on plot No. 19B as claimed by the plaintiff. Due to the fact that the auctioneer had no way of determining whether the said building was on Plot No. 24A or Plot No. 19B the execution of the eviction order had to be called off. The plaintiff has contended that the issue as to the ground location of Plot No. 19B vis-à-vis Plot No. 24 had been determined in the various judicial pronouncements that I have referred to above and could not be raised again in this second round of eviction.

10. The plaintiff’s advocates took up the issue with the auctioneer to whom they explained the position and urged him to proceed with the execution of the order. However whereas the auctioneer was satisfied with the explanation, the OCS Rioma Police Station and OCPD Central Kisii District were not convinced. According to them, the building sought to be demolished was on Plot No. 24 and unless there was an order directing the demolition of a building on Plot No. 24 they were not prepared to assist with the security. The two officers were not convinced that the explanation given by the plaintiff’s advocates was sufficient to lay to rest the dispute that had arisen over the ground location of Plot No. 19B. It is the said police officers failure to provide security to the auctioneer while executing the order of eviction issued herein that has necessitated the filing of this application by the plaintiff.

11. The plaintiff’s application is opposed by the defendant and the interested party. It is not clear to me in what capacity the interested party has responded to and/or opposed the application. As I have stated above the interested party’s application dated 12th July 2011 in which he sought among others an order that he be joined in this suit as an interested party was dismissed by Sitati J. on 7th September 2012. In my view upon the dismissal of the application the interested party ceased to be a party in these proceedings and could not thereafter obtain any relief or have any order issued against him. The application before me is directed against the defendant. No order has been sought against the interested party. I would not say more on this issue since the plaintiff joined the interested party in the application herein and also did not raise any objection to his participation in these proceedings. The defendant and the interested party have filed grounds of opposition and replying affidavit sworn by the interested party. The affidavit has been sworn by the interested party purportedly on his own behalf and on behalf of the defendant. In the grounds of opposition, the defendant and the interested party have contended that the plaintiff’s application is misconceived since the order/decreed sought to be executed has been satisfied. The defendant and the interested party have contended that following the earlier execution by the plaintiff, Plot No. 19B is now an open space and that the intention of the plaintiff in this present application is to demolish a building on Plot No. 24”A”.

12. In his replying affidavit, the interested party has contended that he is an allottee of Plot No. 24 Nyakoe Market that was subsequently sub-divided into Plot No. 24 “A” and Plot No. 24 “B”. The interested party has contended that he retained Plot No. 24A in his name while Plot No. 24B was sold to one Robert N. Nyarandi. The interested party has contended that he has put up a commercial building on

Plot No. 24A. The interested party has contended that his structures on Plot No. 24”A” were demolished in 1997 as a result of which he filed Kisii HCCC No. 502 of 1997 (Supra) against the plaintiff that he lost in the High Court and in the Court of Appeal. The interested party has contended that although his claim was dismissed the court made a finding that he is the owner of Plot No. 24. The interested party has contended that on 3rd May 2010 he learnt that the plaintiff had intended to demolish his building on Plot No. 24A in the pretext that the same was standing on Plot No. 19B. The interested party has contended that the eviction order was directed at Plot No. 19B and not at Plot No. 24 “A” or 24 “B”. The interested party has contended that the defendant against whom the said eviction order had been directed had already removed structures that were lying on the portion of Plot No. 19B that was decreed to the plaintiff and that the plaintiff has since fenced off the said portion.

13. The interested party has contended that on 23rd February 2011, he learnt that the plaintiff’s nominated auctioneers Muriri Auctioneers had served a proclamation for eviction on the interested party’s building on Plot No. 24A and that the plaintiff has continued with his threats to demolish the interested party’s building on Plot No. 24A although the eviction order was directed at Plot No. 19B. The interested party contended that on 23rd March 2011 the said auctioneers accompanied by police officers from Rioma Police Station descended on Plot No. 24A evicted all tenants therefrom and started demolishing a kiosk and a toilet that were constructed thereon. The interested party asked the said auctioneer and the police officers to halt the demolition exercise because the structures that they were demolishing were not on Plot No. 19B. The interested party has contended that an application that he filed to protect his property on Plot No. 24A from being demolished was dismissed by the court together with the entire suit. The same fate fell on the application that he brought under section 34 for the determination of the issue as to whether the execution by the plaintiff was being properly carried out. That said application was struck out. The interested party has contended that the plaintiff is using the court process to fraudulently damage the interested party’s structures which are not on Plot No. 19B which plot is now vacant as stated above.

14. When the application came up for hearing on 14th January 2013, Mr. Oguttu appeared for the plaintiff while Mr. Bosire advocate appeared for the defendant and/or interested party. In his submission, Mr. Oguttu reiterated the contents of the plaintiff’s affidavit in support of the application together with the annexures thereto. Mr. Oguttu submitted that the suit that was filed by the interested party against the plaintiff namely Kisii HCCC No. 502 of 1997 and the appeal that arose therefrom established that the defendant’s eviction had already taken place and that the ground location on which the eviction was carried out did not fall on Plot No. 24. Mr. Oguttu submitted that in her ruling on 7th September 2012, Sitati J. dismissed the interested party’s claim that the issue as to whether the demolition was carried out on Plot No. 24 or Plot No. 19B had not been determined. Mr. Oguttu submitted that the defendant and the interested party came back to Plot No. 19B after the initial eviction in the pretext that the eviction had taken place on Plot No. 24 and not on Plot No. 19B a position which this court and the Court of Appeal held to be incorrect.

15. Mr. Oguttu submitted further that the issue of ground location of Plot No. 19B is *res judicata* and as such cannot be re-opened for determination by this court. He submitted that the issue had been so declared by Sitati J. in her rulings dated 7th July 2011 and 7th September 2012. In conclusion, counsel submitted that the assistance of the police is required only for the purposes of maintaining law and order. The police are not supposed to be involved in actual eviction. In the circumstances, counsel submitted that it was not open to the police to decide where the eviction is supposed to take place. In his submissions in reply, Mr. Bosire insisted that the eviction order in favour of the plaintiff had been executed wholly and as such there is no further execution required in respect of which the assistance of the police can be sought.

16. Counsel submitted that the eviction order sought to be executed was issued wrongfully because the court was duly notified by the defendant that he had already moved from Plot No. 19B in respect of which the order had been sought. Counsel submitted that after obtaining the eviction order the plaintiff despite protests from the defendant, proceeded to Plot No. 24A on which he carried out demolition of the structures standing thereon. Mr. Bosire submitted that the issue as to whether the eviction aforesaid had

taken place on Plot No. 19B has never been determined either by this court or by the Court of Appeal. Counsel submitted that H.P.G Waweru J. had in his judgment of 2nd August 2001 held that the eviction had taken place on Plot No. 222 belonging to the plaintiff and not on Plot No. 24 or Plot No. 19B. Counsel submitted that this finding was confirmed by the Court of Appeal which held that no evidence had been placed before the High Court to establish the ground location of Plot No. 24 and Plot No. 19B. Counsel submitted however that H.P.G Waweru J. had found as a fact that the interested party was an allottee of Plot No. 24.

17. Mr. Bosire submitted that in view of the fact that the existence of Plot No. 24 is not disputed and that the exact location where eviction had taken place had not been determined, it would only be proper that the ground locations of Plot No. 24 and Plot No. 19B be determined before further execution can take place. This he suggested can be done with the assistance of a surveyor. Counsel submitted that the auctioneer who had gone to carry out the eviction that aborted had established through a surveyor that the building that was pointed out to him for demolition by the plaintiff was on Plot No. 24. Counsel submitted that when the interested party resisted the said eviction attempt, he was arrested and charged in court. In the said Criminal Case, counsel submitted that a surveyor testified that Plot No. 24 and Plot No. 19B were separate and distinct and that Plot No. 19B was vacant while Plot No. 24 had demolished structures. In conclusion, counsel submitted that the issue as to the ground location of Plot No. 24 and Plot No. 19B remains unsettled and that the plaintiff's intention is to demolish structures standing on Plot no. 24. Counsel submitted that the defendant and the interested party have no objection to the plaintiff proceeding with the execution of the eviction order in his possession provided the eviction is carried out on Plot No. 19B.

18. I have considered the plaintiff's application together with the affidavit filed in support hereof. I have also considered the grounds of opposition and replying affidavit filed by the defendant and the interested party in opposition to the application. I have also perused the earlier proceedings in this matter and considered the submissions that were made before me by the learned counsels for the parties. The issue for determination in the application before me is whether I should summon the Officer Commanding Rioma Police Station (OCS) and the Officer Commanding Central Kisii Police Division (OCPD) to appear before me to show cause why they have failed to provide security to the auctioneer who was mandated by this court to execute an eviction order against the defendant. In determining that issue, I have also been asked to give such directions as may be necessary or appropriate to enable the successful execution of the eviction order that was issued herein on 12th April 2010. From the material on record, the OCS Rioma Police Station and the OCPD Kisii Central Police Division were duly served with the present application. They neither filed any affidavit in response to the application nor appeared at the hearing of the application.

19. In essence, they did not oppose the application. Although the police officers sought to be summoned have not opposed the plaintiff's application, the orders sought by the plaintiff call for the exercise of this court's discretion. They cannot be issued as of right or as a matter of course. The plaintiff had the obligation to satisfy the court that good reasons or grounds to do exist to warrant the grant of the orders sought more particularly now that the application is opposed by the defendant and the interested party. From what I have outlined above, there is no dispute that the plaintiff obtained judgment herein against the defendant pursuant to which the plaintiff was declared to be entitled to a portion measuring 50 feet by 50 feet of Plot No. 19B that was said to be owned by the defendant.

20. The court (Mbaluto J) entered judgment in terms of the award by Nyakoe market Committee on 15th February 1995. The decree that was issued pursuant to the said judgment was on the following terms;

“It is decreed that the Plot No. 19B to wit 50 feet by 50 feet belongs to the plaintiff and the same do and is hereby given to the plaintiff.”

This is the decree the execution of which is in dispute. The decree to me seems to have been a declaratory one. It is not clear to me from the record at what point it was turned to one for possession. I have not seen from the record any order from this court directing the defendant to deliver and handover

vacant possession of the 50 feet by 50 feet portion of Plot No. 19B to the plaintiff. In my view, it is only in execution of such order that a warrant for the eviction of the defendant could be issued. I have noted from the record that after the decree that I have referred to above was issued, the plaintiff applied for execution thereof. In the said application that was filed in court on 25th May 1995 the plaintiff prayed for the defendant to be served with a Notice to Show Cause why he should not be evicted from the plaintiff's parcel of land. The court issued the Notice to Show Cause dated 29th May 1995 which came up for hearing on 14th June 1995 and 28th June 1995 when the Deputy Registrar Hon. Kathoka Ngomo granted an order for the defendant's eviction.

21. To me, the whole process was irregular. The deputy registrar could not issue an eviction order that the court had not issued. As I have stated above, the decree of this court was only declaratory in nature and there was no aspect of it that required the defendant to handover possession of Plot No. 19B that was in dispute or any portion thereof. Following the said order by the deputy registrar, an eviction warrant was issued by the same deputy registrar on 27th June 1995 for execution against the defendant by the district officer, Marani Division. The said District Officer seems not to have carried out the eviction in a manner satisfactory to the plaintiff who moved the court once again through an application on 28th January 1996 for an order that the OCS Kisii Police Station do supervise the demolition of the structures that were extending beyond Plot No. 19B and thereafter put the plaintiff in possession. This application was allowed by Mbaluto J. on 3rd March 1997. Following this order the plaintiff proceeded with the eviction of the defendant from Plot No. 19B which eviction involved the demolition of structures that were standing on the property and the handing over of possession of the property to the plaintiff.

22. It is after this demolition exercise that the interested party herein moved to court through Kisii HCCC No. 502 of 1997 contending that the properties that had been demolished by the plaintiff were standing on Plot No. 24 and not on Plot No. 19B and as such the execution was directed at the wrong premises and as such was unlawful. The interested party sought as I have stated above declaratory and injunctive reliefs and in addition general damages from the plaintiff. In that case the plaintiff herein contended that the structures that were the subject of the interested party's complaint were standing on the plaintiff's parcel of land and were lawfully demolished pursuant to the order that was issued by this court in this suit as I have stated above.

23. When the interested party's suit came up for hearing before H.P.G Waweru J. ("Waweru J.") among the issues that the court was called upon to determine were; whether the interested party was the owner/allottee of Plot No. 24, whether Plot No. 24 and Plot No. 19B were one and the same and whether the structures that had been demolished were on Plot No. 24 or Plot No. 19B. In his judgment of 2nd August 2001 H.P.G Waweru J. found that; the interested party was the allottee of Plot No. 24, Plot No. 24 was separate and distinct from Plot No. 19B, Plot No. 24 was near or adjacent to Plot no. 19B and that the structures that were demolished pursuant to the eviction orders that were issued in this suit were on the plaintiff's parcel of land namely Plot No. 222 and neither on Plot No. 24 nor Plot No. 19B and that the same belonged to the defendant herein. As I have stated above Waweru J. dismissed the interested party's suit. The interested party's appeal to the Court of Appeal was also dismissed with costs on 11th June 2004.

24. In my view, the decisions in Kisii HCCC No. 502 of 1997 and the appeal that arose therefrom settled the following issues;

- (i) That the plaintiff had already evicted the defendant from the portion of Plot No. 19B that was in dispute between them.
- (ii) That the eviction was neither carried out on Plot No. 24 nor on Plot No. 19B but on the portion of Plot No. 222 to which the defendant who owned Plot No. 19B had encroached.
- (iii) That Plot No. 24 and Plot No. 19B were separate and distinct and that Plot No. 24 was adjacent to or near Plot No. 19B.

After about four (4) years from the date when the interested party's appeal to the Court of Appeal was dismissed the plaintiff lodged yet another application for execution of decree against the defendant. The application was filed on 29th April 2008 and in it the plaintiff asked the court to issue a notice to the defendant to appear before court and show cause why he should not be evicted from Plot no. 19B, Nyakoe Market. The plaintiff's notice to show cause was opposed by the defendant on a number of grounds among others that the same was an abuse of the process of the court and that it was *res judicata* and as such does not lie.

25. On 12th April 2010, G. H Oduor, P.M who was the deputy registrar held that the defendant had failed to show cause and ordered for his eviction from Plot No. 19B. Following this order several fresh eviction orders/warrants were issued against the defendant, the last one having been issued on 21st December 2011 for execution by Homeland Auctioneers. This last order was made after several attempts by the defendant and the interested party to stop further execution by the plaintiff failed. The interested party's suit brought on 5th May 2010 in Kisii HCCC No. 126 of 2010 to stop the plaintiff from carrying out eviction on what he insisted was Plot No. 24 and not Plot No. 19B was struck out without a hearing on the ground that the issues raised were *res judicata*. The interested party's subsequent application brought in this suit on 12th July 2011 to stop the eviction that to him was to be levied on Plot No. 24 "A" met the same fate. The same was not heard on merit but was struck out as *res judicata* on 7th September 2012.

26. In the absence of any impediment, the plaintiff now intends to proceed with the execution of the eviction order that was issued on 21st December 2011 aforesaid. From the record, an earlier attempt to execute the said order on 28th March 2012 did not materialize because of a dispute over the location on which the eviction was to be carried out. The auctioneer who went to the site in the company of police officers called off the exercise after the defendant insisted that the eviction was directed at a building on Plot No. 24A while the plaintiff on the other hand insisted that the building was on Plot No. 19B. The plaintiff who has directed the said auctioneer to proceed with the execution despite the dispute as to the location where the building intended to be demolished is situated now requires the assistance of the police to provide security during the exercise. The police officers who were present at the earlier attempted eviction have insisted that the plaintiff do furnish them with an order for demolition of structures on Plot No. 24 before they can provide the requisite assistance. The plaintiff has found this demand unreasonable and now wants the police officers concerned to show cause why they cannot comply with the court order that had directed them to provide security.

27. I am not in agreement with the contention by the plaintiff that the issue as to the ground location of Plot No. 19B and Plot No. 24 had been determined conclusively. I have highlighted hereinabove the decision of Waweru J. and the decision of the Court of Appeal that confirmed that decision. In none of these decisions did the court lay to rest the dispute that has raged herein since 1997 over the boundary of Plot no. 24 and Plot No. 19B. what was laid to rest was the fact that Plot No. 24 and Plot No. 19B exists independent of each other and that the execution that was carried out herein earlier and that was the subject of the interested party's complaint was carried on none of the two plots. What we are considering now is not the first eviction but the second round of eviction. The first eviction was held to have been carried on Plot No. 222. The plaintiff has contended that after that eviction the defendant came back and restored the building that had been demolished. The plaintiff's contention is that this second round of eviction is directed at the said buildings that were restored and which the court had held not to have been on Plot No. 24 or Plot No.19 "B". The eviction order sought to be executed by the plaintiff is directed at Plot No. 19 "B".

28. As Waweru J. had held in his judgment that I have referred to above, the earlier eviction and demolition of structures did not take place on Plot No. 19B. It is a contradiction therefore for the plaintiff to contend that he intends to evict the defendant from the buildings that had earlier been demolished and which the defendant and the interested party restored. If that is the case, the eviction order could have been directed at Plot No. 222 which was the subject of the earlier eviction. The eviction order issued herein having been directed at Plot No. 19B and there being a dispute as to whether the buildings which are intended to be demolished are on Plot No. 19B or Plot No. 24 the issue needs to be resolved for

smooth execution of the order of this court to take place. It was not unreasonable therefore in my view for the police officers who had complied with the court order by accompanying the auctioneers to the site to carry out the eviction but were confronted with a dispute over the premises on which the eviction was to be carried out to ask that the said dispute be resolved first before they can assist with the execution. Their duty being that of maintaining law and order such a request in my view was not unreasonable and did not amount to a breach or contempt of the eviction order of 21st December 2011. Having come to that conclusion, I am not inclined to grant prayer 2 in the plaintiff's application dated 14th January 2013. Instead I am minded to give the necessary directions for the better carrying out of the execution of the eviction order issued herein on 21st December 2011 which has not been set aside or varied.

29. I am in agreement with the submission by the advocate for the plaintiff that the issue as to the ground location of Plot No. 24 and Plot No. 19B cannot be determined in these proceedings. The directions that I would give would not therefore be intended to determine that issue. Rather, the same is intended to identify with some degree of certainty the location at which the execution has to be carried out. Towards that end, I hereby make the following orders;

- (i) M/s Homeland Auctioneers shall proceed with the execution of the eviction order issued herein on 21st December 2011 in accordance with the terms thereof.
- (ii) The parcel of land namely Plot No. 19 "B" Nyakoe Market upon which the said order is to be executed shall be identified to the said auctioneers by the Kisii County Land Surveyor who shall be accompanied by the plaintiff and the defendant during the exercise.
- (iii) The expenses to be incurred by the said surveyor if any shall be met by the plaintiff and the defendant equally.
- (iv) The officer commanding police station (OCS), Rioma police station shall provide security to the said auctioneers and surveyor while discharging their duties as ordered by the court in the eviction order of 21st December 2011 aforesaid.
- (v) The parties shall be at liberty to apply on the implementation of the orders issued herein.
- (vi) Each party shall bear its own cost of the application.

Delivered, signed and dated at KISII this 31ST of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Oguttu-Mboya for the plaintiff

Mr. Bigogo h/b for Bosire for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE

