REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 103 OF 2015

NELSON RUTO KORIR.....PLAINTIFF

VERSUS

1. EUGINIA NJOKI

2. REGISTRAR OF TITLES.....DEFENDANTS

RULING

1. By this Notice of Motion dated 5th February 2020, Nelson Ruto Korir (the Plaintiff) prays for orders framed as follows:

> ***b) That this Court do issue an order of stay of any further execution of the decree issued on 28th January 2020 pending the hearing and determination of the intended Appeal.***
>
> ***c) That the Honourable Court be pleased to issue a temporary injunction to restrain the Defendants either by themselves or through their agents, servants, proxies, beneficiaries or persons claiming through them from wasting, damaging, alienating, selling or offering for sale or developing or carrying out any excavation or development and construction on Plot No. 2679 (Original No. 34/27) Section III Mainland North as delineated on Land Survey Plan No. 180554 pending the hearing and determination of the intended appeal against the Judgment delivered on 23rd January 2020 and the subsequent decree.***
>
> ***d) That an order (be issued) that the issuance of the decree dated 28th January 2020 was irregular, null and void ab initio as it was issued contrary to the provisions of Order 21 Rule 8 (2) (3) and (4) of the Civil Procedure Rules.***
>
> ***e) An order (be issued) that the demolition and forceful takeover of the Plaintiff's property on Plot No. 2679 (Original No. 34/27 Section III Mainland North as delineated on Land Survey Plan No. 180554 on 29th January 2020 by the Defendants either by herself or through her agents, servants, employees or people acting under their instruction and benefit in purported execution of the decree dated 28th January 2020 was illegal, unlawful and an abuse of the Court process and an order for the restitution of the status quo ante before the unlawful eviction and destruction of the Plaintiff's property and a demolition of any new developments on (the suit property) made in purported execution of the decree dated 28th January 2020.***
>
> ***f) That the Court do require the defendants to provide security for restitution of the Plaintiff's property which has been demolished in purported execution of the Court decree dated 28th January 2020 or for payment of the value of the said property equivalent to the value of the Plot and the property pursuant to the provisions of Order 42 Rule 7 of the Civil Procedure Rules.***
>
> ***g) Costs.***

2. The application which is supported by an affidavit sworn by the Plaintiff is based on the grounds that: -

> ***The Plaintiff is the rightful owner of the said Plot No. 2679 (Original No. 34/27) Section III Mainland North;***
>
> ***a) The Plaintiff is dissatisfied with the Court's Judgment dated 23rd January 2020 and has filed a Notice of Appeal against the same;***
>
> ***b) Any interference with the subject property will further complicate this dispute wherein both the Plaintiff and the 1st Defendant are claiming ownership hence it is better to conserve the status quo pending the hearing and determination of the Appeal;***

c) If status quo is not conserved the 1st Defendant will execute the Judgment and that will occasion the Plaintiff substantial and irreparable loss and damage;

d) The Plaintiff has an arguable appeal with a high probability of success;

e) The Plaintiff has a right of appeal which should be protected;

f) On 29th January 2020, the Defendant in purported execution of the Court decree dated 28th January 2020 descended on the suit property with goons and demolished the Plaintiff's property;

g) A decree is said to have been issued in this matter on 28th January 2020 without regard to the provisions of Order 21 Rule 8 (2) (3) and (4) of the Civil Procedure Rules; and

h) The purported execution of the Court decree on 29th January 2020 was done contrary to the rules as taxation of the costs had not been done and without leave of the Court contrary to Section 94 of the Civil Procedure Act.

3. The 1st Defendant –Euginia Njoki is opposed to the application. In a Replying Affidavit sworn on her behalf by her appointed attorney Florence Kamunyu and filed herein on 17th February 2020 she avers that on 28th January 2020, her Advocate on record extracted a decree in terms of the Court's Judgment delivered on 23rd January 2020.

4. The 1st Defendant avers that on 29th January 2020, she executed the decree and took possession of the suit property. She further avers that at the time when she executed the decree, there were no stay orders in place and hence the execution was lawful and done by a successful litigant keen to enjoy the fruits of her Judgment.

5. The 1st Defendant denies that there was any destruction of the Plaintiff's property in the process of execution. She avers that the Plaintiff does not reside on the property and that it is one Emily Mwende Makasi who had put up a cattle house and a chicken house and was in occupation of the property as a licencee of the Plaintiff.

6. The 1st Defendant further avers that the Plaintiff obtained title to the property fraudulently and has denied her the use and enjoyment of the same since 3rd June 2011 when she purchased the same and urges the Court to reject the application for restitution of status quo ante and a stay of execution herein.

7. I have perused and considered the Plaintiff's application and the response thereto by the 1st Defendant. I have similarly perused and considered the rival submissions filed herein by the Learned Advocates for the parties.

8. Order 21 Rule 8(2), (3) and (4) of the Civil Procedure Rules sets out the steps to be followed when a decree is drawn. Under Sub-rule (2) of the order, it requires a draft decree to be sent to the opposite party for approval. If it is opposed and the Registrar of the High Court is satisfied that it is drawn up in accordance with the Court's Judgment, the Registrar shall sign and seal the decree. Under Sub-rule (3), where the opposing party fails to approve the draft decree within seven days of delivery, the Registrar ought to be notified of that failure formally and it is only then that the Registrar can, upon confirmation that the draft decree conforms to the Judgment, sign and seal it.

9. In the matter before me, the 1st Defendant does not deny that the draft decree was not forwarded to the Plaintiff for approval. She in fact appears to me oblivious of that requirement and hence her strong averments at paragraphs 4 to 7 of the Replying Affidavit as to how her former Advocates extracted the decree on 28th January 2020 and how a day later she proceeded to execute the same by taking over possession of the suit property.

10. As it were, Judgment had only been delivered herein some five (5) days prior to the execution and the Plaintiff was thereby denied a right to scrutinize and participate in the preparation of the decree. As the Honourable Justice PJ Otieno stated in ***Henry Simiyu Murwa –vs- Timothy Vitalis Okwaro t/a Tim Okwaro & Company Advocates & Another (2019) eKLR***: -

> *"……..It may help that the Deputy Registrar and Executive Officers (in respect of lower Court decrees) be reminded that it is not permissible for a party to unilaterally extract a decree to the exclusion of the adversary. It matters not that the other side maybe procrastinating or just unwilling to participate so as to earn some undeserved holiday from meeting its Judgment debt. The rules set adequate measures to be taken to prevent such ill designs."*

11.It was also clear to me that as at the time the 1st Defendant purported to execute the decree the costs awarded to her had not been taxed. Section 94 of the Civil Procedure Act expressly provides that where there are orders as to costs as in this case, unless and until those costs are ascertained by the taxing officer, execution can only be levied with the leave of this Court. No such leave had been sought or obtained herein and it therefore follows that the execution levied against the Plaintiff on 29th January 2020 was irregular and unprocedural.

12. As regards the prayer for stay of execution, the conditions to be met before an order of stay of execution is granted are provided by Rule 6(2) of Order 42 of the Civil Procedure Rules as follows:

> ***"No order for stay of execution shall be made under sub-rule (1) unless-***

a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

13. Accordingly, a demonstration that substantial loss is likely to be suffered by an applicant is core to the granting of a stay order pending Appeal. In his application before me, the Plaintiff repeatedly accuses the 1st Defendant of invading the suit property and thereby proceeding to evict him and to demolish his property therein. The Plaintiff does not however mention which property was so demolished.

14. From the proceedings herein, it was clear to me that despite holding a title to the suit property, the Plaintiff has not been in occupation of the land. Instead, his neighbor by the name Emily Mwende oversees the land and rears chicken thereon. Taking the totality of the circumstances herein into consideration, I am not persuaded that there has been any demonstration of the likelihood of the Plaintiff suffering any substantial loss unless the orders sought herein are granted.

15. As was stated by the Honourable Justice F Gikonyo in ***James Wangalwa & Another –vs- Agnes Naliaka Cheseto (2012) eKLR:***

"……...the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process."

16. In the premises, I do partially allow the Plaintiff's application in so far as the decree issued on 28th January 2020 is concerned by setting aside that decree and directing that a proper decree be drawn in strict compliance with the rules and in full agreement with the Judgment of this Court as delivered on 23rd January 2020.

17. In the circumstances herein, the Plaintiff shall have the costs of the application.

Dated, signed and delivered at Malindi this 19th day of February, 2021.

J.O. OLOLA

JUDGE