



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO.515 OF 2013

TERESA CHEBICHI RUTOO

(Administratrix of the Estate of the late ERNEST KIMAIYO).....PLAINTIFF

AND

TALALEI KIPTENAI.....DEFENDANT

RULING

Introduction and background

1. This is a ruling in respect of a Notice of Motion dated 2nd August, 2021 in which the Defendant/Applicant seeks the following orders:-
 - 1) Spent
 - 2) Spent
 - 3) THAT the Honourable Court be pleased to vacate the ruling issued by Hon. Lady Justice (Dr.) M.A. Odeny on 27th July, 2021, allowing the Plaintiff's Application dated 19th march, 2021 and the Plaintiff's application be set down for hearing inter-partes.
 - 4) THAT the costs of this motion be provided for.
2. The Plaintiff/Respondent had filed a suit against the Applicant in which among other reliefs sought for a declaration that the Applicant was holding 38 acres in trust for her and her siblings. The entire parcel was 72 acres. In a judgment delivered on 28th October, 2015, the Court found that the Applicant was holding 38 acres in trust for the Respondent and her siblings.
3. The Applicant was aggrieved with the decision of the court and preferred an Appeal to the Court of Appeal. In a judgment delivered on 7th March, 2019, the Court of Appeal dismissed the Applicant's Appeal save that the entitlement of the Respondent and her siblings was reduced from 38 acres to 28 acres.
4. Despite the Applicant substantially losing in the Court of Appeal, he did not move out of the portion which was given to the Respondent by the Court of Appeal. This is what prompted the Respondent to file a Notice of Motion dated 19th march, 2021 seeking eviction orders against the Applicant.
5. The Applicant who had been duly served with the Notice of Motion dated 19th March, 2021 through his Advocate did not attend court on 27th July, 2021 when the motion was set for hearing. The application for eviction orders was granted ex-parte as prayed. This is the ruling which the Applicant seeks to have set aside so that he can be heard.

Applicant's Contention

6. The Applicant contends that his former Advocate did not attend court on 17th July, 2021 because he mis-diarized the date in his diary as 28th July, 2021 instead of 27th July, 2021. The Applicant argues that his former Advocate acted negligently by not attending court and that he has since reported him to the Law Society of Kenya.

7. The Applicant argues that the Respondent is hell-bent on evicting him from the suit property by not complying with **Section 152 E&G of the Land Act and the UN Committee on Economic, Social and Cultural Rights** as stated in **General Comment No.7**. He further argues that the impending eviction will disrupt his life and that of his family and that it is therefore necessary that the ruling of 27th July 2021 be set aside so that he can be heard.

Respondent's Contention

8. The Respondent contends that the Applicant's application is meant to hold this court at ransom. The subject of this suit has gone upto the Court of Appeal which has ruled in her favour but the Applicant is not keen on moving out of the portion given to her by the Court of Appeal. The Respondent argues that the Applicant is only speculating on the manner the eviction is likely to be carried out and that in any case, the Applicant has had over two years to voluntarily vacate the Respondent's portion but he has failed to do so.

9. The Respondent argues that the Applicant has demonstrated that he is not ready to move out of the portion given to her by the court and that this application is only meant to delay the execution of the decree herein.

Analysis

10. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the Applicant has made out a case for favourable exercise of discretion in his favour.

11. The affidavit in support of the Applicant's application is contradictory. On the one hand, the Applicant blames his Advocate for negligence. On the other hand, the applicant claims that his former Advocate erroneously misdiarized the date as 28th July, 2021 instead of 27th July, 2021. It is also important to note that it is not the Applicant's former Advocate who swore the affidavit. The affidavit was sworn by his current Advocate when the issue of misdiarizing ought to have been deponed to by the former Advocate.

12. There is a claim that there is an Appeal pending before the Court of Appeal. I wonder which Appeal this could be because there is an Appeal which was determined on 7th March, 2019. The Applicant has had ample time to move out of the portion which the Court of Appeal granted the Respondent. I do not see the benefit the Applicant will derive even if he was given an opportunity to be heard on the application for eviction. It is clear that the Applicant is not keen on moving out of the portion given to the Respondent. The Applicant cannot claim that he will suffer when he has been given 48 acres out of the 72 acres.

13. As was clearly stated in the case of **Mbogo =vs= Shah [1968] EA 93**, the discretion of the court is intended to protect inadvertent mistakes but not to assist a party who is out to delay or obstruct the course of justice. In the instant case it is clear that the Applicant is out to delay the execution of the decree herein. I therefore find no merit in the application dated 2nd August, 2021 which is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18TH NOVEMBER, 2021

E.O. OBAGA

JUDGE

IN THE VIRTUAL PRESENCE OF;

MR. MOMANYI FOR PLAINTIFF/APPLICANT

COURT ASSISTANT – MERCY

E.O. OBAGA

JUDGE