



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 25 OF 2012

JOSEPH WANYAMA KIBIRA.....PLAINTIFF

VERSUS

BOARD OF MANAGEMENT

ST. TERESA SECONDARY SCHOOL.....1ST DEFENDANT

HASSAN NDAMWE WAKOLI.....2ND DEFENDANT

RULING

1. The plaintiff in this suit filed an application dated **8/3/2021** seeking the following orders:

- a) That this application be certified as urgent and Prayer No 3 be granted in the interim;**
- b) That this Hon Court be pleased to extend time within which the applicant can file a notice of appeal against the judgment of 11/2/2021;**
- c) That this Hon Court be pleased to stay the enforcement of the judgment of the court while pending the hearing and determination of the application herein;**
- d) That costs do abide in the results of the intended appeal.**

2. The grounds upon which the application is made are that the plaintiff desires to appeal against the judgement of the court; that the plaintiff only got to know of the judgment on **5/3/2021**; that he is late in filing the intended appeal by only **11 days** which is not inordinate; that the delay was occasioned by the fact that his counsel could not reach him through his phone which was faulty and that the enforcement of the judgment would deny him the use of the land which he had utilized for many years.

3. The application is opposed by the defendants through the replying affidavit of one **Justus Chatty Wafula**, the Secretary to the Board of Management of St Teresa School sworn on **7/4/2021**. He states that the plaintiff was served with the decree in the suit, but instead of complying with the same he ploughed and harrowed the land and sowed maize thereon on **7/4/2021**. It is further stated that there was another suit **Kitale CMC Land Case No 12 of 1999** whose judgment had been implemented only for the plaintiff to go against the said judgment and uproot the beacons that had been restored on the land.

4. In **paragraph 25** of the judgment that the plaintiff intends to appeal against, this court found as follows:

“Much oral and documentary evidence has been adduced in respect of this issue and in view this is an issue that could only have been determined by way of evidence and not solely by submissions as a preliminary objection. The plaintiff’s locus in this case is severely affected by the fact that there are records including litigation records that indicate that the original dispute regarding the suit land was between the plaintiff’s mother and the 1st defendant’s school. She is reflected as the 1st respondent in the Land Disputes Tribunal case proceedings dated 4/11/1998. In the body of the proceedings she is stated to have claimed ownership of the suit land. The plaintiff is not mentioned anywhere in those proceedings. The evidence of the probe committee member Mr. Samuel Ngeiywa during the course of the proceedings indicated that when school land was demarcated it was Veronica’s land that was affected and that she had been compensated for her loss. Subsequently when the elder’s award was adopted by the Magistrate’s Court as required by law it was the plaintiff’s mother who approached court in 1999 in Kitale SPMCC Land Case No. 12 of 1999 seeking a stay of execution and the plaintiff was not mentioned anywhere. At the time of the execution of the decree in Kitale CMCC Land Case No. 12 of 1999 the plaintiff and his brother attended the exercise carried out by the District Surveyor and they are reflected in the District Surveyor’s report as “sons to the late Veronica Kibira.” In Kitale HC Misc. Application No. 48 of 1999 which the plaintiff acknowledged to have been

filed, Veronica Kibira was the ex-parte applicant and she swore the verifying affidavit claiming to own 14 acres in Chepkorok farm by virtue of her holding two share certificates Nos. 155 and 157 in the Chepkorok Farm Co Ltd. She also deposed in the same affidavit that she had occupied the land since 1971 and that the probe committee demarcated part of her "land and gave it to St Teresa Secondary School." There can be only one St Teresa Secondary School in Sikhendu Location which is the subject matter of this suit and that must be the school run by the defendants. There can also be only one parcel lying contiguous to the St. Teresa School which was owned by Veronica, and which was affected by the dispute then, and the plaintiff has not demonstrated that the parcel he is claiming is a different one.

Besides, the proceedings in Kitale HCCA No. 26 of 1986 upheld the decision of the panel of elders who dealt the dispute by consent of both parties and in the record of proceedings of that panel the name Veronica Kibera appears as member No. 34 while no name of the plaintiff appears therein. This court therefore safely concludes that the parcel claimed by the plaintiff is one and the same as the one claimed by the deceased Veronica Kibira.

By virtue of that observation it is clear that the plaintiff was suing in respect of property owned by his late mother and therefore needed authorization by the court, he required a grant of letters of administration in accordance with the provisions of Section 45 of the Law of succession Act which he never produced before court in evidence and he may be termed as intermeddler more so for the reason that at least one of the possible beneficiaries to Veronica Kibira's estate is named in the Survey Report produced by DW1. For this omission the plaintiff lacks locus standi to lodge or maintain this suit and this suit is therefore dismissed with costs to the defendants."

5. The plaintiff has not demonstrated that he has prior to the lodging of the instant application acquired letters of administration to the estate of the owner of the suit land. It is not clear which portion of the judgment he intends to appeal against. A draft of a notice of appeal intended to be filed would have indicated this but none is exhibited. It is not for this court to presume that the finding that he was not the administrator will be subject to appeal. Consequently I find that he lacks the *locus standi* to lodge the instant application and it ought to be dismissed.

6. On their part, the defendants in the present suit filed an application dated 7/4/2021 by which they sought the following orders against the plaintiff:-

a) That pending the *inter partes* hearing of this application the Trans Nzoia County Police Commander and the Kiminini Sub- County Police Commander do supervise enforcement of the judgment and decree of the court in this suit;

b) That the plaintiff herein, Joseph Wanyama Kibira, be committed to civil jail for a period of six months or such other appropriate period or alternative punishment as this honourable court may deem fit for disobedience of the judgment and decree in this suit;

c) That the said Joseph Wanyama Kibira ought not to have audience before this honourable court unless and until he has fully purged his contempt and rendered such apology as the court may direct.

d) That costs be provided for.

7. The grounds upon which the application is made are that judgment having been delivered against the plaintiff in this suit and the plaintiff being aware of the judgment and decree after the latter document was served upon him on 21/3/2021 he ploughed the portion of the school land which he had been restrained by the court's judgment from trespassing upon. He later chased away the 1st defendant's workers who were repairing the school fence which he had allegedly uprooted and later harrowed the land ready for sowing and subsequently planted maize thereon.

8. The application by the defendants is opposed by the plaintiff who in his sworn affidavit states that he had instructed his advocates to lodge an application to maintain the *status quo*; that he had ploughed his land on an unstated date in February 2021; that the decree in this suit is not due for execution and Section 94 of the Civil Procedure Act is yet to be invoked; that costs have not yet been taxed; that no leave has been sought by the defendants to execute before taxation; that the application by the defendant is therefore premature; that consequently it was not an offence to sow on the said land which sowing he has carried on for years and that he was not served with the decree as alleged. However, the application to maintain the *status quo* which the plaintiff claims to have filed is that dated 8/3/2021 which this court has already been found to have no merit as stated earlier in this ruling.

9. The defendants filed a supplementary affidavit of Justus Chatty Wafula dated 17/5/2021 in which it was stated that the plaintiff ploughed the land in March and not in February as he alleges in his replying affidavit; that court orders take effect immediately they are pronounced unless stayed and that the issue of non-taxation of the costs is not relevant in the current scenario, and that in any event, the defendants are at liberty to tax or abandon the costs if they so wish.

10. I find that the submission by the plaintiff's counsel regarding the impact of Section 94 of the Civil Procedure Act is correct and applicable in the proper cases. However it is clear that in the instant case, despite the non-taxation of costs, the application dated 7/4/2021 also seeks execution of the judgment of this court and I do not see which other application can be made by the defendants. If that kind of prayer had not been included in the instant application I am of the view that the provisions of Section 94 would have barred the grant of the defendants' application. The submission that the applicants are at liberty to tax or abandon their costs also makes a strong case for the rejection of the proposition that costs must be taxed before execution in all cases. In the instant application therefore, I consider that Prayer no (b) thereof amounts to seeking of leave under Section 94 and to state otherwise would be to require the parties to engage in another needless long process seeking a similar prayer in a separate application in the midst of case backlog and contribute to application of much valuable judicial time on a case that has reached its end which is to be greatly discouraged.

11. In addition, the order granted in the reviewed judgment dated 11/2/2021 required the plaintiff to refrain from any interference with the

suit land and this court agrees with the defendants that that order took effect immediately.

12. From the material in the defendant's application, the supporting affidavits and the plaintiff's replying affidavit, I am persuaded that the plaintiff committed the acts stated by the defendants in defiance of the court's order requiring that he refrain from interfering with the suit land.

13. Consequently I find that the plaintiff's application dated **8/3/2021** lacks merit and it is hereby dismissed with costs to the defendants.

14. The defendants' application dated **7/4/2021** has merit and the same is granted in terms of **Prayers No (b)** as prayed. **Prayer no (c)** is granted to the extent that the plaintiff is hereby convicted of contempt of Court and he shall present himself before this court for mitigation and sentencing on **6/10/2021** at **9.00 am**. The costs of the defendant's application dated **7/4/2021** shall be borne by the plaintiff.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 9TH DAY OF AUGUST, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.