



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC APPEAL CASE NO. E 82 OF 2018

(Formerly Kisii ELC case No. 212 of 2014)

**GEOFFREY SURE OGADA... (Suing as administrator of the Estate
of JOSHUA OGADA OGONDA (DECEASED)).....PLAINTIFF/ RESPONDENT**

VERSUS

REUBEN OTIENO DISI.....1ST DEFENDANT/APPLICANT

KARILUS ODIE.....2ND DEFENDANT/ APPLICANT

RULING

1. This ruling is in respect of twin applications namely;-

- a) A motion on notice dated 11th November 2020 filed in court on 12th November 2020 by the firm of Ndeda and Associates Advocates for the plaintiff (The 1st application herein) and,
- b) A motion on notice dated 19th March 2021 and duly filed in court on 22nd March 2021 by the firm of Nelson Jura and Company Advocates for the defendants (The 2nd application herein).

2. In the 1st application which was originated pursuant to, inter alia, sections 3 3A, 30 and 34 of the Civil Procedure Act Chapter 21 Laws of Kenya and Rules 9 (a) (b) (c) and 12 (2) (b) of the Auctioneer Rules, 1996, the plaintiff has sought the principal order infra:-

- a) That the officer commanding Uriri Police Station to provide security to Ikimwanya Auctioneers to evict Reuben Otieno Disi and Karilus Odie from parcel No. Kanyamkago/Kawere 1/1176 (now known as Kanyamkago/Kawere 3853 and 3854) to remove all the structures built on the said parcel of land together with any persons thereof.

3. The said application is premised on the grounds that the defendants have refused to vacate the suit land LR NO. KANYAMKAGO/KAWERE 1/1176 now known as LR NO. KANYAMKAGO KAWERE 1/1176 in spite of the issuance of eviction order thereof and that there may be hostile environment during eviction thus, security thereof is paramount. The application is further fortified by a seven (7) paragraphed supporting affidavit of even date sworn by Gladys Achieng Ndeda, learned counsel for the plaintiff to the effect that judgment was delivered on 3rd December 2019 in favour of the plaintiff and that a decree was served on the defendants who had erected structures on the suit land which need to be demolished.

4. In his seven (7) paragraphed replying affidavit sworn on 19th March 2021 and filed in court on 22nd March 2021, the 1st defendant, Reuben Otieno Disi for his own behalf and on behalf of the 2nd defendant, Karilus Odie, deposed, inter alia, that they have filed an appeal against the judgment rendered on 3rd December 2019 which the plaintiff is seeking to execute hence, will render the appeal nugatory if the orders sought in the 1st application are granted. That the 1st application lacks merit and should be dismissed with costs.

5. By the 2nd application commenced under section 1,1A,1B, 3A (supra), among other provisions of the law, the defendant is seeking the following orders;-

- a) That this honourable court be pleased to vary/review its ruling/order dated 22nd July 2020 by allowing the applicants to deposit with this court title deed of LR No. Kanyamkago/Kawere/1/5654 measuring 3.92 Ha as security instead of the sum of Khs 100,000/= as earlier ordered.

b) That upon grant of prayer 3 above this honourable court be pleased to extend time of filing and serving record of appeal and depositing the title deed as security by thirty (30) days and subsequently this honourable court be pleased to order for stay of any further execution of the decree of this court dated 3rd December 2019 and all further proceedings in this matter subsequent to the said decree pending hearing and determination of Kisumu Court of Appeal Civil Appeal No. E53 of 2020.

c) That the costs of this application be provided for.

6. The 2nd application is anchored on grounds 1 to 8 set out on its face which include; that the defendants have filed Civil Appeal No. 53 of 2020 in the Court of Appeal at Kisumu; that the defendants have not been able to raise funds to deposit security and to file and serve record of appeal within the timelines set by this court.

7. The 2nd application is further anchored on the 1st defendants supporting affidavit of eleven (11) paragraphs sworn on even date and accompanying documents marked as "ROD1" to the "ROD4" which include a copy of the decree or order dated 3rd December 2019 and a copy of this court's ruling dated 11th November 2020. The 1st defendant deposed that in the interest of justice, the 2nd application be allowed as the plaintiff will not be prejudiced in any way to enable them exercise their right of appeal, among other things.

8. By 28 –paragraphed replying affidavit sworn on 14th April 2021 and filed in court on 19th April, 2021, the plaintiff opposed the 2nd application and sought its dismissal with costs to him. He deposed in part, that the 2nd application seeks to review orders of this court issued on 22nd July 2020 but brought under wrong provisions of the law, that the same has been brought seven (7) months after delivery of the ruling and after the commencement of the 1st application, thus it is not made in good faith and suffers from inordinate delay.

9. The plaintiff also deposed that he is not aware of the alleged appeal filed by the defendants who did not attach it to the 2nd application. That the alleged appeal was not served on him.

10. On 22nd March 2021, this court ordered and directed that the 1st and 2nd applications be argued by way of written submissions as they are interrelated. This accords to **Article 159 (2) (b) and (e) of the Constitution of Kenya, 2010 and Order 51 rule 16 of the Civil Procedure Rules, 2010.**

11. Accordingly, on 19th April, 2021, learned counsel for the plaintiff filed submissions dated 14th April, 2021 whereby reference was made to the orders sought in the 1st application, brief facts of the matter inclusive of this court's ruling delivered on 22nd July, 2020 and urged the court to invoke its inherent jurisdiction and allow the 1st application. To reinforce the submissions, counsel cited **section 24 of the National Police Service Act** and the decision in **Njeru Mugeru =vs= Emina L. Nkiriote Njagi (2016) e KLR**, among other authorities.

12. On the other hand, the defendants' counsel filed a five (5) paged submissions dated 4th June 2021 on even date giving a brief background of the matter and urged this court to allow the 2nd application in the interest of justice. To buttress the submissions, counsel cited the decision in **Giella =vs= Cassman Brown (1973) EA 358** which was reiterated in the case of **Ngurman Limited =vs= Jan Bonde Nielsen and 2 others (2014) eKLR and Pius Kipchirchir Kogo =vs= Frank Kimeli Tenai (2018) eKLR** on the threshold in granting the orders sought in the 2nd application.

13. I have anxiously considered the 1st and 2nd application, the respective responses thereto and the rival submissions including all the authorities cited therein. So, have the plaintiff and the defendants established their respective cases for the grant of orders sought in the twin applications?

14. It is common baseline that judgment herein was delivered in favour of the plaintiff on 3rd December 2019. As a result, a decree was issued and served accordingly. To that extent, the plaintiff is entitled to the fruits of the judgment which should be effectual in the circumstances as noted in **Shahmad =vs= Shamji Bros and another (1957) EA 438.**

15. In light of the judgment, the defendants are prohibited from unlawful occupation of the suit land. Section 152A of the Land Act, 2016 (2012) prohibits unlawful occupation of land including private land.

16. The defendants contend that they have filed Civil Appeal No. E 53 of 2020 at the Court of Appeal, Kisumu and that they are seeking stay of execution of the judgment. That if the orders sought in the 1st application are granted, the appeal will be rendered nugatory.

17. Notably, a stay of execution of the judgment and decree was granted with conditions by this court's ruling delivered on 22nd July 2020. Therefore, did the defendants comply with the conditions therein?

18. It is trite law that stay of existing orders is not a matter of course. The same is based on genuine grounds, conditions and dispatch; see **Malindi LSK =vs= LSK Nairobi Branch and 5 others (2017) e KLR.**

19. Plainly, this court granted conditional stay of execution of the judgment and decree. The bottom line was to meet the best ends of justice herein as envisioned under **Article 159 (2) (b) and (e) of the Constitution of Kenya, 2010 (The Constitution).**

20. The defendants asserted that they have filed an appeal as noted in paragraphs 6 and 16 hereinabove. However, at the time of mounting the 2nd application, the defendants had not complied with the conditional stay of execution of the judgment and subsequent decree.

21. Clearly, the defendant went into slumber for seven (7) months only to be woken up by the 1st application. This court is bound by the principles of equity including that delay defeats equity as captured in **Article 10 (2) (b) of the Constitution**.

22. This court being a court of law and a court of equity as stipulated under Article 10 (2) (b) (Ibid) and being guided by the Court of Appeal decision in **Macharia Mwangi Maina and 37 others =vs= Davidson Mwangi Kagiri (2014) e KLR** at paragraph 26, can not aid the defendants for the inordinate delay in mounting the 2nd application. It must be observed that court orders are not made in vain. It is not an academic exercise.

23. This court is conscious of the established law that a party should not be shut out of hearing of his or her matter on merits; see **Philip Chemwolo =vs= Augustine Kubende and another (1982-88) KAR 103** and **James Kanyiita Nderitu and another =vs= Philotas Ghikas and another (2014)e KLR**.

24. **Article 50 (1) of the Constitution** provides for the right to fair hearing. It is one of the rights which can not be curtailed under Article 25 (c) of the same Constitution.

25. **In the case of Films Role Industrial Ltd =vs= Cannon Film Sales Ltd (1986) ALL ER 7722**, Hoffman J stated that the court should take the lower risk of injustice in a matter as a fundamental principle. I approve the said reasoning as the same is sound and relevant hereto.

26. The defendants have claimed to have filed Civil Appeal No. E 53 of 2020 in the Court of Appeal at Kisumu. They did not comply with the conditional stay of execution of judgment and subsequent decree herein. Besides, by the defendant's notice of appeal herein, an appeal to the Court of Appeal is deemed to have been filed by dint of **Order 42 Rule 6(4) of the Civil Procedure Rules, 2010**.

27. Thus, this court is devoid of jurisdiction over the matter. I have no power to make one more step as held in the case of **Motor Vessel Lilian "S" v Caltex Oil Kenya(K) Ltd (1989) KLR**.

28. Wherefore, I proceed to decline the applicant's notice of motion dated 11th November 2020 and filed in court on 12th November 2020 as well as the defendant's Notice of Motion dated 19th November 2020 and filed herein on 22nd March 2021. No order as to costs. Orders accordingly.

DELIVERED, DATED AND SIGNED VIA EMAIL FURTHER TO EARLIER NOTICE ISSUED TO THE PARTIES, THIS 29TH DAY OF JULY 2021

G.M.A. ONGONDO

JUDGE