



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 66 OF 2017**

**MICHAEL MUNENE KUBURIA.....1<sup>ST</sup> PLAINTIFF**

**JOHN KITHIGA MWAI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**VIRGINIA MUTHONI (Suing in her capacity as**

**the Legal Representative of**

**SAMUEL GACHUBI KUBURIA (deceased).....1<sup>ST</sup> DEFENDANT**

**SOFIA MUTHONI (Sued in her capacity as the**

**Legal Representative of**

**SAMUEL GACHUBI KUBURIA (deceased).....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

The applicant vide a Notice of Motion dated 6th October 2020 sought the following orders:-

- (1) Spent.**
- (2) This Honourable Court do cite Michael Munene Kuburia and John Kithiga Mwai for contempt of this Court's orders issued on the 28th Day of June 2019 by Hon. E.C. Cheronu and commit them to civil jail for a period of 6 months.**
- (3) A warrant of arrest and detention to civil jail do issue against Michael Munene Kuburia and John Kithiga Mwai.**
- (4) An order do issue evicting the plaintiffs and their relatives or agents from land Reference Number INOI/KIAGA/63 and such eviction be supervised by the Officer Commanding Station, Kerugoya.**
- (5) Costs of this application be awarded to the Plaintiff/Applicant.**

The application is supported by grounds apparent on the face of the said application and the affidavit of Sofia Muthoni sworn the same date. The affidavit is further supported by numerous annexures.

By way of a response, the respondents filed a replying affidavit by Michael Munene Kuburia opposing the said application sworn on 9th November 2020.

**Summary of Facts**

The applicants in the supporting affidavit contend that this Honourable Court on 28/6/2019 issued an order directing the plaintiffs to vacate the suit property land Reference No. INOI/KIAGA/63 within 6 months failing which they be evicted. Pursuant to that order, their advocates wrote to the contemnors advocates on record informing and serving them the decree of the Court and asking them to comply. The applicants stated that despite the said letter forwarding the decree of this Honourable Court, the respondents have blatantly and in total disregard

disobeyed the said Court orders and failed to move out from the suit property land Reference No. INOI/KIAGA/63. It is the applicants' further contention that the respondents are in contempt of this Honourable Court and that their action or omission amount to a deliberate defiance of the Court order and should therefore be punished by this Court.

The applicants also stated that in the interest of justice and protection of the integrity of the Judiciary, the respondents herein Michael Munene Kuburia and John Mwai Kithiga be cited for contempt and committed to civil jail for a period of six (6) months. The applicants also argued that the plaintiffs/respondents had filed an application for stay of execution on 16th July 2019 and this Honourable Court dismissed the same and that the 1st plaintiff/respondent constantly threatens the 1st defendant/applicant with eviction especially whenever he is drunk. It is the plaintiffs' contention that despite their advocates on record writing to the plaintiffs advocates on 18th August 2020 and also on 3rd September 2020 asking the plaintiffs to vacate the suit land, they have now tilled and planted which are clear acts of contempt of the orders of this Honourable Court.

The respondents in their replying affidavit stated that this Honourable Court did not order that they would be in contempt of Court and therefore liable to be committed to civil jail should they not vacate as that would be criminalizing a civil matter. The defendant further stated that they were dissatisfied and aggrieved by the judgment of the Court and filed a Notice of Appeal and subsequently appealed to the Court of Appeal at Nyeri vide Civil Appeal No. 143 of 2020.

The respondents also stated that they filed an application for stay of execution at the Court of Appeal at Nyeri being Misc Civil Application No. 96 of 2020. They annexed a copy of the same and marked MMK 3. Both the record of Appeal and the application for stay of execution before the Court of Appeal are pending hearing and were served upon the plaintiffs/applicants. As regards the letter dated 18th August 2020, the respondents stated that their advocates on record were not served with the same and that their advocates only received a letter dated 3rd September 2020 which made mention of the alleged letter dated 18th August 2020. The respondent stated that their advocates on record wrote to the applicants advocates on 9th September 2020 indicating that they had not received the purported letter dated 18th August 2020. On 5th October 2020, the applicants advocates forwarded to their advocates on record a copy of their letter dated 18th August 2020 and on 6th October 2020, their advocates on record wrote in response to the said letter dated 18th August 2020. In the said letter, their advocates notified the applicants advocates on record that their clients were damaging their property despite an appeal and an application for stay of execution having been filed in the Court of Appeal at Nyeri. Thereafter, the applicants then filed the instant application which they argued is intended to pre-empt the hearing of their application for stay of execution before the Court of Appeal.

In conclusion, the respondents urged this Honourable Court to do substantive justice and disallow the application for eviction until the matter before the Court of Appeal is determined.

#### **Plaintiff/Applicants Submissions**

The applicants through the firm of M/S Kinuthia Wandaka & Co. Advocates submitted that by an application dated 16th July 2019, the respondents applied for stay pending appeal which application was dismissed by this Honourable Court. The applicants further argued that the respondents are in contempt of this Honourable Court's orders as they continue to occupy the suit land while threatening the applicants with eviction. They cited the case of *Shimmers Plaza Limited Vs National Bank Limited (2015) e K.L.R where the case of Hadkinson Vs Hadkinson (1852) All E.R 567 .....*

#### **Respondents Submissions**

The respondents through the firm of Magee Law LLP on their part submitted that the respondents are not liable to be committed to civil jail on the following grounds:-

- (1) On 28th June 2020, the Honourable Court in its judgment ordered the plaintiffs/respondents to vacate L.R. INOI/KIAGA/63 within 6 months failing which they would be evicted.
- (2) The order is self-explanatory in that should the plaintiffs/respondents fail to vacate the suit land, they would be evicted.
- (3) The prayer for committal of the plaintiffs/respondents to jail for failure to vacate the suit land is therefore untenable.
- (4) The plaintiffs respect Court orders and have not failed to vacate the suit land out of respect.

The respondents counsel submitted that the applicant has failed to follow the laid down procedure for eviction of the respondent under *Section 152 (B) of the Land Act No. 6 of 2012*. The learned counsel also cited *Section 152F, 152G and Rule 65 of the Land Regulations 2017*.

The respondents further averred that no notice in form LA 57 was issued to them and that the applicants did not adhere to the mandatory procedural requirements for evicting the respondents. In addition, the respondents argued that they filed Nyeri Court of Appeal Civil Appeal No. 143 of 2020 challenging the judgment of this Honourable Court. They also filed an application for stay vide Court of Appeal Civil Application No. 96 of 2020 which was duly certified urgent but has not been heard due to shortage of Judges in the Court of Appeal. The applicants have been served in the aforesaid matters before the Court of Appeal.

#### **Analysis and Decision**

I have carefully considered the affidavit evidence and the submissions by counsels for both the applicants and the respondents. The second prayer in the application is seeking to cite the respondents for contempt of the orders of this Honourable Court issued on 28th June 2019. A decree in respect of the impugned judgment provides as follows:-

(a) *The plaintiffs suit be and is hereby dismissed.*

(b) *The defendants counterclaim is allowed.*

(c) *The plaintiffs are given six (6) months to vacate from the suit land No. INOI/KIAGA/63 failing which they shall be evicted.*

By an application dated 16th July 2019, the plaintiffs/respondents applied for stay of execution pending appeal under *Order 42 Rule 6 CPR*. However, the said application was dismissed by this Honourable Court on 14th February 2020. The plaintiff/respondents were dissatisfied with the judgment and filed Notice of Appeal and applied for stay of execution which is said to be pending hearing and determination.

The judgment of this Court issued on 28th June 2019 is clear on the manner in which the decree is to be executed. Under paragraph 3 of the said judgment, the Court ordered the plaintiffs/respondents to vacate the suit property L.R. INOI/KIAGA/63 within six (6) months failing which they were to be evicted. The defendants/applicants were to make a formal application to have the plaintiffs/respondents evicted from the suit land if they failed to move out voluntarily and willingly after the lapse of the six months' period. This being a civil claim, the Civil Procedure Act provides civil mechanisms for execution of such claims. This Court did not state that the plaintiffs would be committed to civil jail should they fail to vacate as that would be criminalizing a civil matter. I therefore find that the first prayer seeking to cite the plaintiffs/respondents for contempt of Court and for their committal to civil jail is untenable.

The third prayer by the plaintiffs/applicants is for a warrant of arrest and detention to civil jail against the plaintiffs/respondents. Since the 2nd prayer failed the third prayer automatically fails. The fourth prayer is for an order of eviction against the plaintiffs and their relatives or agents from the suit land L.R. No. INOI/KIAGA/63. The defendant/applicants annexed a copy of the decree of this Honourable Court which gave the plaintiffs/respondents six (6) months from the 28th day of June 2019 to vacate the suit property failing which they would be evicted. The plaintiffs/respondents in their replying affidavit stated that they have preferred an Appeal to the Court of Appeal at Nyeri and even applied for stay pending appeal which is pending determination. **Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules** provides as follows:-

*“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.*

2. *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; and*

(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”.*

The import of the provisions of **Order 42 Rule 6 (1) of the Civil Procedure Rules** is that an Appeal or second Appeal shall not operate as a stay. The respondents in this case have stated that they have filed an appeal before the Court of Appeal at Nyeri and even applied for stay of execution before the superior Court which is pending determination. Filing Appeal or applying for stay before the appellate Court in my understanding cannot operate as a stay.

I also note that before applying for a stay of execution application before the Court of Appeal where the appeal has been preferred, the plaintiffs/respondents had made a similar application for stay of execution before this Honourable Court which was dismissed on 14th February 2020. In the circumstances therefore, I find the defendants/applicants are entitled to the fourth prayer for eviction and do hereby allow as prayed. The fifth and last prayer is for costs. It is trite law that costs normally follow the event unless the Court or Judge for just reasons decides otherwise. The defendants/applicants have been partially successful in this application. I order that the plaintiff/respondents pay half the costs to be assessed or agreed.

**Disposition**

Following my analysis of the issues in the application dated 6th October 2020, I allow the same in terms of prayer No. 4 plus half the costs. The other prayers are disallowed. It is so ordered.

**READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 12TH DAY OF MARCH, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. *Ms Kiragu holding brief for Mr. Magee for Respondents*
2. *Ms Wambui holding brief for Kinuthia Wandaka for the Defendants*
3. *Kabuta – Court clerk.*