



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 87 OF 2015

[FORMERLY KITALE HCCC NO. 18 OF 2008]

ELDORET EXPRESS CO. LIMITED.....JUDGMENT CREDITOR/PLAINTIFF

VERSUS

TAWAI LIMITED.....JUDGMENT DEBTOR/DEFENDANT

NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

[NOTICE OF MOTION DATED 30TH NOVEMBER, 2020 BY THE JUDGMENT CREDITOR/PLAINTIFF.]

[NOTICE OF MOTION DATED 1ST MARCH, 2021 BY THE JUDGMENT DEBTOR/DEFENDANT]

1. The judgement creditor, plaintiff, moved the court through the notice of motion dated the 30th November 2020, seeking for an order directing the County Commissioner and County Commander Trans – Nzoia County, OCPD Kiminini Sub-County and OCS Kiminini Kiminini Police Station, Trans-Nzoia County to accord Seventy-Seven Auctioneers police security to maintain law, peace and order during the execution of the eviction order issued on the 19th November, 2020. The application is based on the seven (7) grounds on its face, and supported by the affidavit of Joseph Ng’ang’a Thungu, a director of the plaintiff, sworn on the 30th November, 2020. It is the plaintiff’s case that vide the judgement delivered by the Court of Appeal on the 28th November, 2019 in **Eldoret CACA No. 118 of 2017**, the plaintiff was declared the lawful owner of land **Reference Number 5707/6 (I. R. No. 43019) 184**, measuring 259.1 Ha, the suit property, situated at Kiungani, South West of Kitale Town, Trans-Nzoia County. That consequently, the plaintiff obtained an eviction order from this court issued on the 19th November, 2020. That the plaintiff then instructed the Seventy-Seven Auctioneers to carry out the eviction of the defendant, its agents, servants, employees, members and or shareholders from the suit property. That so as to maintain peace and security during the exercise, it is imperative that the Auctioneers be accorded security by the named law enforcement agencies to avoid chaos and skirmishes that may endanger lives of many people.

2. The application is opposed by the defendant through the replying affidavit of **David Juma Wafula**, a director of the defendant, sworn on the 1st March, 2021. The defendant’s case is that the plaintiff’s prayers should not be granted at that stage because the suit property is occupied by more than 1000 members, and instead the execution should be stayed pending the determination of the **Supreme Court of Kenya Motion No. 23 of 2020** against the Court of Appeal decision of 28th November, 2019 in **Civil Appeal No. 118 of 2017**.

3. On their part, the defendant moved the court through the Notice of Motion dated the 1st March, 2021, seeking for stay of the eviction order issued on the 19th November, 2020 pending the hearing and determination of the **Supreme Court of Kenya Motion Cause No. 23 of 2020**. The application is based on the eleven (11) grounds on its face and supported by the affidavit of **David Juma Wafula**, a director with the defendant, sworn on the 1st March, 2021. The defendant’s case is that this court had on 16th August, 2017 delivered a judgement in their favour in respect of the suit property. That the plaintiff filed an appeal to the Court of Appeal being **Civil Appeal No. 118 of 2017**. That in the judgement delivered on the 28th November 2019, the plaintiff was successful in the appeal. That the defendant then moved to the Supreme Court of Kenya, where the Motion **Cause No. 23 of 2020** was pending. That as the plaintiff had on the 19th November, 2020 obtained eviction order against them, there is need to stay the eviction to await the decision of the Supreme Court of Kenya on the pending matter. There is also on record a Chamber Summons application by one **Nathan Wanjala Muindi** dated the 17th November, 2020, seeking for among others, stay of execution of this court’s decree of 18th August, 2017 pending the hearing and determination of the intended appeal in the Court of Appeal. That though the court was not addressed on this latter application, it is obviously misplaced, defective, and an abuse of the court’s process as there is no judgement on record delivered by this court on the 18th August, 2017. That this court’s judgement that was set aside by the Court of Appeal in **Civil Appeal No. 188 of 2017** was the one delivered on the 16th August, 2017 and not 18th August,

2017. That application dated the 17th November, 2020 should therefore be struck out without going to its merits.

4. That the learned counsel for the parties attended the court on the 9th March, 2021 and directions that the two applications be heard together through written submissions to be filed and exchanged within the given timelines were issued. The court further directed the learned counsel to brief the court on the outcome of the matter pending before the Supreme Court of Kenya that was reportedly coming up for ruling on the 17th March 2021, during the next mention of the 26th May, 2021.

5. That during the mention of the 26th May 2021, **Mr. Nyachoti** and **Mr. Omboto**, the learned counsel for the plaintiff and defendant respectively, addressed the court. The counsel for the plaintiff confirmed that the ruling of the Supreme Court was delivered in their client's favour and submitted that their application dated 30th November, 2020 should be granted to enable them take possession. The counsel for the defendant indicated that they had filed their replying affidavit and submissions and that the court should set a date for ruling. That upon counsel for the plaintiff indicating that they would not be filing submissions, the court set the date for the ruling.

6. The following are the issues for the court's determinations;

(a) Whether there is a final determination on the ownership/proprietorship of the suit property, and if so, in whose favour.

(b) Whether the plaintiff has made a reasonable case for granting of the prayer sought in his application.

(c) Whether the prayers, or any of the prayers, sought by the defendant can be issued in their favour.

(d) Who pays the costs of the applications?

7. That I have considered the grounds on the applications, the parties' affidavit evidence, the two learned counsel's oral submissions, the record and come to the following conclusions;

(a) That though none of the parties has availed a copy of the decision of the Supreme Court of Kenya in **Motion Cause No. 23 of 2020** to the court, Mr Omboto advocate for the defendant did not dispute Mr. Nyachoti advocate's oral submission that it was in the plaintiff's favour. That effectively confirms the final determination of ownership of the suit property is in accordance of the Court of Appeal judgement of 28th November, 2019 in **Civil Appeal No. 118 of 2017**. That the proprietorship of the suit property has therefore been determined in favour of the plaintiff by the Court of Appeal vide its judgement delivered on the 28th November 2019, and there is no evidence of any legal challenge on their title that is pending.

(b) That the finding in (a) above leads to the finding that the defendant's application dated the 1st March, 2021 that sought for stay orders pending the determinations of the pending application before the Supreme Court of Kenya has been left without any grounds to stand on, and is therefore without merit.

(c) That as it is evident from the affidavit evidence presented by both sides that the Defendant has a sizeable number of people on the suit property, I agree with the plaintiff that it would be desirable to have the law enforcement agencies in the County to be involved in the eviction exercise, through the provision of security, and overseeing of the plaintiff taking possession of the suit property, so as to ensure law and order is maintained by all. That I therefore find merit in the plaintiff's application dated the 30th November, 2020.

(d) That in terms of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, the plaintiff being the successful party, is entitled to the costs of the application.

8. That flowing from the foregoing, I find and order as follows;

(a) That the defendant's application dated the 1st March, 2021 has no merit in view of the final determination of the question of ownership of the suit property by the Court of Appeal and Supreme Court of Kenya in favour of the plaintiff. The application is hereby dismissed with costs.

(b) That the plaintiff's application dated the 30th November, 2020 has merit and is allowed in terms of prayer 2 with costs.

Orders accordingly.

DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JUNE, 2021.

S. M. KIBUNJA

ENVIRONMENT & LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFF: ABSENT

DEFENDANT: ABSENT

INTERESTED PARTY: ABSENT

COUNSEL: M/S KEMBOI FOR NYANCHOTI FOR PLAINTIFF

MR. OMBOTO FOR OKEMWA FOR 1ST DEFENDANT AND

MR. KURIA FOR 2ND DEFENDANT

COURT ASSISTANT: CHRISTINE.