



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**CIVIL APPEAL NO. 44 OF 2010**

**MORAA MASARE.....1<sup>ST</sup> APPELLANT/APPLICANT**

**JEMIMAH MASARE.....2<sup>ND</sup> APPELLANT/APPLICANT**

**BWARI MASARE.....3<sup>RD</sup> APPELLANT/APPLICANT**

**EVANS SAMWEL MOCHACHE MASARE....4<sup>TH</sup> APPELLANT/APPLICANT**

**PETER MORBEBO MIENCHA.....5<sup>TH</sup> APPELLANT/APPLICANT**

**VERSUS**

**GEOFREY MATOKE.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. What is before me is the Appellants' application dated 1<sup>st</sup> December, 2020 seeking the following orders:

1) Spent

2) Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an interim order of injunction barring and/or restraining the Respondent herein from entering upon and/or otherwise taking possession of the portion of LR NO. ISOGE/KINENI/49 hereinafter referred to as the suit property, which portion falls outside the portion hitherto under the use, possession and/or occupation of the Respondent prior to and/or before the impugned orders issued on the 28<sup>th</sup> day of July 2020.

3) Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an order of mandatory injunction to compel and/or direct the Respondent herein to remove the cedar posts, barbed wire and/or fence erected on a portion of the suit property pursuant to the impugned orders made on the 28<sup>th</sup> day of July 2020, but which have since been set aside, vacated and/or otherwise rescinded.

4) The Honourable Court be pleased to grant an order of injunction barring and/or restraining the Respondent herein from entering upon and/or otherwise taking possession of the portion of LR NO. ISOGE/KINENI/49 hereinafter referred to as the suit property, which portion falls outside the portion hitherto under the use, possession and/or occupation of the Respondent prior to and/or before the impugned orders issued on the 28<sup>th</sup> day of July 2020 pending the hearing and conclusion of the outstanding Notice to Show Cause and the Preliminary Objection in respect of the subject matter.

5) The Honourable Court be pleased to grant an order of mandatory injunction to compel and/or direct the Respondent herein to remove the cedar posts, barbed wire and/or fence, erected on a portion of the suit property pursuant to the impugned orders made on the 28<sup>th</sup> day of July 2020, but which have since been set aside, vacated and/or otherwise rescinded, pending the hearing and conclusion of the outstanding Notice to Show Cause and the Preliminary Objection in respect of the subject matter.

6) In the alternative and without prejudice to prayer (5) hereof, the Honourable Court be pleased to grant liberty and/or authority to the Applicants herein to remove and/or evacuate the offensive barbed wire fence that has eaten into and/or encroached upon the suit property albeit without lawful cause and/or basis.

7) The Honourable Court be pleased to order the O.C.S Riontonyi Police Station and Sub County Police Commandant (SCPC) Borabu Sub-County, to provide reasonable security to facilitate the implementation and/or execution of the orders hereof.

8) The Honourable Court be pleased to grant such further and/or other orders and/or reliefs as may be deemed just appropriate and/or expedient.

9) The costs of this application do abide the Appeal.

2. The application is based on the grounds stated on the face of the Notice of Motion and the Supporting Affidavit of Evans Samwel Mochache Masare, the 3<sup>rd</sup> Appellant/Applicant herein sworn on the 1<sup>st</sup> December 2020, in which he contends *inter alia* that the Respondent duped the court into granting orders for execution of the judgment dated 24<sup>th</sup> June 2013 after which the Respondent proceeded with execution of the said judgment, thereby demarcating and fencing off a portion of the 4<sup>th</sup> and 5<sup>th</sup> Respondent's portion of land measuring 5 acres. It is the Applicants' contention that the said demarcation is unlawful and amounts to premature execution of a non-existent decree. The same is buttressed by the 3<sup>rd</sup> Appellant's further Affidavit sworn on 25<sup>th</sup> January 2021 in which he refuted the allegations in the Respondent's Replying Affidavit.

3. The Respondent resisted the application through his Replying Affidavit sworn on the 20<sup>th</sup> January 2021. The long and short of it is that the Respondent lawfully executed the judgment dated 21<sup>st</sup> June 2013 following the withdrawal of the Appellant's Appeal in the Court of Appeal and pursuant to the court's finding that Appellants had failed to show cause why execution should not issue.

4. In his Further Replying Affidavit sworn on the 8<sup>th</sup> February 2021, the Respondent annexed a copy of the Ruling of the Court of Appeal delivered on the 20<sup>th</sup> November 2019, in which the Appellant's Appeal was deemed as withdrawn in accordance with order 83 of the Court of Appeal Rules. Additionally, he annexed the ruling of Justice Okong'o dated 19<sup>th</sup> February 2014 setting out the terms of the order of stay of execution pending appeal.

5. The application was canvassed by way of written submissions and both parties filed their submissions. Subsequently, counsel for both parties orally highlighted their submissions on 18<sup>th</sup> February 2021.

#### **ISSUES FOR DETERMINATION**

6. Having considered the history of this case, the Notice of Motion, rival affidavits as well as the submissions of counsel, both written and oral, the following issues arise for determination:

i. Whether the Order of stay of execution of the Judgment and Decree issued on the 19<sup>th</sup> day of February 2014, remains in existence following the withdrawal of the Notice of Appeal.

ii. Whether the execution of the Judgment and Decree, which were carried out on the basis of the Orders issued on the 28<sup>th</sup> day of July 2020, were legitimate and/or lawful.

iii. Whether the actions and/or activities carried out on the basis of the Orders of the 28<sup>th</sup> day of July 2020, which have since been set aside and/or discharged, can

iv. remain in place despite the said orders having been discharged.

v. Whether the Appellants/Applicants have demonstrated a basis for the grant of the orders of Temporary and Mandatory Injunction, respectively.

#### **ANALYSIS AND DETERMINATION**

7. It is common ground that the Appellants were granted a stay of execution pending appeal vide the court's ruling dated 19<sup>th</sup> February 2014. It is also not in dispute that the Notice of Appeal was deemed as withdrawn as evidenced by the ruling of the Court of Appeal dated 19<sup>th</sup> November 2019. By dint of the said ruling, the order of stay of execution ceased to exist as the same having been predicated upon the filing of the Notice of Appeal could not continue to exist in the absence of an Appeal.

8. Having arrived at the finding that there was no stay pending Appeal, the Respondent was expected to execute the judgment dated 21<sup>st</sup> June 2013 as there was nothing barring him from doing so.

9. However, since the judgment had been delivered more than a year from the date of execution, he was required to take out a Notice to Show Cause against the Applicants. The said Notice to Show Cause was indeed taken out and the Deputy Registrar subsequently rendered a ruling allowing the Respondent to proceed with execution. The Applicants subsequently applied to have the said ruling and orders set aside on the grounds that the court had been misled into granting the orders and that the Applicants were not aware of the Notice to Show Cause. The Deputy Registrar then proceeded to set aside her order after which the Applicants filed the instant application.

10. As I have stated earlier in this ruling, it is clear to me that as at now, there is no Appeal pending in the Court of Appeal. Therefore, nothing stops the Respondent from applying for execution. Pursuant to Order 22 rule 18 (1) (a) of the Civil Procedure Rules, the Respondent was required to apply for a Notice to Show Cause against the Applicants since the application for execution was being made more than a year

from the date of the decree. It was also incumbent upon the Respondent to serve the said Notice to Show Cause upon the Applicant. I want to make it clear that this court will not deal with the issue as to whether or not the Notice to Show Cause was properly served as that falls within the jurisdiction of the Deputy Registrar.

**11.** The final issue that I shall consider is whether the Applicants have satisfied the conditions for the grant of a mandatory injunction. First and foremost, this is a matter where judgment was delivered way back in 2013. There is no Appeal or order for stay of execution in force at the moment.

**12.** Granted that the execution proceedings that had been commenced were set aside by the Deputy Registrar, there is absolutely no basis for granting a mandatory injunction in a concluded matter as this would amount to granting an injunction *in vacuo* contrary to established principles of injunction set out in the case of **Giella v Cassman Brown 1973 E.A 358**. I hasten to add that the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** cited by counsel for the Applicants is not applicable to this matter as the orders of injunction sought herein are not interlocutory in nature.

The upshot is that I find no merit in the application and I dismiss it with costs to the Respondent. For the avoidance of doubt, the interim orders issued herein on 10<sup>th</sup> December, 2020 are hereby vacated.

**DATED, SIGNED AND DELIVERED AT KISII THIS 18TH DAY OF MARCH, 2021.**

**J. M. ONYANGO**

**JUDGE**