



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MAKUENI

ELC CASE NO 287 OF 2017

FRANCIS MUISYO MAITHYA.....PLAINTIFF/RESPONDENT

VERSUS

BERNARD MAITHYA NTHENGE.....1ST DEFENDANT

AGNES NTHAMBI MAITHYA.....2ND DEFENDANT

FREDRICK DAVID MUEMA.....3RD DEFENDANT/APPLICANT

RULING

1. The 3rd Defendant in this matter through a Notice of Motion brought under Sections 63(c), 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 2 of the Civil Procedure Rules and all other enabling provisions of the law is seeking for the following orders: -

a) Spent.

b) That the Plaintiff/Respondent, his servants and/or agents or any person claiming under him and who enters or remains on Land Ref Number Makueni/Unoa/2291 be punished for a period not exceeding six (6) months imprisonment for contempt of court orders issued on 31st May 2017 and 27th June 2017 and unsatisfactorily instituting a suit against the Defendants.

c) That the Officer Commanding Station Makueni Police Station does provide security for the eviction of the Plaintiff/Respondent, his servants, agents and/or any other person under him and who enters or remains on LR No. Makueni/Unoa/2291 by the court bailiff from the Applicant's parcel of land being Makueni/Unoa/2291.

2. The application is premised on the grounds on the face of the application namely: -

a) That the Applicant is the absolute registered owner of land parcel number Makueni/Unoa/2291.

b) That the Plaintiff/Respondent suit was dismissed on the 13th of May 2019.

c) That the Plaintiff/Respondent application to reinstate the suit was dismissed vide a ruling dated 29th of April 2020.

d) That the Plaintiff/Respondent has been in contempt of court orders issued on the 31st of May 2017 and 27th of July 2017.

e) That the Plaintiff/Respondent has failed to vacate the suit premises and has constructed and dumped construction material on the suit land.

f) That it is in the interest of justice that the application be allowed as prayed.

3. The application is supported by the affidavit of Fredrick David Muema sworn on the 16th of February 2021 who reiterates the grounds on the face of the application. He annexed a copy of the title deed, copy of the proceedings, ruling and the court orders to his supporting affidavit.

4. The Plaintiff/Respondent vide his replying affidavit sworn on the 25th of October 2021 opposed the application and averred that the application is frivolous, misconstrued, an abuse of the courts process and fatally defective. The Respondent averred that he purchased the disputed parcel of land from the 1st and 2nd Defendants who were his biological parents and thereafter took possession and constructed rental

and a commercial building. He further averred that he had maintained the status quo as per the court orders and had not carried out any construction. He further averred that the 1st and 2nd Defendants informed him that the 3rd Defendant had purchased a separate plot from the disputed one and that in a written acknowledgment to the court, they confirmed that he was the owner of the suit land. He urged the court to dismiss the application.

5. The application was canvassed by way of written submissions.

6. The Applicant through his written submissions filed on the 10th of September 2021 submitted that he was the absolute registered owner of the suit land. He submitted that after the court dismissed the Plaintiff's suit, the Respondent made an application to reinstate his suit, but the same was equally dismissed. He argued that the Plaintiff had refused to vacate the suit premises despite being served with the court orders made on 31st of May 2017.

7. He further submitted that on 27th July 2017 the court ordered the plaintiff to be jailed for contempt of court and for the O.C.S Makueni Police Station to enforce the orders. He argued that the Respondent was not committed to jail but instead entered the suit property and started developing it. To buttress their submissions, reliance was placed on **Order 40 rule 3(1) and Order 22 rule 28(1) of the Civil Procedure Rules, Section 4(1)(a) and 4(2) of the Contempt of Court Act 2016 and in the case of: -**

a) Katsuri Ltd Vs Kapurchand Depar Shah (2016) eKLR.

b) Econet Wireless Kenya Ltd Vs Minister for Information & Communication of Kenya & Another.

8. The Plaintiff/Respondent submissions were filed on the 22nd of October 2021. The Plaintiff submitted that the 1st and 2nd Defendants who were his biological parents sold to him the disputed parcel of land. He submitted that his parents confirmed in a family meeting that they sold a different parcel of land to the 3rd Defendant and wrote a letter to the Deputy Registrar to confirm as much. The Respondent urged the court to give the parties time to pursue negotiations to settle the matter as provided under Article 159 of the Constitution.

9. I have considered the application, the affidavits and the rival submissions and I find that the issue for determination is whether the 3rd Defendant/Applicant is entitled to the orders sought.

10. I have carefully perused the court record and I find that by a Plaint dated 6th of December 2016 and filed in court on 7th December 2016, the Plaintiff sought for the following orders against the Defendants: -

a) An order declaring the Plaintiff as the lawful and bona fide purchaser of land no 2291.

b) An order directing the that the register to be rectified to remove the Defendants as proprietors of the land and an order of fresh adjudication and the entire process to be declared as illegal, null and void.

c) An order of permanent injunction restraining the Defendants whether by themselves, their servants or agents or otherwise from trespassing, occupying the suit land.

d) Cost of the suit plus interest.

11. On the 13th of May 2019, the Plaintiff's suit was dismissed with costs to the Defendants on the grounds of inability or unwillingness by the Plaintiff to prosecute his suit. Thereafter, the Plaintiff filed an application to reinstate his suit which was equally dismissed with costs to the Defendants vide a ruling dated 20th of April 2020. The 3rd Defendant/Applicant has sought to have the Plaintiff, his servants or agents imprisoned for a period of six months for being in contempt of court orders issued on the 31st of May 2017 and the 27th of July 2017.

12. I have read the proceedings for the 31st of May and I find that vide an application dated the 24/05/2017, the Plaintiff/Respondent was restrained either by himself, his servants, agents or any other person claiming under his instructions from continuing construction on the property known as Makueni/Unoa/2291 pending the hearing and determination of the main suit.

13. Thereafter, the court on the 26 of July 2017 allowed the application dated 07/06/2017 in the following terms: -

a) That an order for committal to jail be and is hereby issued against the Plaintiff/Respondent (Francis Muisyo Maitha) herein committing him to jail for a period not exceeding six (6) months for contempt of an order of this Honourable court issued on the 31/05/2017 and served on the same date.

b) That the OCS Makueni Police Station be and is hereby ordered to enforce the orders of the Honourable Court sought in prayer 2 above and all orders issued on 31/05/2017.

c) That the cost of this application be borne by the Plaintiff/Respondent.

14. These orders were issued by the court before the Plaintiff's suit was dismissed with costs to the Defendants. The orders lapsed after the Plaintiff's suit was dismissed. I have carefully looked at the Defendant's statement of defence and I find that the 3rd Defendant did not file a Counter Claim against the Plaintiff's Claim. The 3rd Defendant, can only therefore move the court for execution for costs. I find that currently, there is no pending suit before this court upon which this application can be hinged on.

15. The Applicant has also sought for orders to have the Respondent evicted from Land Parcel No. Makueni/Unoa/2291. Having found that there is no pending suit before the court, the proper avenue for the Applicant is to file a fresh suit for an eviction order where the case will be heard on merits.

16. In so finding, I am guided by the case of Tatecoh Housing and Co-op Sacco Ltd Vs Qwetu Sacco Ltd (2021) eKLR where the court held that;

“Without much ado, I will agree with the position of the respondentthat the appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought are orders of eviction.one will ordinarily only obtain an order of eviction after a full hearing of the case. What the appellant needed to do was therefore to file a substantive suit for eviction through a plaint.it is upon the hearing of such suit and If successful, that an order of eviction would issue.”

17. In light of the foregoing, I find that the application lacks merit and the same is dismissed with costs to the Plaintiff/Respondent.

RULING DELIVERED, READ, DATED AND SIGNED THIS 9TH DAY OF FEBRUARY 2022 VIRTUALLY VIA TEAMS' PLATFORM.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF

Kiluva holding brief for Makundi for the 3rd Defendant/Applicant

Court Assistant - Kwemboi