



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MIGORI**

**ELC CASE NO. 95 OF 2018**

**(Formerly Kisii ELCC NO. 172 OF 1993)**

**JOANESS ODHIAMBO MIGWALA.....PLAINTIFF**

**Versus**

**ISAAC OWUOCHA.....1<sup>ST</sup> DEFENDANT**

**SAMWEL OJUANG' OWUOCHA.....2<sup>ND</sup> DEFENDANT**

**AND**

**CHARLES OTIENO OWUOCHA.....1<sup>ST</sup> APPLICANT**

**ELSA ACHIENG AJWANG.....2<sup>ND</sup> APPLICANT**

**RULING**

1. By a Notice of motion dated 15<sup>th</sup> January 2020 and duly filed in court on even date (The application as referred to hereinafter), the 1<sup>st</sup> and 2<sup>nd</sup> applicants, **CHARLES OTIENO OWUOCHA** and **ELSA ACHIENG AJWANG** respectively through the firm of Sam Onyango and Company Advocates are seeking the orders infra:-

- i. Spent
- ii. Spent
- iii. **THAT** this Honourable court be pleased to order the setting aside of the said eviction orders unconditionally.
- iv. **THAT** the costs of this application be provided for.

2. The application is beaoned on grounds (i) to (iv) set out on it's face alongside an eleven (11) paragraphed supporting affidavit sworn on even date by the 1<sup>st</sup> applicant. In summary, the applicants complain that there are several occupants including the applicants on the suit land, LR NO. KANYAMKAGO/KAWERE 1/1010. That on 14<sup>TH</sup> January 2020, armed police officers and hired workmen went to the suit land and threatened all the occupants at eviction from the entire parcel of land and from the portion specified in the previous order of the court. That the intended eviction is not in consonant with the law hence should be nullified by this Honourable court.

3. By an eleven (11) paragraphed replying affidavit sworn on 12<sup>th</sup> October 2020, the plaintiff, **JOANESS ODHIAMBO MIGWALA** who appeared in person and presently represented by the firm of Apondi and Company Advocates, opposed the application, termed it unmerited and that the same be dismissed with costs. That the applicants delayed inordinately in filing the application without explanation. That the same has not been brought in good faith and it's an abuse of the court process as the orders sought to be set aside, were issued by this court way back on 9<sup>th</sup> January 2018 and 15<sup>th</sup> October 2019. That an appeal has not been lodged to challenge the said orders. The respondents denied the applicants allegations and stated that a notice was properly issued and then served by the OCS Uriri police Station.

4. In addition, the respondent opposed the application by way of six (6) grounds of opposition of even date. The same include, that the applicants are in continued unlawful occupation of the suit land contrary to section 152 of the Land Act,2016 (2012) and that the application is a non starter in law.

5. The application was canvassed by way of written submission as ordered and directed by this court on 20<sup>th</sup> May 2021 further to **Order 51 Rule 16 of the Civil Procedure Rules 2010 as read with Section 19 (2) of the Environment and Land Court Act, 2015 (2011)**. Accordingly, learned counsel for the respondent filed four (4) paged submissions dated 3<sup>rd</sup> July 2021 on 5<sup>th</sup> July 2021.

6. The applicants' counsel failed to file submissions in this application.

7. It was the submission of the respondents' counsel that this court is functus officio to hear the application and that the application amounts to an abuse of the process of the court. To fortify the submissions, counsel relied on four authorities namely **ICEA Lion General Insurance Co. Ltd =vs= Julius Nyaga Chomba (2020) eKLR, Jersey Evening Post Ltd =vs= Al Thani (2002) JLR 542 at 550, Muchanga Investments Ltd =vs= Safaris Unlimited (Africa) Ltd and 2 others Court Appeal No. 25 of 2002 (2009) KLR 229 and Stephen Somek Takwenyi and another =vs= David Mbuthia Githare and 2 others Nairobi (Milimani HCCC No. 363 of 2009)**.

8. I have duly considered the application, the replying affidavit and the ground of opposition in their entirety as well as the respondents' submissions inclusive of all the authorities cited therein. So, is the application meritorious?

9. The order of eviction sought to be set aside was generated on 16<sup>th</sup> October 2017 when the Court (Mutungi J) ordered and directed inter alia;-

***".....The defendants to vacate from portions of parcel 1010 that they have occupied.."***

10. The defendants herein are deceased as discerned in paragraph 4 of this court's ruling rendered on 17<sup>th</sup> July 2019 as regards the application dated 27<sup>th</sup> June 2018 and a preliminary objection thereto lodged on 14<sup>th</sup> January 2019. At paragraph 22 of the ruling, I noted that;-

***"..... The applicants are legal representatives of the estate of the defendants in this suit....."***

11. In paragraphs 2,3,4 and 5 of the 1<sup>st</sup> applicant's supporting affidavit, it is deposed that apart from the 1<sup>st</sup> applicant who resides on the suit land, other families reside thereon. That some of the occupants have been notified of the impending eviction but the affected persons have not been served with the mandatory notices as revealed in ground (iii) of the application.

12. The respondents contend that the application is tailored to depriving them of the right to property as enshrined under Article 40 of the Constitution of Kenya,2010. That the applicants are in continued unlawful occupation of the suit land **Contrary to section 152 of the Land Act, 2016 (2012)**.

13. **Sections 152 A and 152 B** of the said Land Act prohibit unlawful occupation of land including private land and the that evictions to be undertaken in accordance with the Act respectively. Section 152 E of the same Act governs eviction notice to unlawful occupations of private land.

14. Notably, any person(s) served with the notice in terms of section 152 E (Ibid) may apply to court for relief including cancellation or variation to the notice on such terms as the court deems equitable and just under section 152 F of the same Act. Further, this court is not unaware of the mandatory procedure during eviction as stipulated in section 152 G of the said Act.

15. In paragraph 4 of the supporting affidavit to the application, among the occupants of the suit land, are minors. **Article 53 (2) of the Constitution of Kenya, 2010** provides;

***"A child's best interest are of paramount importance in every matter concerning the child."***

16. In the case of **Mitu-Bell Welfare Society vs Kenya Airports Authority (2021)eKLR**, the appellant had sought a declaratory relief and compensation for the eviction of over 15,000 people from the land adjacent to the Wilson Airport in Nairobi. The Supreme Court of Kenya addressed itself to Articles 23 (3) and (2) of the Constitution of Kenya 2010, among others, and held that every individual has the right to housing even if that individual does not own land.

17. Notably, this court had considerably performed duties as observed in **ICEA Lion and Jersey Cases** (supra). However, in view of sections 1 A, 1 B, 3 and 3A of the Civil Procedure Act chapter 21 Laws of Kenya, Sections 3 and 18 of the Environment and Land Court Act, 2015 (2011), the preamble to the Constitution of Kenya 2010 and Articles 10, 28 and 43 (1) (b) of the same Constitution alongside **Mitu-Bell case** (supra), I hereby make orders infra:-

a) Set aside eviction orders against the Defendants and the applicants from the suit land, LR No. KANYAMKAGO/KAWERE 1/1010 save for the portions of the same specified in paragraph 9 hereinabove and bearing in mind rectifications to the Registry Index Map (RIM) as ordered by the Court on 16<sup>th</sup> October 2017.

b) The parties to bear their own costs of this application.

18. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMABAY VIA E-MAIL AS THE PARTIES WERE DULY NOTIFIED, THIS 22<sup>ND</sup>**

**DAY OF SEPTEMBER 2021.**

**G. M. A. ONGONDO**

**JUDGE**