



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC APPEAL NO. 12 OF 2020**

**(formerly Bungoma H.C.C.A No. 52 of 2020)**

**FLORENCE NAMACHITU.....1<sup>ST</sup> APPELLANT**

**RONALD KERRE .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**DORIS WANYAMA .....RESPONDENT**

**15<sup>th</sup> December 2021**

**Coram: Boaz N. Olao J**

**(in Chambers)**

**RULING**

I have before me the Notice of Motion by **DAMSEY AUCTIONEER** (the Applicant) dated 9<sup>th</sup> December 2021 and filed under Certificate of Urgency.

The application is premised under the provisions of **Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Rules** and seeks the following orders: -

- (a) That this application by way of Judicial Review be certified as urgent and heard on priority basis.**
- (b) This Honourable Court be pleased to set aside the ruling delivered on 24<sup>th</sup> November 2021 in respect to the application dated 15<sup>th</sup> November 2021 asking the Applicant to fix a date in February 2022 and yet it was an ex – parte application.**
- (c) That the said application dated 15<sup>th</sup> November 2021 was in the cause list of 8<sup>th</sup> December 2021 as No 33 on page 3 and the trial Magistrate refused to hear madam LUCY NANZUSHI.**
- (d) The ex – parte application was to order the Officer Commanding Bungoma Police Station to give adequate security while evicting the Respondent herein.**
- (e) The Ex – parte order sought to be given to the Auctioneers SAMSON OKALL T/A DAMSEY AUCTIONEERS with sufficient security while evicting the Respondents herein.**
- (f) That the Honourable Court signed the Decree on 8<sup>th</sup> July 2020 and eviction orders on 4<sup>th</sup> November 2021. An application for execution filed on 17<sup>th</sup> November 2021 and which was coming up for hearing on 8<sup>th</sup> December 2021 was put off for hearing February 2022.**
- (g) This Court to make a ruling that the Deputy Registrar to sign the order of 15<sup>th</sup> November 2021 or to give a date on a priority basis.**

The application is founded on the grounds set out therein and is also supported by the affidavit of **SAMSON OKALL T/A DAMSEY AUCTIONEER** dated 10<sup>th</sup> December 2021.

Although the application has been placed before me for directions as to its disposal, I do not see the need to do so. I am seized of sufficient evidence to enable me determine it without even calling for a response from the Respondent.

It is clear from the application that the record in **BUNGOMA CHIEF MAGISTRATE CIVIL CASE No 85 of 2018** which is before me for a pending appeal that by a Judgment delivered on 15<sup>th</sup> May 2020, **HON S. O. MOGUTE (PRINCIPAL MAGISTRATE)** found in favour of **DORIS WANYAMA** (the plaintiff) in the dispute relating to the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/8863** (the suit land). A Decree was issued on 15<sup>th</sup> May 2020 ordering, inter alia, that **FLORENCE NAMACHITU** and **RONALD KERRE** (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively) be evicted from the suit land.

In the process of executing the order of eviction, the Applicant faced resistance and threats from the defendants and so he approached the trial Court vide an application dated 15<sup>th</sup> November 2021 and filed under Certificate of Urgency seeking the main order that the Officer Commanding Bungoma Police Station provide him with security during the eviction process.

When the application was placed before **HON. S. O. MOGUTE** on 18<sup>th</sup> November 2021, he made the following order: -

***“The application dated 15.11.21 is seen. No urgency disclosed. The application to be served and hearing date for the same to be given at the registry.”***

The Applicant appears to have gone to the Registry for a date and was given 8<sup>th</sup> December 2021 for the hearing of the application. For some un – known reasons, however, the file was not placed before the trial Court on 8<sup>th</sup> December 2021. The record shows however that on 25<sup>th</sup> November 2021, the file was placed before **HON S. O. MOGUTE** who made the following orders addressed to the Officer – in – Charge of the Civil Registry: -

***“Please note that I directed that the diary for this year is full. Fix the application for hearing in early February 2022.***

**S. O. MOGUTE**

**P.M**

**25.11.21”**

I have looked at the record of the trial Magistrate and it is obvious that his diary for 2021 is full and so he would not have been able to hear the application on 8<sup>th</sup> December 2021 a date fixed by the Registry on his own directions. However, and in all fairness to the Applicant, and indeed all the parties herein, unless the trial Court was not sitting on 8<sup>th</sup> December 2021, it would have been more courteous for the parties to appear before the trial Magistrate for further directions. That would obviate situations such as this where the Applicant is expressing his displeasure in the way the matter has been handled and has posed the question in paragraph (f) of his application and said ***“..... Why did the Court on an Exparte application coming up for hearing on 8.12.2021 order the same to come up for hearing in February 2022.”*** It is not unusual for parties to read mischief even where there is none. But I think that can easily be addressed where, in a situation such as this, they hear from the Judicial Officer himself unless he is not in the station.

Having said so, the Applicant has approached this Court through what he says is a ***“Judicial Review.”*** A Judicial Review application is governed by the provision of **Order 53** of the **Civil Procedure Rules**. It is also commenced by an application for leave. It cannot be brought in the manner in which the Applicant has approached this Court.

Secondly, no ruling was delivered by the trial Magistrate on 24<sup>th</sup> November 2021 which this Court can set aside as sought by the Applicant. The only order that was made on 24<sup>th</sup> November 2021 was in the Civil Registry and it reads: -

***“Order***

***Case fixed for hearing of application dated 15.11.2021 on 8.12.2021. Notice to serve.”***

Even assuming that this is proper Judicial Review application before me, it is difficult to understand whether the Applicant is seeking an order of **CERTIORARI** to quash the date fixed for the hearing, **PROHIBITION** to prohibit the trial Court from hearing the application on any date other than a date agreeable to the Applicant or **MANDAMUS** to compel the trial Court to hear the application on a specific date to be fixed by this Court. Surely, the act of listing of a matter by the Registry for hearing or mention before a Court cannot by any stretch of imagination be amenable to redress by Judicial Review. That would be stretching the scope of Judicial Review too far.

In the circumstances, the Notice of Motion dated 9<sup>th</sup> December 2021 is devoid of any merit. It is dismissed with no orders as to costs.

**BOAZ N. OLAO.**

**J U D G E**

**20TH DECEMBER 2021.**

Ruling dated, signed and delivered this 20<sup>th</sup> day of December 2021 at **BUNGOMA** by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines with notice to the parties.

**BOAZ N. OLAO.**

**J U D G E**

**20TH DECEMBER 2021.**