



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 131 OF 2015**

**JOSHUA MUTUA KITHUMA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ANGELINA MUTHEU MUTUA.....DEFENDANT/APPLICANT**

**RULING**

**Introduction:**

1. This Ruling is in relation to a Notice of Motion Application dated 3<sup>rd</sup> March, 2020 in which the Defendant/Applicant is seeking for the following orders:

***a) That the court do review its orders made on 20<sup>th</sup> February, 2020 for warrant of arrest against the Defendant/Applicant and order the Defendant/Applicant be allowed to file a Replying Affidavit to the Application dated 12<sup>th</sup> November, 2019.***

***b) That the costs of this Application be provided for.***

2. The Application is supported by the Affidavit of Angelina Mutheu Mutua, the Defendant/Applicant herein, who has deponed that she moved from the suit premises on 23<sup>rd</sup> May, 2019 and since that time, she has not gone back to the premises; that on 20<sup>th</sup> February, 2020, this court issued warrants of arrest against her for disobedience of the court orders and that she has filed a response to the Application dated 12<sup>th</sup> November, 2019.

3. The Defendant deponed that she will obey and abide by the orders given by the court and apologized to the court for failing to reply in time which was as a result of not understanding the procedures of court and that unless the court stays its orders of 20<sup>th</sup> February, 2020, she will suffer irreparable loss.

4. The Motion was opposed vide the Plaintiff's/Respondent's Replying Affidavit dated 14<sup>th</sup> September, 2020. The Plaintiff deponed that the Application dated 12<sup>th</sup> November, 2019 was allowed in the absence of the Applicant and that the Applicant served him with a copy of an order dated 6<sup>th</sup> March, 2020 which was received under protest.

5. According to the Plaintiff, the Defendant/Applicant was granted an alien prayer not sought for in the Application dated 3<sup>rd</sup> March, 2020; that the Defendant/Applicant does not dispute having been served on 29<sup>th</sup> September, 2017 with the Application for contempt of court dated 12<sup>th</sup> November, 2019 and that the Applicant's Supporting Affidavit sworn on 3<sup>rd</sup> March, 2020 is marred with falsehoods as the Applicant had continued to engage in contemptuous conduct ever since the restraining orders were issued.

6. The Plaintiff/Respondent deponed that the Applicant had failed to give adequate and satisfactory reasons as to why she did not file a reply to the Application dated 12<sup>th</sup> November, 2020 in good time and that the Applicant's Application does not meet the threshold for granting a stay of execution order.

7. The Plaintiff deponed that the contemnor has deprived him of his source of income by continuing to collect rent from the suit premises despite the existence of restraining orders and that the Application should be dismissed with costs.

8. This suit was commenced by way of a Complaint dated 27<sup>th</sup> April, 2015. In the Complaint, the Plaintiff sought for several orders including an order of permanent injunction restraining the Defendant from accessing plot number 930 Kitui/Kwa Vonza (*the suit property*) and other property belonging to the Plaintiff.

9. Together with the Complaint, the Plaintiff filed a Notice of Motion on the same date in which he sought for a temporary injunction pending the

hearing of the Application. The record shows that on 7<sup>th</sup> May, 2015, this court allowed the Plaintiff's Application for a temporary injunction.

10. The record further shows that on 22<sup>nd</sup> September, 2019, the court allowed the Plaintiff or his agent to collect rent from the suit property pending the hearing and determination of the suit. At the same time, the court restrained the Plaintiff from selling the suit property.

11. On 22<sup>nd</sup> May, 2019, this court found the Defendant/Applicant for being in contempt of the orders of the court. The court fined the Defendant a sum of Kshs. 50,000 and in default to serve a jail term of twenty one (21) days.

12. Vide an Application dated 12<sup>th</sup> November 2019, the Plaintiff for the second time, sought to have the Defendant committed to civil jail for being in contempt of the court. Upon being satisfied that the Defendant was served with the Application, and the Defendant having not filed a Replying Affidavit, the court allowed the Plaintiff's Application dated 12<sup>th</sup> November, 2019. Those are the orders that the Defendant is seeking to review and set aside.

13. The applicable law as regards the varying and/or review of a decree or order of the court is Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

*“Any person who considers himself aggrieved:*

*(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

14. Order 45 Rule 1 of the Civil Procedure Rules elaborates the grounds upon which Decree or Order can be set aside as follows:

*“(1) Any person considering himself aggrieved:*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”*

15. In her Affidavit, the Defendant/Applicant has not denied that she was served with the Application dated 12<sup>th</sup> November, 2019. However, it is her contention that she has since moved out of the suit premises and that she has since filed a reply in response to the said Application.

16. The Defendant in this matter is acting in person. Although no good reason has been given as to why the Defendant did not file a response to the Application dated 12<sup>th</sup> November, 2019, I shall exercise my discretion in her favour because she is a lay person and secondly because the committal to jail has serious ramifications on the Defendant's well-being and liberty.

17. Consequently, I shall, which I hereby do, allow the Application dated 3<sup>rd</sup> March, 2020 as follows:

*a) The orders of this court dated 20<sup>th</sup> February, 2020 be and are hereby set aside.*

*b) Each party to bear his/her own costs.*

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 4<sup>TH</sup> DAY OF JUNE, 2021.**

**O. A. ANGOTE**

**JUDGE**