



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA

AT ELDORET

E & L CASE NO. 124 OF 2017

EVANS KEMBOI KOECH.....PLAINTIFF/APPLICANT

VERSUS

MARY JUSTER CHEPLETING.....DEFENDANT/RESPONDENT

AND

AGRICULTURAL FINANCE CORPORATION.....INTERESTED PARTY

RULING

This ruling is in respect of the plaintiff/applicant's application dated 14th July 2020 seeking for the following orders:

- a) Spent
- b) THAT the defendant/respondent do give the Plaintiff/Applicant vacant possession do yield, vacate, move out and hand-over possession of the whole of that parcel referred to as Land Reference No. 3209/1 situated in Arbabuch area, Moiben, Uasin Gishu County by herself, her family, her employees, representatives, contractors and anybody whatsoever ,whatsoever on the parcel on her behalf and or at her instance or invitation, do remove her livestock and animals, her machinery and all her belongings, assets and accessories and anything whatever and whatsoever that belongs to her within seven (7) days of the court orders herein.
- c) THAT in default of the defendant/respondent vacating the Land Parcel L.R No 3209/1 situated in Arbabuch Area, Moiben, Uasin Gishu County the Plaintiff/Applicant be at liberty to effect the eviction of the defendant/respondent herself, her family, her employees, her representatives, her contractors and anybody whatsoever whatsoever on the parcel on her behalf and or at her instance or invitation, her livestock and animals, her machinery and all her belongings, assets and accessories and anything whatever and whatsoever that belongs to her.
- d) THAT the eviction be effected using a court bailiff
- e) THAT the Officer Commanding Police Station Eldoret Central Police Station do supervise the process

Counsel for the plaintiff gave a brief background to the case and stated that the court entered judgement in favour of the Plaintiff/applicant vide E&L Case No. 124 of 2017 delivered on the 11th of January 2019 by learned Judge Ombwayo wherein the defendant's counter-claim to be declared the owner and to be allowed to possess and utilize the said parcel was dismissed with costs.

That the court found that the plaintiff properly bought the parcel from the interested party and therefore a bona fide owner hence the judgement effectively determined and terminated the interim orders of stay upon which the defendant/respondent was to remain on the parcel of land.

Counsel submitted that the defendant has neither moved out of the parcel nor paid the costs awarded to the plaintiff/applicant and further that there is no pending motion or step and/ or challenge to the said judgement considering that the defendant/respondent filed and later on withdrew an appeal together with an application for review.

The defendant/respondent opposed the application on the grounds that the plaintiff/applicant has no locus standi to move the court for the drastic orders sought for eviction and that by virtue of the Plaintiff/applicant withdrawing his suit at trial, then the plaintiff has no suit to move the court for any adverse or draconian orders against the defendant/respondent.

Counsel submitted that the plaintiff sought for restraining orders and not eviction in the plaint which amounts to an abuse of court process.

PLAINTIFF/APPLICANT'S SUBMISSION

Counsel submitted that the prayer for eviction is sought on the premise that the court already made an order that the plaintiff properly and lawfully purchased at a public auction the whole parcel namely L.R No.3209/1 situated in Arbabuch Area, Moiben, Uasin Gishu County from the interested party for value, in good faith and without any adverse notice.

In addition, Mr Katwa Counsel for the plaintiff/applicant submitted that the grant of the eviction order is inevitably due for the fact that 3 issues which the court must satisfy were definitively decided in the judgement delivered on the 11th of January 2019 which are:

- a) AFC the interested party, properly exercised its power of sale and sold the parcel; by auction to the plaintiff.
- b) The plaintiff is the successful bidder and purchaser of the parcel in the auction and as such, he is the bonafide owner.
- c) The defendant defaulted in servicing her debt is in default and lost her redemption rights to the parcel. As such she has no interest in the land and any redress she may have can only be by way of damages and not the land itself.

Counsel further submitted that the that the court in the judgement of 11th January 2019 made unequivocal finding that the defendant had no right to the parcel and rejected her request for injunction to remain on the parcel of land and further, that the questions and issues now being raised by the defendant herein having been rejected by the trial judge stand concluded and are therefore res-judicata.

Counsel therefore contends that the defendant raising those issues at this juncture is putting the trial court's judgement on trial and amounts to asking the court to sit on appeal on the same issues addressed at trial.

Mr Katwa listed the following issues for determination by the court, namely:

- a) Whether the interested party AFC, properly advertised for auction sale the parcel in proper exercise of its statutory power of sale in the auction of 9th September 2016.
- b) Whether pursuant to the schedule auction of 9th September 2016 the parcel was properly sold to the plaintiff, whether the plaintiff got good title in law to land parcel No.3209/1 measuring about 305 acres.
- c) Whether the defendant retained any residual rights and interests in the land Parcel LR No.3209/1 situated in Arbabuch Area, Moiben, Uasin Gishu measuring 305 acres in fact, equity and law.
- d) Whether there is any equivocation of the judgement dated 11th January 2019 by way of stay, appeal, reversal or review.
- e) Whether there is any pending aspect for determination as to the auction sale and or ownership of parcel LR No.3209/1 situated in Arbabuch Area, Moiben, Uasin Gishu County.
- f) Whether litigation has and should come to an end. Whether the plaintiff should now be allowed to enjoy peaceful fruits of his success in litigation over a parcel he bought in 2016.

On the issue as to whether there was any equivocation of the judgment dated 11th January, 2019 by way of stay, appeal reversal or its review, counsel stated the the court held as follows in its judgment:

4.3.1 There is neither stay of the execution of the judgment herein dated nor has it been varied by Appeal nor adjusted by review

4.3.2 (A)The Defendant, upon losing the suit/counter claim sought to challenge it by Appeal, and issued a Notice Of Appeal. The notice of Appeal was dated 15th January 2020. Later, on 23rd January 2019 the Defendant lodged an Application to review the judgment dated 11th January 2019. This review Application dated 21st January 2019 made about 5 days after issuing the Notice of Appeal [Notice of Appeal dated 15th January 2020] was then again withdrawn. As it is now there is neither an Appeal nor review, nor stay on the court's judgment of 11th January 2019 declaring the Plaintiff the unqualified owner of the parcel

Counsel argued the above issues and relied on the case of **Mary Wambui Njuguna v William Ole Nabala & 9 others [2018] eKLR** where the court stated that:

"25. -In disallowing that prayer, the trial court found the appellant could not pursue both review and appeal simultaneously: that having opted for review, she had effectively abandoned the option of appeal. Under Order 45 rule 2 of the rules, it is stipulated that:

"A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review. "

Counsel submitted that the learned Judge held correctly that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders as the appeal could only lie on the outcome of the application for review:

4.3.1 The Appeal stood abandoned on account of the review because the law does not allow a party to pursue both an Appeal and Review. When the Defendant filed for Review the Appeal stood abandoned. Further any Appeal is grossly overdue. Appeal can in law be filed within 60 days. The delay now on the judgment of 11th January 2019 amounts to over 637 days as at November 2020.

4.3.2 The only remedy the Defendant could have, if it had any legitimate grievance including those alluded to in paragraph 9, 13, 15 and 16 of the Defendant's affidavit would be a suit against the Interested party, for damages.

44.5 (a) The law in Section 99, Lands Act, 2012 as read with Sections 96, and 26 Act gives the purchaser, in this case the Plaintiff unqualified title land. The purchaser/Plaintiff is protected. Inversely any party claiming land was not properly sold is required to sue for damages not for land itself. Section 99 section 99 Protection of purchaser

(1) This section applies to—

(a) a person who purchases charged land

(2) A person to whom this section applies—

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

Counsel also cited the case of **Celine Wambui Kigwe v National Bank of Kenya & 2 others [2020] eKLR** where the court held that.

"The Plaintiff/Applicant is seeking to injunct the Defendants after the fall of the hammer. The Court will concur with the 3rd Defendant's Submissions that once the property has been knocked down and sold in a Public Auction, by the chargee, in exercise of its Statutory Power of Sale, the equity of redemption of the Chargor is extinguished See the case of Bomet Beer Distributors Ltd & another v Kenya Commercial Bank Ltd & 4 others [2005] eKLR:-

There are other decisions made on this point but the above referred cases will suffice for the purposes of this application. What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages. "

On the issue as to whether there is any pending aspect for determination as to the auction sale and or ownership of parcel LR No. 3209/1 situated in Arbabuch Area Moiben. Uasin Gishu County, whether litigation has and should come to an end, counsel reiterated his submissions that there are no pending issues as to the auction upon judgment being delivered in favour of the plaintiff. Counsel further submitted that litigation must come to an end to enable parties enjoy the fruits of the judgment as was stated in the case of **Dysselcer Mireille Lesoipa v Manuel Lesoipa Alias Emmanuel Lesoipa [2017] eKLR** Counsel also cited the case of **William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR** where the court held that

"The philosophy behind the principle of res judicata is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go."

Counsel therefore urged the court to not allow the defendant to re-litigate, re-canvass issues that had already been determined by the court and allow the application for eviction with costs as prayed.

DEFENDANT/RESPONDENT SUBMISSION

Counsel for the defendant respondent opposed the application and listed the following issues for determination by the court

a) Whether or not based on the judgement made on 11/01/2019 the court made specific orders for eviction, ejection, giving vacant possession, moving out and/or handing over of the whole suit parcel L.R. NO. 3209/1 measuring 305 Acres situated in Arbabuch Area, Moiben Uasin Gishu County.

b) Whether or not the plaintiff/Applicant in his plaint/suit categorically pleaded or prayed for eviction, ejection, giving out vacant possession, moving out and/or handing over of the whole suit parcel namely L.R. 3209/1 measuring 305 Acres situated at Arbabuch Area Moiben Uasin Gishu County.

c) Whether or not the plaintiff/Applicant withdrew the suit before judgement was delivered on the 11/01/2019.

d) Whether or not the instant Notice of Motion is a substantive suit/pleadings which can give rise to the reliefs being sought against the Defendant/Respondent.

e) Whether the Plaintiff/Applicant obtained or has good title to the suit land pursuant to public auction sale of 9th September, 2016.

f) Whether or not the Plaintiff/Applicant had the locus standi to institute the suit.

g) Whether it is the plaintiff (Evans Kemboi Koech) who emerged the highest or it is Spaceler Co. Ltd.

h) Whether this court can issue or grant the orders being sought by the plaintiff/Applicant.

Counsel submitted that the suit herein was determined and/or concluded on the 11th January 2019 where the trial learned Judge Justice A. Ombwayo) Pg 33 held inter-alia:-

"The upshot of the above suit is that the suit having been withdrawn by the plaintiff with costs, the counter claim having not been proved on a balance of probabilities the same is dismissed with costs to the plaintiff and interested party. Orders accordingly".

Mr. Omboto submitted that it is evident that plaintiff withdrew the suit therefore there was nothing to order in terms of evicting, ejecting, giving vacant possession, moving out and/or handing over the suit property to the plaintiff/Applicant as was stated on page 21 of the judgment where the judge directed or observed inter-alia: -

"It is important to note that the plaintiff withdrew the suit before the filing of submissions and therefore what is pending in this court is the counterclaim by the Defendant, the plaintiff's Defence to counter claim and the interested party's statement of Defence and Reply to counter-claim

On the second issue, the defendant/respondent submitted that the plaintiff/applicant having withdrawn his case, it would be a draconian measure or travesty of the Law and practice for this Honourable court to grant or issue the orders being sought herein through an application that is not supported by a suit.

Counsel submitted that the parties entered into a consent order as follows:

CONSENT ORDER

"Upon this matter coming up on the 25/05/2018 before the Hon. Justice A. Ombwayo for the hearing and upon hearing the submissions of Mr. Odoyo for the plaintiff, Mr. Omboto for the Defendant and Mr. Nyachiro for the interested party:

IT IS HEREBY ORDERED THAT

a) *The suit be and is hereby withdrawn with costs to be assessed at the conclusion of the matter.*

b) *The defendant to file and serve submissions within 15 days.*

c) *The plaintiff/defendant and interested party in the counter-claim to file and serve within 7 days of submissions.*

d) *Highlighting on the 24th July, 2018*

It was therefore counsel's submission that it is trite that once a party has withdrawn a suit or any pleadings all the predetermined orders by way of interim or interlocutory orders and/or subsequent orders are disregarded, discharged or dismissed.

It was Counsel's submission that the applicant/plaintiff never sought for eviction orders in his suit and cannot therefore claim eviction orders in the instant application. Further that he has no locus since he filed and later on withdrew the suit against the defendant and that it is only via a substantive suit that the plaintiff can approach court and not via a notice of motion.

Counsel therefore urged the court to dismiss the application with costs to the defendant.

ANALYSIS AND DETERMINATION

The issues for determination are, what is the effect of the plaintiff's withdrawal of the suit and whether the plaintiff is entitled to the orders sought for eviction.

On the issue on the effect of the plaintiff's withdrawal of the suit, Order 25 Rule 1 of the Civil Procedure Rules provides as follows:

"At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action".

The plaintiff withdrew this suit by consent as follows:

CONSENT ORDER

"Upon this matter coming up on the 25/05/2018 before the Hon. Justice A. Ombwayo for the hearing and upon hearing the submissions of Mr. Odoyo for the plaintiff, Mr. Omboto for the Defendant and Mr. Nyachiro for the interested party:

IT IS HEEBY ORDERED THAT

- a) *The suit be and is hereby withdrawn with costs to be assessed at the conclusion of the matter.*
- b) *The defendant to file and serve submissions within 15 days.*
- c) *The plaintiff/defendant and interested party in the counter-claim to file and serve within 7 days of submissions.*
- d) *Highlighting on the 24th July, 2018*

This consent has neither been varied nor challenged by any party. This consent is binding on the parties that entered into it. In the case of **M & E. Consulting Engineers Limited vs Lake Basin Development Authority & Another [2015] eKLR** the Court of Appeal stated as follows:

"19. We re-affirm the dicta in the High Court case of Kenya Commercial Bank Ltd. -v-Specialised Engineering Company Ltd., 1982 KLR 485 as was upheld by this Court in Civil Appeal No. 43 of 1980 thereof where it was stated as follows:

"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

3. An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.

4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.

5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds."

Since the consent withdrawing the suit has not been set aside and is not in issue, I find that the plaintiff's suit was withdrawn and a counterclaim dismissed.

The part of the judgment that the plaintiff hinges the application for eviction on reads as follows:

"I have looked at the memorandum of sale and do find that there was a sale by public auction on 9th September 2016 of the suit land and that Evans Kemboi Koech emerged as the highest bidder and was declared the purchaser at a price of Kshs.100,000,000 and paid a deposit of Kshs. 25,000,000 and a further Shs.75,000,000 was paid. The interested party has admitted having received kshs.100,000,000 from the plaintiff and the evidence of payment through the receipts indicate that the plaintiff paid the entire amount. The defendant has not enjoined speceller as an interested party and there no is scintilla of evidence that speceller connived

with the plaintiff. “

The excerpt from the judgment dated 11th January 2019 was an obiter which the judge used to explain the dismissal of the defendant’s counterclaim as follows:

“The defendant has failed to demonstrate that the public auction was carried out irregularly. The court finds that the defendant still owes the interested party the principal sum and interest more than 20 years since the mortgage deed was executed and therefore it will be unfair to the interested party for this court to issue an injunction against the interested party and the defendant.”

“... The upshot of the above is that the suit having been withdrawn by the plaintiff with costs, the counter claim having not been proved on a balance of probabilities the same is dismissed with costs to the plaintiff and interested party. Orders accordingly.”

This was not a determination that the plaintiff was entitled to eviction. The plaintiff never prayed for eviction specifically in his suit which unfortunately or fortunately was withdrawn by consent. The Judge never made a specific determination on eviction of the defendant hence an order of eviction cannot be issued in an application where the same was either not sought or granted.

In a decision of the **Allahabad High Court in Smt Raisa Sultana Begam & others vs. Abdul Qadir & others AIR(1966 ALL 318)** the Court held,

“Either it is done or not done; there is nothing like its being incompletely or ineffectively. The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only Plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court; if he is only one of several Plaintiffs, he ceases to be a party and the suit of only the other Plaintiffs continues. If he withdraws only a part of the suit that part goes out of jurisdiction of the court and it is left with only the other part. This is the natural consequence of the act; a further consequence imposed by Sub-rule (3) is that he cannot institute any fresh suit in respect of the subject matter. He becomes subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he is absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court. The bar on his instituting a fresh suit would be meaningless if he were permitted to revoke the withdrawal and get himself restored to the status of a Plaintiff in respect of the withdrawn suit. There is no provision allowing revocation of the withdrawal”

Further in the case of **Bahati Shee Mwafundi v. Elijah Wambua[2015]eKLR**, where the Court held,

“11. I have considered the Appellants’ Application. The Notice to withdraw this Appeal was filed under the provisions of Order 25 of the Civil Procedure Rules. As rightly submitted by the Respondent there is no provision under that order for withdraw of the Notice to withdraw an Appeal. Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuation cannot be raised as a defence in a subsequent suit.

12. Under Order 25 once a suit is withdrawn or discontinued the Court shall enter judgement for costs against the Plaintiff.

23. It follows that Order 25 does not permit a party to withdraw a notice to withdraw or discontinue a suit. The filing of such a notice to withdraw or discontinue a suit terminates the suit and there cannot be, thereafter, a setting aside of the notice to withdraw or discontinue a suit. The following is what the learned author Stuart Sime in the book “A Practical Approach to Civil Procedure” 9th edition stated:

‘Notice to discontinue takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant’.

In this case the Respondent had Notice to withdraw or discontinuous of this Appeal before seeking to set aside the consent before Kwale Court. That Notice of the Withdraw or discontinuous had the effect of terminating this appeal. The appeal having terminated it cannot in my humble view be reinstated or resuscitated. On that ground the Appellant’s Notice of Motion is unmerited and misconceived. It is dismissed with costs to the Respondent”.

In determining the effect of withdrawal of a suit in essence terminates this application as it has no legs to stand on. I will therefore not belabor to dwell on whether the applicant is entitled to the orders sought for eviction as the application was dead on arrival. This application is an afterthought after the judgment had some snippets of what the plaintiff would have wanted in his claim which he had withdrawn.

I find that the plaintiff having withdrawn his suit has no locus to file this current application for eviction which was never pleaded in the original claim.

I wish to state the issues that both counsel raised had been determined in the main suit and were not relevant to this application. The application is therefore dismissed with each party bearing their own costs.

DATED and DELIVERED at ELDORET this 21ST DAY OF APRIL, 2021

M. A. ODENY

JUDGE