



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC APPEAL NO. 12 OF 2020

SAMWEL ATIKA NCHOGU.....APPLICANT

VERSUS

CHRISTOPHER CHWEYA.....RESPONDENT

RULING

INTRODUCTION

1. What is before me is the Appellant's Notice of Motion dated 28th October 2020 seeking the following orders:

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2. That pending the hearing and determination of this Application inter partes, there be a stay and suspension of execution of the Ruling/Orders issued by the Principal Magistrates' Court at Kisii (Hon. E. A. Obina) in Kisii CMELC Case No. 22 of 2020 and all other consequential orders made thereto.

3. That pending the hearing and determination of the Appellant/Applicant's appeal, there be a stay and suspension of execution of the Ruling/Orders issued by the Principal Magistrates' Court at Kisii (Hon. E. A. Obina) in Kisii CMELC Case No. 22 of 2020 and all other consequential orders made thereto.

4. That the cost of this Application be in the cause.

2. The Application is anchored on the grounds stated on the face of the Notice of Motion and the Applicant's affidavit sworn on the 28th October 2020. Briefly stated, the Applicant's contention is that the Respondent who is the Plaintiff in Kisii CMELC case No. 22 of 2020 filed an Application dated 27th February 2020 seeking the following orders:

1. "That the Honourable Court be pleased to certify the instant Application as urgent and the same do proceed ex-parte in the first instance.

2. That the Honourable Court be and is hereby pleased to issue a temporary injunction restraining the Defendant/Respondent either by himself or through the funeral committee members of the late Cecilia Kemunto Nchogu, their agents, servants or anyone claiming under them from interring the remains of Cecilia Kemunto Nchogu on **L.R NO. NYARIBARI CHACHE/KEUMBU/2474** pending the hearing and determination of the instant suit.

3. That the Honourable Court be and is hereby pleased to issue a mandatory injunction compelling the Defendant/Respondent to immediately vacate **L.R NO. NYARIBARI CHACHE/KEUMBU/2474** along with his siblings and remove all structures created by themselves and in default the same be removed by the court approved bailiffs

4. That the Honourable Court be and is hereby pleased to issue a temporary injunction restraining the Defendant/Respondent either by himself or through the funeral committee members of the late Cecilia Kemunto Nchogu, their agents, servants or anyone claiming under them from interring the remains of Cecilia Kemunto Nchogu on **L.R NO. NYARIBARI CHACHE/KEUMBU/2474**, encroaching, trespassing, and/or in any other manner whatsoever interfering with the Plaintiff's quiet possession and enjoyment of the suit property, pending the hearing and determination of this suit.

5. That the Honourable Court be and is hereby pleased to order the OCS Kisii Central Police Station to enforce and ensure compliance with all the orders.

6. That the costs of this Application be borne by the Defendant/ Respondent.”

3. The Applicant herein filed his Replying Affidavit in opposition to the said Application. After hearing both parties, the trial magistrate rendered his Ruling dated 7th October 2020 in which he arrived at the following conclusion:

“Having carefully evaluated the facts of this case, it is clear that the Plaintiff has established a prima facie case that will enable this court grant him the order of interlocutory injunction sought. The Application dated 27th February 2020 has merit and orders are granted in terms of prayers 4, 5 and 6”.

4. The Respondent herein thereafter extracted an order in the following terms:

ORDER

“UPON READING the Notice of Motion filed under the provisions of order 40 Rule 1 and 2, Section 1A, 1B 3, and 3A and 63 (c) and (e) of the Civil Procedure Act Cap 21 of the Laws of Kenya 2010 and the rules made there under. AND UPON reading the affidavit of Christopher Chweya Nchogu in support and upon hearing Mr. Ongegu counsel for the Plaintiff /Applicant and Mr. Nyariki for the Defendant /Respondent:

IT HEREBY ORDERED AS FOLLOWS:

1. THAT the Honourable Court hereby issues a mandatory injunction compelling the Defendant/Respondent to immediately vacate L.R No. Nyaribari Chache/Keumbu/2474 along with all his siblings and remove all his structures created by themselves and in default the same be removed by the court appointed bailiffs.

2. THAT the Honourable Court hereby issues a temporary injunction restraining the Defendant/Respondent either by himself or through the funeral committee members of the late Cecilia Kemunto Nchogu, their agents, servants or anyone claiming under them from interring the remains of Cecilia Kemunto Nchogu on L.R No. Nyaribari Chache/Keumbu/2474, encroaching, trespassing, and/or in any other manner whatsoever interfering with the Plaintiff’s quiet possession and enjoyment of the suit property, pending the hearing and determination of this suit.

3. THAT the Honourable Court hereby issues an order to the OCS Kisii Central Police Station to enforce and ensure compliance with the orders of this Honourable Court.”

5. The Respondent then proceeded to serve the Applicant herein with the said order and upon reading its contents he realized that the order did not conform to the orders issued by the court.

6. The Respondent filed a Replying Affidavit sworn on 17th November 2020 in opposition to the Application, the gist of which is that there was a typographical error in the order that was served upon the Applicant.

7. The Applicant countered the Replying Affidavit with a Supplementary Affidavit sworn on 28th October in which he contends that if indeed there was a typographical error in the court order as alleged by the Respondent, then nothing would have been easier than to have it corrected. It is his contention that there was a conspiracy between the Respondent and the judicial officer who signed the impugned order to defeat the course of justice.

8. The Application was canvassed by way of written submissions but only the Applicant filed his submissions which I have considered.

ISSUES FOR DETERMINATION

9. The central issue for determination is whether the applicant should be granted a stay of execution.

ANALYSIS AND DETERMINATION

10. It is common ground that the lower court granted a temporary injunction restraining the Applicant from interring the remains of his late mother Cecilia Kemunto Nchogu on **L.R NO. NYARIBARI CHACHE/KEUMBU/2474**. The court further restrained the Applicant from encroaching, trespassing, and/or in any other manner whatsoever interfering with the Plaintiff’s quiet possession and enjoyment of the Suit Property, pending the hearing and determination of this suit. Additionally the court granted prayers 5 and 6 of the Notice of Motion which entailed directing the OCS Kisii Central Police Station to enforce and ensure compliance with all the orders as well as ordering that the costs of the Application be borne by the Defendant/ Respondent.

11. Nowhere in the Ruling of Hon. Obina did the order that a mandatory injunction be issued compelling the Defendant/Respondent to immediately vacate **L.R NO. NYARIBARI CHACHE/KEUMBU/2474** along with all his siblings and remove all his structures created by themselves and in default the same be removed by the court appointed bailiffs.

12. It is instructive to note that the Respondent has now stated that the limb of the order talking about the mandatory injunction was a mistake. If that is the position, I agree with counsel for the Applicant that the Respondent ought to have had the mistake corrected as soon as it was pointed out to him. Instead, the Respondent has not only stood his ground by opposing this Application but he has taken no steps to correct the apparent error. This smacks of mischief and is a gross abuse of the court process. This court cannot countenance the misuse of its

orders in a manner that does not meet the ends of justice. As the main suit is still pending before the lower court, the Respondent should wait for the court to determine whether or not to issue the orders of eviction rather than try to achieve this result through unorthodox means.

13. In view of the foregoing, I find merit in the Application and I grant it and make the following orders:

a) Pending the hearing and determination of the Appellant/Applicant's appeal, there be a stay and suspension of execution of the Ruling/orders issued by the Principal Magistrates' Court at Kisii (Hon. E.A Obina) in Kisii CMELC Case No.22 of 2020 together with all other consequential orders made thereto.

b) That the cost of this Application be in the cause.

Dated, signed and delivered at Kisii this 9th day of February 2021.

J.M ONYANGO

JUDGE