



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL 35 OF 2012
LESIIT J.

NATHAN M'ETIRIKIA M'BARUTUA..... APPELLANT

VERSUS

RAEL MWONTUBUCHIU.....1ST RESPONDENT

JOSEPH NONGAI NGARUNI.....2ND RESPONDENT

GRACE MUTHAICU NGARUNI.....3RD RESPONDENT

KUBAI MURUNGI.....4TH RESPONDENT

MONICA KAREMA NGARUNI..... 5TH RESPONDENT

FRANCIS MWITI.....6TH RESPONDENT

ISAAC MEEME.....7TH RESPONDENT

R U L I N G

The Application before court is a Notice of Motion dated 2nd May, 2012. It has been brought under the provisions of Order 51 Rule 1, Order 42 Rule 6 of Civil Procedure Rules and Section 3A of CPA.

The Applicant seeks a stay of execution of the judgment delivered on 7th March, 2012 by Hon. R. N. Mukungu, SRM Maua, in CMCC No. 105 of 2003 and the consequent decree issued pending the hearing and determination of an appeal lodged in this court against the said judgment. The application is premised on nine (9) grounds which are:

0. **That the subject matter in the Maua CMCC. No. 105 of 2009 (which was between the Appellant herein and the Respondents) was land Parcel NO. AMWATHI/MAUA/3403,**

where on the Applicant lives with his two wives, their children, grand children and sons and daughters-in-law.

- 0. That the Respondents do not live or use the said land.**
- 0. That the Appellant sued the Respondents in respect of the said land and the Respondents counter-claimed claiming a portion of the said land and that the Hon. R. N. Mukungu, SRM decided the said suit in favour of the respondents.**
- 0. That the Appellant/Applicant is dissatisfied with the said judgment of the Hon. R. N. Mukungu SRM delivered on 7th March, 2012 and has preferred an appeal in this court both against the judgment and decree, which appeal has prima facie chances of success.**
- 0. That the Respondents have embarked on the process of demolishing the homes built on the suit land, cutting down trees and causing senseless damage thereon, purporting to be executing the decree from the said judgment.**
- 0. That the Respondents are using violent and armed goons in causing the said damage and if the said process is not stopped the Applicant/Appellant will continue suffering irreparable loss and damage.**
- 0. That unless the orders for stay are granted, the Appellant/Applicant will suffer substantial/irreparable loss in the event the appeal is successful.**
- 0. That the Applicant has moved to court without unreasonable delay and in the event of any delay, such delay is reasonably explicable.**
- 0. That the Respondents will not suffer any prejudice if this Application is allowed.**

The application is also supported by an affidavit sworn by the Applicant dated 30th April 2012. The gist of the affidavit is that the Applicant lost his case against the Respondent before Maua Court and that he has lodged an appeal against same. The Applicant contends that the Respondents have never lived on the suit land, that they hired armed goons who have started demolishing the home on the suit land on which the Appellant his sons, daughters, grandchildren and wives live. The Applicant has deposed that there is an imminent eviction and that the same should be stopped to prevent irreparable and wanton loss of Applicant's property, and to prevent the appeal being rendered nugatory.

The application is opposed. The 2nd Respondent has filed a replying affidavit in which he has annexed the Decree and an Order of the lower court. The Decree orders for the eviction of the Plaintiff from Parcel Nos. Maua/Amwathi/10399, 10400, 10401 and 10402; and a permanent injunction restraining him from cultivating or interfering with the said land. The Order directs the OCS Maua Police Station to provide security to Japhet R. Nkonge Auctioneers during the eviction pursuant to the Decree annexed herein. Both the Decree and the Order are annexed herein and are both dated 12th April, 2012. In the Replying Affidavit the 2nd Respondent deposes that the Appellant was lawfully evicted from the suit lands on 28th April, 2012 under the watch of the Deputy OCS Maua Police Station.

The 3rd Respondent has also filed a Replying Affidavit which is dated 10th May, 2012. The said Respondent deposes that the Appellant who is their paternal uncle was left with their grandfather's land measuring 23 acres, to share between the Respondent's father, his blood and only brother, and himself. The 3rd Respondent deposes that the Appellant dispossessed them of the said land. She deposes that their objection to the Land Disputes Tribunal concluded with a finding that the Respondents Nos. 1 to 6 should be given 5 acres out of the land, which was their father's share of the suit land. The 3rd Respondent deposes further that the suit filed by the Appellant seeking to reclaim the 5 acres from the Respondents was dismissed and the Appellant ordered to vacate their land or he be evicted. The 3rd Respondent

complains that the Appellant's family has cut down their fences and mounted physical attacks on their family leading to a police case.

The Appellant filed a supplementary affidavit dated 14th May, 2012. It is a response to the 3rd Respondents Affidavit dated 10th May, 2012. In the said affidavit, the Appellant contends that the land Dispute was not heard but that instead the Respondents colluded with members of the committee to fraudulently take away his land. The Appellant denies being served with Notice before attempt to evict which was made by the Respondents. The Appellant contends that it is the Respondents who have been aggressive towards his family and that due to their collusion with the Police, reports made by the Appellant's family have remained unattended.

The 2nd Respondent has also sworn a replying affidavit which is dated 11th May, 2012. It is 38 paragraphs long. The gist of the affidavit is that the Respondents were put into possession of the suit lands in February, 2000 by the Land Adjudication Board. That in 2003, the Appellant torched their buildings and evicted them from the suit land. That subsequent to the judgment of SRM Maua giving the Respondents back the suit lands, the Respondents' Agents successfully evicted the Appellant from the land and demolished all buildings and structures on the land and placed the Respondents in possession to date. The 2nd Respondent deposes that the Appellant wrongfully obtained an order of stay of eviction which he used to evict the Respondents from the suit properties. He deposes further that after Hon. Makau J. ordered a locus in quo visit by the court's E. O. and obtained a report from him, the Respondents were put back in possession and the Appellant ordered to leave them in peace.

The report by the Executive Officer is before court. On one hand the Report says that all houses and structures on four portions of land together with the old and new fences were demolished. New fences were demolished leaving the Appellant on the fifth portion. Then it goes on to say that the person in occupation of the suit land is the Appellant. Simple interpretation of the Report appears to suggest that the Appellant is in occupation of a fifth portion of the suit land with the other four portions having demolished houses.

I have considered this application together with the affidavits and annexures filed by rival parties and submissions by both counsels to the Applicant and Respondents.

The Appellant approached the court with an application under certificate of urgency dated 2nd May, 2012. In the interim order sought and which the court granted, the Appellant sought a temporary order of stay of execution of the judgment of the SRM's Court Maua. I have referred in this ruling to the Decree of the Lower Court which ordered for the eviction of the Applicant from Land Parcel Nos. Maua/Amwathi/10399, 10400, 10401 and 10402.

The Respondents have demonstrated that an eviction of the Appellant from the said four parcels of land was carried out by an Auctioneer, who was guarded by the Deputy OCS Maua, on 28th April 2012. The 2nd Respondent has deposed this in his replying affidavit dated 11th May, 2012. The fact the eviction was carried out by Japhet R. Nkonge Auctioneers is supported by the auctioneer in his replying affidavit dated 10th May, 2012. In that affidavit, the Auctioneer deposes that the caused out an eviction exercised under watch of DOCS Maua on 28th April, Maua on 28th April, 2012. The Auctioneer deposes that the evicted the April from Land Parcel Nos. Maua/Amwathi/10399, 10400, 10401 and 10402 pursuant to the court order in decree dated 12th April, 2012.

The Appellant did respond to the issue of the eviction by stating that he was still in occupation of Parcel No. Maua/Amwathi/3403 and that the parcel of land was never subdivided into the Nos. 10399, 10400, 10401 and 10402.

The report by the Executive Officer of this court confirms that there are five parcels of land on the ground; that all structures in four of the parcels of land were demolished and that the Appellant lives on one of the five portions of the land.

I have the proceedings of the lower court and the original record. In the plaint filed by the Appellant, at paragraph 6 thereof he states;

“The Defendant were unlawfully and illegally allocated parts of the plaintiff’s land as follows:-

- i. AMWATHI/MAUA/10399 to the first defendant and second defendants.**
- ii. AMWATHI/MAUA/10400 to the third defendant.**
- iii. AMWATHI/MAUA/10401 to one JERUSHA KABURO M'MBATUA and the fourth defendant.**
- iv. AMWATHI/MAUA/10402 to the fifth defendant and sixth defendant.”**

This is an interlocutory application seeking discretionary orders pending an appeal to this court. It is incumbent upon the Appellant to come with clean hands and disclose the true state of affairs. Having considered all the facts and evidence placed before me I have come to the conclusion that the Applicant swore falsely that he was threatened with imminent eviction from the suit land. The truth of the matter as demonstrated by the Respondents and the replying affidavits filed herein, is that the Applicant had already been evicted from the suit lands in execution of the lower court Decree, on 28th April 2012. That eviction took place two weeks before the date this application was filed.

I have also come to another conclusion that the Appellant after extracting the interim order I granted to him to stay execution of the lower court’s decree until the application was heard inter partes, used the stay of execution order to evict the Respondents from the suit land.

The third conclusion I have come to is that the Applicant had contradicted himself in the further supporting affidavit and his plaint filed in the lower court.

In the plaint, the Applicant acknowledged that the suit land originally No. MAUA/AMWATHI/3403 was allocated to the Respondents in five portions 10399, 10400, 10401, 10402 and 20945. The fact he quoted the Parcel Nos excised out of “his” on final portion is in itself an acknowledgment that there was a subdivision. The Applicant is guilty of approbating and reprobating at the same time, which cannot be allowed.

The Appellant is seeking equitable relief. He who comes to equity must come with clean hands. The Appellant has come to court with unclean hands. He has abused the process of the court by using an order of this court which granted a stay of execution of a Decree, to evict the Respondents who had entered possession of the suit lands after evicting him. That is an abuse of the due process of the court which this court cannot countenance.

The conclusion of this matter is that the application has no merit and the same is dismissed with costs to the Respondents. The interim order granted by the court on 4th May 2012 is hereby lifted.

Those are my orders.

DATED SIGNED AND DELIVERED THIS 28TH DAY OF JUNE 2012

LESIIT, J

JUDGE.