



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC CASE NO. 8 OF 2021

{Formerly Environment and Land Court at Kisii Case No. 455 of 1998}

PETER MIGOSI MIGOSI.....PLAINTIFF/APPLICANT

VERSUS

DIOCESE OF KISII.....DEFENDANT/RESPONDENT

RULING

By a Notice of Motion dated 05/05/21 the plaintiff prays for the following orders:-

1. Spent.

2. THAT, pending *inter partes* hearing of this Application there be an order of stay of execution of the Decree herein and particularly to stop any development on the disputed portion of Land Parcel NO. WEST MUGIRANGO/BOMANONO/1083 by the Respondent.

3. THAT, the execution proceedings by the Respondent be set aside.

4. THAT, this Honourable Court do order the Respondent to stop any further development on the disputed portion of land parcel LR. NO. WEST/MUGIRANGO/BOMANONO/1083 until the directions given by the Decree are complied with.

5. Costs.

The orders sought to be stayed are from the Judgment of 13/03/15 of this Honourable Court to the effect that: -

(i) An injunction is hereby issued in favour of the Plaintiff restraining the Defendant from interfering with the Plaintiff's right of way through the disputed portion of LR. NO. WEST MUGIRANGO/BOMANONO/1083 to the main road in the area.

(ii) Provided that reasonable road of access is provided by the Defendant to the Plaintiff through the disputed portion of LR. NO. WEST MUGIRANGO/BOMANONO/1083 to the main road, an injunction is hereby issued in favour of the Defendant restraining the Plaintiff from interfering with the Defendant's activities on the said portion of the disputed property.

(iii) Each party shall bear its own cost of this suit and the originating summons.

The Applicant claims that the Respondent failed to meet the conditions imposed on her but went ahead to fell the Applicant's trees on the suit land. The Applicant further claims that the Respondent intends to put up permanent buildings on the disputed land which is illegal and wrongful since the Decree is being executed before the mandatory notice to show cause is served on the Applicant's a couple of years after the Decree was made.

When this Application came up for hearing on 08/05/20 before my sister the Honourable Lady Justice J.M. Onyango. Orders were granted as follows: -

1. THAT Notice of Motion dated 5th May 2020 be and is hereby certified as urgent.

2. THAT a stay of execution be and is hereby granted stopping any development on the disputed portion of LR. NO. WEST MUGIRANGO/BOMANONO/1083 pending hearing and determination of the Application *inter partes*.

3. THAT the application shall be served upon the Defendants/Respondent forthwith.

4. THAT owing to the extraordinary circumstances brought about by COVID – 19 pandemic and the directive of the Chief Justice dated 15/03/2020 suspending open court sessions, the order of stay of execution will remain in force until such time as the court will be able to hear the Application inter partes or until such time as the court gives further directions.

5. THAT to facilitate the inter partes hearing of the application, the Defendant/Respondent shall file its response within 15 days after service.

The above orders being granted on 11/05/20, a further Application was filed by the Plaintiff/Applicant on 16/09/20 this time seeking to cite the In charge of Nyamira parish /agent/servant or the Respondent one Raphael Achira for contempt of the aforesaid order after it was made on the ground that the Respondent had started developing the suit property with the protection of armed police in spite of having been served with the requisite court Order.

The above Application was dismissed by the Honourable Lady Justice Onyango on 11/06/21 on the ground that the alleged acts of contempt were not proved and that the Application lacked merit. Mr. Kimaiyo for the Plaintiff/Applicant then prayed that the Application dated 05/05/20 be fixed for hearing and the same was given 22/07/21 as the date fixed for hearing. On the said date, Mr. Kimaiyo successfully sought the court's leave that the said Application be canvassed by way of written Submissions. Parties were allowed 30 days to file and exchange their written Submissions and the matter was to be mentioned on 12/10/21. I believe for purposes of establishing whether the directions of 22/07/21 had been complied with. So far none of the parties has complied with the Directions nor did any of them appear in court. In the circumstances, I proceed to write my Ruling which I am dutifully bound to do.

The Application before Court is brought under Order 22 Rules 18 and 22 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 as well as Sections 1A, 1B and 3A of the Civil Procedure Act.

Order 22 Rule 18 of the Civil Procedure Rules, 2010 is on the process to be followed when executing a Decree. It is true that the same provides that where in a Decree such as in case here is in question, the Court executing a Decree shall issue a Notice to the person against whom the execution is applied for requiring him to show cause why the Decree should not be executed against him if the Application for execution is made more than 1 year after the date of the Decree or if the same is being sought to be executed against the legal representative of a party to the Decree or if the same is in respect of attachment of the Judgment Debtor's salary or allowance. The other provision under this Order is that envisaged under Rule 6 where Judgment was entered against in default of appearance or defence.

In the current case, save attaching copies of the Judgment and Decree to the Affidavit supporting the Application, the Plaintiff/Applicant has not shown any step taken towards execution of the Decree. The court has not even been invited to commence the process of execution and when that time comes the court will certainly follow the right procedure as provided for in the Civil Procedure Rules. The court has therefore not allowed any execution of the Decree and no application has ever been sought to grant leave to the process. The mere fact that the Respondent applied for a certified copy of the Decree on 21/02/20 and paid for the same, which was issued, does not amount to execution. In any case the Plaintiff's Advocates had also sent a draft Decree to the Defendant's Advocates way back on 29/10/15 and later even paid some Deposit for certified typed proceedings and Judgment. This did not amount to commencing the process of execution of the Decree either.

Finally, I must address the issue of the purpose of seeking the order of stay of execution. Upon delivering the Judgment of the Trial Court as is the case in this suit, the court then proceeds to execute its Decree *albeit* procedurally. Unless for good reasons it deems it necessary to stay the same. This is mainly to pave way for Appeal where, should the same not be granted, the Appeal if successful would be rendered nugatory. To ask the trial court to order a stay of execution, on mere speculations that the Court is going to fail to follow the rightful procedure in executing its orders, is frivolous.

On the second substantive prayer, seeking the court's intervention to stop any further development by the Respondent on the suit property until the directions given by the Decree are complied with, the court has already pronounced itself in its Ruling of 11/06/21 that: -

“From the above analysis it is clear that there is doubt as to whether the actions of Mr. Achira and the youth amounted to development. While the Applicant averred that the Respondent was preparing the ground for development, no evidence has been tendered of the eventual development on the disputed portion of the land. In any event the said actions have been explained by the Respondent to have been merely the preparation of the grounds for a church service. The Applicant was required to prove his case to the required standard and mere suspicion of development does not meet the threshold.”

In the absence of evidence that construction is taking place the court will not give any order since its Judgment will suffice. The final Judgment of the Trial Court is meant to be thunderous. Restating what the Judgment pronounced meant is a waste of the scarce judicial time. Otherwise, the court will keep expounding on its judgment. This is not what Courts are supposed to be doing. It is tantamount to abuse of the court process. The upshot of this is that the Application dated 05/05/20 is hereby dismissed with costs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 14TH DAY OF OCTOBER, 2021.

MUGO KAMAU

JUDGE

IN THE PRESENCE OF: -

COURT ASSISTANT - MARGARET

PLAINTIFF'S COUNSEL - N/A

DEFENDANTS' COUNSEL - N/A