



**REPUBLIC OF KENYA**

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

**ELC NO. 281 OF 2014**

**EVALYNE MANDE OLOO**

**EDWIN ODHIAMBO SIALA.....DECREE HOLDERS/ APPLICANTS**

**-VERSUS-**

**THE COUNTY GOVERNMENT OF SIAYA**

**THE NATIONAL LAND COMMISSION.....JUDGMENT DEBTORS/ RESPONDENTS**

**(Under Section 63 (e) of the Civil Procedure Act, Order 22 Rule 29 and Order 51 Rule 1**

**(1) of the Civil Procedure Rules, 2010).**

**RULING**

**BRIEF FACTS**

The Applicants herein through a Notice of Motion dated 12<sup>th</sup> March 20121 sought for the following orders:

1. Spent.
2. That O.C.S Siaya Police Station to execute the eviction orders against the 1<sup>st</sup> Respondent from the Applicants' land parcel no. Siaya/Township Block 1/541 and maintain peace upon eviction.
3. That costs of the Application be provided for.

The Application was based on grounds that the Applicant filed this suit against the Respondents seeking for injunctive orders and eviction orders from the suit property and the Respondents filed a Statement of Defence where they denied the Applicants ownership of the suit property.

This court delivered its judgement on 30<sup>th</sup> January 2020 where it granted permanent injunction restraining the Respondents, its servants and or agents from entering, remaining thereon, trespassing, building any structures thereon or in any way interfering with the quiet possession of the Applicants' property. The court further ordered the Respondents to remove the structures built and eviction of the Respondents from the suit property.

The Respondents have refused to vacate the structures erected on the suit property and are not willing to comply with the court orders and the Applicants need to forcefully evict the Respondents from the suit property.

Mr. Edwin Odhiambo Siala in his supporting Affidavit stated that this Honourable court delivered its judgment on 30<sup>th</sup> January 2020 where it granted a permanent injunction restraining the Respondents, its servants and or agents from entering, remaining thereon, trespassing, building any structures thereon or in any way interfering with quiet possession of the Applicants land. The court further ordered that the Respondents to remove the structures built and the suit property and eviction of the Respondents from the suit property.

The Respondents were informed of the Judgment and they even took part in the assessment of the Bill of Costs. Edwin Odhiambo Siala further stated that the Respondents have in blatant defiance of the Decree issued by this court refused to vacate from the suit property and that the Respondents are taking this court for granted and are not willing to voluntarily comply with the court orders.

The 2<sup>nd</sup> Applicant further alleged that there is need to forcefully evict the Respondents from the suit property and the intended exercise is likely to be met with hostilities, resistance and possible violence hence requires police to provide justice.

The Respondents through a Replying Affidavit of Mirembe Edmond stated that he knows that Judgment was entered against the Defendants without ant notice to them. That upon perusal of the court file in 4<sup>th</sup> February 2020, his firm proceeded to file a Notice of Appeal and applied for copies of proceedings.

The Notice of Appeal was availed to his firm on 17<sup>th</sup> February 2020 and the same was served to the Plaintiffs' Advocates the same day. The Proceedings were availed to them on 3<sup>rd</sup> March 2021.

The Respondents Advocate alleged that the Application before court was premature and is meant to jeopardize the intended appeal yet the Respondents are desirous to pursue the Appeal.

Mr. Mirembe also stated that the application should be stayed pending the outcome of the Appeal since implementing the Judgement will render the Appeal nugatory.

### **ANALYSIS AND DETERMINATION**

Section 63 (e) of the Civil Procedure Act provides as follows

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

( e) make such other interlocutory orders as may appear to the court to be just and convenient.

Order 22 Rule 29 of the Civil Procedure Act provides as follows:

(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property.

(3) Where possession of any building or enclosure is to be delivered, and the person in possession being bound by the decree does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of her community to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

From the Replying Affidavit, it is clear that the Respondents did not waste time as they proceeded to file a Notice of Appeal under Rule 75 of the Court of Appeal Rules.

I am not in a position to determine whether or not the intended Appeal to the Court of Appeal is arguable. I am aware of the fact that the Applicants herein have a Judgment in their favour while the Respondents being aggrieved by the said Judgment, have decided to pursue an Appeal.

The Respondents in paragraph 7 of the Replying Affidavit stated that this instant Application should be stayed pending the outcome of the Appeal.

In my view, the Respondents have not demonstrated whether they have an arguable Appeal or not and therefore the Applicants should continue to enjoy the fruits of their Judgment.

### **CONCLUSION**

The notice of motion dated 12<sup>th</sup> March 2021 is therefore allowed in the following terms: -

1. That O.C.S Siaya Police Station to execute the eviction orders against the 1<sup>st</sup> Respondent from the Applicants' land parcel no. Siaya/Township Block 1/541 and maintain peace upon eviction.
2. That costs of the Application be borne by the Respondents.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 1<sup>ST</sup> DAY OF OCTOBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**