



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO 83 OF 2010

MARY WANGUI KARANJA.....1ST PLAINTIFF

SALOME NJERI KARANJA.....2ND PLAINTIFF

VERSUS

RHODA WAIRIMU KARANJA.....1ST DEFENDANT

JOHN KIOI KARANJA.....2ND DEFENDANT

RULING

1. Before this Court for determination is the Plaintiffs'/Applicants' Notice of Motion dated 13th May 2020 seeking the following orders:

a) That this Honourable Court be pleased to grant the Plaintiffs/Applicants leave to execute the decree issued on the 12th of May, 2020 against the 2nd Defendant before taxation of the Party and Party Bill of Costs.

b) That this Honourable Court be pleased to order that the 2nd Defendant be evicted from the suit property in enforcement of the judgment delivered on 6th February, 2020.

c) That this Honourable Court be pleased to order the OCS, Kikuyu Area to supervise in the enforcement of the orders of this court and to maintain law and order.

d) That the costs of this Application be borne by the 2nd Defendant/Respondent.

2. The Application is based on the grounds on the face of the Motion and supported by an Affidavit sworn jointly by Mary Wangui Karanja and Salome Njeri Karanja, the Plaintiffs herein. The Plaintiffs deponed that they are the executrices of the Will of their late father, James Karanja Kioi, who died on 3rd of February, 1995; that the 1st Defendant (*now deceased*) was their step-mother who came onto the suit property in 1995 to mourn their father and that the 2nd Defendant is their step-brother who came onto the property through his mother in 2006.

3. According to the Plaintiffs, the Defendants refused to vacate the suit property leading to the institution of the present suit in 2010 seeking for their eviction and that the 1st Defendant passed on before the determination of the suit and that she was never substituted as the suit against her had since abated.

4. According to the Plaintiffs, Judgment was entered in their favour on 6th February, 2020 where the court found the 2nd Defendant guilty of trespass on the suit property as from 1st June 2006 and ordered him to surrender possession of the house he occupies on the suit property to the Plaintiffs and that they have extracted the decree and wish to execute the same before taxation of the bill of costs as envisaged by Section 94 of the Civil Procedure Rules.

5. The Plaintiffs deponed that whilst they were indeed served with a Notice of Appeal against the judgment of 6th February, 2020, they have not been served with any order for stay of execution from either this court or the Court of Appeal; that the 2nd Defendant is a violent man as evidenced by his actions which includes killing the 2nd Plaintiff's puppy which had wandered onto the portion of the suit property where he resides and threatening to kill and/or harm an employee of the Plaintiffs and that further, the 2nd Defendant had all the trees on the suit property cut down and sold.

6. The Plaintiffs deponed that they informed their advocate of the aforesaid activities who in turn communicated the same to the 2nd Defendant's counsel vide a letter erroneously dated 11th April 2020 instead of 11th May 2020; that they were advised to call the police but the police indicated that they were unable to act for lack of a decree and that it is apparent that the 2nd Defendant will not voluntarily vacate the suit property.
7. It is the Plaintiffs deposition that despite the existence of court orders declaring them the rightful owners of the suit property, the 2nd Defendant has refused to vacate the premises; that they have subsequently been constrained to live in rental premises and do not wish to spend their pension on paying rent and that they wish to enjoy their property which was bequeathed to them in 1995.
8. In response to the Application, the 2nd Defendant filed Grounds of Objection dated 19th June 2020 and swore a Replying Affidavit on 29th June 2020. In the Replying Affidavit, the 2nd Defendant admitted that Judgment against him was entered in this suit on the 6th of February 2020; that on 19th June 2020, he filed an Application for an injunction/stay of execution in the Court of Appeal being Civil Application Nairobi No. 160 of 2020 and that the Application was filed electronically pursuant to the practice directions for prevention of the spread of Corona Virus issued by the President of the Court of Appeal on the 21st of April 2020.
9. It is the deposition of the 2nd Defendant that the fate of the Application is currently unknown; that if the Plaintiffs' Application is heard and determined before the outcome of the matter in the Court of Appeal, the courts may issue contradictory orders and that the Plaintiffs' Application is an attempt to prematurely execute the decree in an endeavor to defeat any orders of the Court of Appeal and further render any appeal nugatory.
10. It was deponed that the eviction of the 2nd Defendant from the suit premises must be in accordance with **Sections 152(B)-152(I)** of the **Land Act** as amended by **Act No 28 of 2016**; that the Plaintiffs seek to override these mandatory provisions; that no eviction orders were granted by the court in its judgment of 6th February, 2020 and that the Application has no legal basis.
11. In conclusion, the 2nd Defendant deponed that the Plaintiffs were making wild allegations in an attempt to create panic and encourage the court to issue eviction orders without following due process. He urged the court to dismiss the Application.
12. In response to the Replying affidavit, the Plaintiffs filed a Supplementary Affidavit in which they deponed that the issue of ownership of the suit property was conclusively determined by the succession court; that the 1st Defendant filed a Notice of Appeal in respect to the decision in the succession cause but the same was struck out in January 2010; that the 2nd Defendants' opposition to the Application signifies his defiance of authority and constitutes an abuse of court process as discussed in the Article-**"The Inherent jurisdiction of the Court"** and that after delivery of the judgment, the 2nd Defendant sought and was granted 14 days stay of execution to enable him seek relief in the Court of Appeal.
13. The Application was canvassed by way of written submissions which I have considered. I have also considered the filed authorities.

Analysis & Determination

14. Having considered the pleadings and submissions herein, the court finds that the main issues raised by the parties for determination are;
- i. *Whether the Plaintiffs should be granted leave to execute the decree of 12th May 2020 before taxation of costs?*
 - ii. *Whether the Plaintiffs should be granted eviction orders against the 2nd Defendant and;*
 - iii. *Orders as to costs.*
15. The Plaintiffs are seeking for an order allowing them to execute the decree of this court dated the 12th of May 2020 before taxation of costs. The Application has been brought pursuant to **Section 94** of the **Civil Procedure Act**. The said section provides as follows:
- "Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation"***.
16. The Court of Appeal considered this section in the case of ***Bamburi Portland Cement Co. Ltd vs Hussein (1995) LLR 1870 (CAK)*** stating thus:-
- "Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to the High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court."***
17. This position was adopted by the Court of Appeal in the case of ***Lakeland Motors Limited vs Harbhajan Singh Sembhi[1998] eKLR*** where the court stated;

*“The exercise of judicial discretion by the superior court under section 94 of the Act necessarily requires that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This, we think, is the spirit of the observation of Shah, J.A., with which we agree, in **BAMBURI PORTLAND CEMENT COMPANY LIMITED VS IMRANALI CHANDBHAI ABDULHUSSEIN**, Civil Appeal No. 83 of 1995 (unreported) in regard to the application of section 94 of the Act.”*

18. As correctly cited by the parties, Kuloba J, (as he then was) elaborately discussed the rationale for this section in the case of **Mercedes Sanchez Rau Tussel vs Samken Ltd & 2 Others [2002] eKLR**, as follows:-

“The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs.

Till such formal expression has been given to the judgment of the court, the decree is not executable, and in order to obviate the difficulty arising in a case where the taxation of the costs would take some time, section 94 permits the decree holder, as it were to execute a “decree” which strictly does not constitute the formal expression of an adjudication in as much as the provision with regard to costs has not been embodied in that decree, and it is perfectly true that an order from the court for a decree to be executed is required if it is a “decree” not in the proper sense of the term as defined by section 2 of the Act. That is the rationale for section 94 making a specific order of the court necessary in a case where a decree holder wants to execute a decree which does not contain the provision for costs, and that permission is necessary because a decree cannot be drawn up and the seal of the court cannot be put upon the decree unless the provision with regard to costs is inserted in it, because it is in the judgment of which the decree is only a formal expression.”

19. From the wording of **Section 94** of the **Civil Procedure Act**, it is apparent that the decision of whether to allow execution to proceed before costs are ascertained is in the discretion of the court. This position was fortified in the case of **Mercedes Sanchez Rau Tussel vs Samken(Supra)**, where it was stated that:

“On the wording of the section, the ordering of execution to be done forthwith is a matter in the sound discretion of the court when the court considers it necessary that in all the circumstances of the case the decree should be executed before awarded costs are ascertained by taxation.”

20. The only condition precedent to exercise of the discretion conferred by **Section 94** of **Civil Procedure Act** is that the decree must have been passed in the court’s exercise of its original civil jurisdiction. A “decree” as defined in **Section 2** of the **Civil Procedure Act** means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Considering that there exists a decree in this matter, the court is satisfied that this condition has been met.

21. The undisputed background to this matter is that the Plaintiffs herein instituted this suit against the 1st and 2nd Defendants (1st Defendant now deceased) as trespassers, seeking *inter alia*, their eviction from the suit property. The matter went to trial and the court vide its Judgment of 6th February 2020 found in favour of the Plaintiffs. The 2nd Defendant was found liable for trespass and was ordered by the court to give possession of the suit property to the Plaintiffs.

22. The 2nd Defendant has averred that having filed an appeal, the Plaintiffs are attempting to prematurely execute the decree in an endeavor to defeat any orders of the Court of Appeal and that the Plaintiffs have not given any plausible reason as to why the court’s discretion should be exercised in their favour.

23. It is trite that an appeal does not operate as a stay of execution. **Order 42 Rule 6(1)** of the **Civil Procedure Rules** is instructive in this regard and states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

24. It is clear from the provisions of **Order 42 Rule 6 (1)** of the **Civil Procedure Rules** that an appeal or second appeal does not operate as an automatic stay of execution of a decree. The Appellant has to specifically move the court for an order for stay of execution. This position was reiterated by the Court of Appeal in the case of **Equity Bank Limited vs West Link Mbo Limited [2013] eKLR** where it was stated thus;

“As a general principle of law an appeal being a totally distinct proceeding from the original or appellate proceedings appealed from, the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree, in civil matters unless otherwise expressly so provided.”

25. Further, the fact that an Appeal has been filed in the Court of Appeal does not divest this court of its jurisdiction with regard to execution of the decree. This was the position that was taken in the case of **Adiel Muriithi Philip vs Thomas Maingi [2017] eKLR** where the Court of Appeal held as follows:

“The fact that the respondent had filed a notice of appeal in the High Court did not change this position as jurisdiction still remained with the High Court to deal with issues concerning the satisfaction of the decree... Therefore, without an order of stay of execution, either from the High Court or the Court of Appeal, the High Court remained seized of jurisdiction to deal with matters concerning the execution of the decree even where an appeal is pending in the Court of Appeal against the decree. The issue of the High court being functus officio does not therefore arise.”

26. The court in the case of *Violet Jeptum Rahedi vs Albert Kubai Mbogori [2014] eKLR* while considering an application under Section 94 stated:

“I note that there is no stay of execution of decree and none has been sought. An intention to appeal against the judgment, or even an appeal already duly filed, cannot be a good reason to refuse the application at hand. Whether execution is pursued before or after taxation of the Plaintiff’s costs the Defendant’s obligation to satisfy the decree will always be there, unless the judgment is overturned on appeal, an unlikely event on the issue of liability, given the circumstances of this case. It is also not lost on me that it may take a while, in the ordinary course of business, for that taxation to take place.”

27. With respect to the applicability of section 94 of the Civil Procedure Act on non-monetary decrees, the court in the case of *Sparkle Properties Limited vs Johana Ngai & 8 others [2020] eKLR* stated thus:

“...On my part, I can’t quite grasp the philosophy behind Section 94, save probably for monetary decrees, so that the judgment creditor does not need to face execution twice, once for the money in the decree, and secondly for the money in the costs. That is the only reason that I can see apparent on the face of Section 94. But where the decree is not for money, I really find it difficult to see the reason behind Section 94. If, assuming, the decree is for delivery of a chattel, say a car, why should the decree holder have to wait until the costs are taxed for him to execute for the delivery of the car? And if he has another car for use for his daily errands, would it be considered “necessary” for him to execute for delivery of the car before taxation of costs? In decrees for delivery of land, why should a decree holder wait, until the costs are taxed for him to execute for possession of the land? On my part, I find little or no correlation between the delivery of the land and the payment of the costs. I think it is time we relooked the necessity of Section 94.”

28. This court is in agreement with the above reasoning. The decree sought to be executed is with respect to delivery of possession of the suit property. In its Judgment, the court clearly stated that the 2nd Defendant should give to the Plaintiffs possession of the house he is occupying which is on LR No. 11595 forthwith. That being the case, and considering that the Judgment of the court was made more than one (1) year ago, this court finds the Plaintiffs’ Application to be meritorious.

29. Indeed, the court having decreed that the 2nd Defendant should give to the Plaintiff possession of the suit property, the obligation was on the 2nd Defendant to give up possession of the suit property. The 2nd Defendant having failed to give up possession as ordered, it follows that the only recourse available to the Plaintiffs is for an order of eviction to issue. This order is apt considering that courts do not issue orders in vain.

30. The 2nd Defendant has raised the issue of the applicability of Section 152E of the Land Act to evictions carried out in execution of court decrees. An analysis of this issue reveals that there are two divergent opinions on whether execution of court orders pertaining to eviction pursuant to a Judgment are subject to the provisions of section 152 of the Land (Amendment) Act, 2016.

31. Eboso J, while dealing with a similar question in *Muthithi Investments Limited vs Andrew S Kyendo & 22 others [2020] eKLR* had this to say:

“Secondly, the applicant’s reliance on Section 152E of the Land Act are misplaced because that framework does not relate to evictions carried out in execution of court decrees. Thirdly, there is no evidential material presented to the court to demonstrate that the decree holder has or is about to violate the eviction procedure spelt out in Section 152E of the Land Act or any other Section of the Land Act.”

32. In the case of *Benjamin Kimeli Tanui vs Omari Salim Nasib & another [2020] eKLR*, Olao J held as follows:

“The order that this Court granted in its judgment related to the Appellants who were to “be evicted in accordance with the law.” That law is found in Section 152 E of the Land Act. The up – shot of the above is that having considered both applications by the Appellants and the Respondent, I make the following orders: -

.....

The Respondent must comply with the provisions of Section 152 E of the Land Act if he wishes to evict the Appellants.”

33. This was also the position in *Solome Naliaka Wabwile vs Alfred Okumu Musinaka [2020] eKLR* where the court in making its final determination stated;

“The plaintiff shall vacate the land parcel NO BUNGOMA/KABISI/61 within 6 months from the date of this Judgment or be evicted therefrom in accordance with the relevant provisions of Section 152 of the Land Act.”

34. Where the court specifically provides in its final orders that the provisions of section 152 E of the Land Act should be complied with

during eviction, then the said procedure has to be complied with. However, where the court directs that a party should give vacant possession of the suit without mentioning the applicability of **section 152 E** of the **Land Act**, it would be inimical to justice for a successful party to face extreme hurdles and difficulties in execution of the Judgment of the court by issuing notices provided for under **section 152 E** of the **Land Act**.

35. The reading of the provisions of **sections 152 A to 152 G** of the **Land Act** are applicable in respect to evictions of persons occupying public, community or private land that may be carried without a court order. In those instances, it is a requirement that notices be issued by the National Land Commission or the County Executive Committee member responsible for land or the owner of private land as the case may be. However, the said provisions are not applicable in a situation where the court gives an order for eviction, unless the court itself states that the provisions of **Section 152** of the **Land Act** are applicable.

36. This court is of the view that the Judgment of 6th February, 2020 was a final adjudication of the rights of the parties within the meaning of the **Civil Procedure Act**, subject to appeal. There was no other issue which was left undecided in so far as the dispute over the suit property is concerned. There being no order for stay of execution in force, the court finds and holds that the Plaintiffs are entitled to an eviction order, which order should be supervised by the police.

37. It is against the foregoing that the court finds the Application dated 13th of May, 2020 merited and proceeds to allow it in the following terms:

- i. The Plaintiffs be and are hereby granted leave to execute the decree dated 12th May, 2020 against the 2nd Defendant before taxation of costs.**
- ii. An order of eviction be and is hereby issued against the 2nd Defendant by himself, or his agents and/or servants from Land Reference number L.R No. 11595 situate at Muguga pursuant to the Judgment of this court granted on 6th February, 2020.**
- iii. The Officer Commanding Police Station (OCS), Kikuyu Area is hereby authorized to enforce compliance of order ii above.**
- iv. The 2nd Defendant shall bear the costs of this Application.**

DATED, SIGNED AND DELIVERED IN VIRTUALLY IN NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of:

Ms Nduta for the Plaintiff

Mr. Mbaabu for the Defendants

Court Assistant – John Okumu