



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 9 OF 2020

MICHAEL NDERITU WAIREGI.....APPLICANT

VERSUS

NDUNGU MATHENGE.....RESPONDENT

RULING

Background

The application before me is the Notice of Motion dated 15th October 2020 brought under *Section 1, 1A, 3, 3A CPA, Order 42 Rule 6 and 51 CPR*. The Applicant is seeking the following orders:-

(1) Spent.

(2) That the Court orders the Respondent and his agents and/or anyone else to desist from further acts of destruction and/or entering the suit lands pending hearing of the application dated 30th July 2020 and 1st October 2020 both coming up for hearing on 4th November 2020.

(3) That the Court directs the Nyeri County Commander of Police, Nyeri OCPD and or OCS Mweiga Police Station ensure compliance of the orders sought herein and those issued on 30th July 2020.

(4) That the Respondent be condemned to pay costs of this application.

Grounds upon which the Application is Premised

(i) That the respondent through his agents/purchaser has since interfered with the prevailing status quo as at 30th July 2020.

(ii) That the respondent through his agent/purchaser particularly one Peter Koine Watuthu continue wanton acts of destruction of the suit land in total disregard of the orders of the Court issued on 30th July 2020.

(iii) That the respondent through his agents/purchaser continue to threaten the applicant with dire consequences should he interfere with his wanton acts of destruction.

(iv) That despite the direction issued in certificate of urgency dated 30th July 2020, the respondent through his agents/purchaser particularly one Peter Koine Watuthu continues wanton acts of destruction/and are now felling/cutting down trees and completely fencing of the land greatly prejudicing the applicant.

(v) That the Court orders that the respondent through his agents/purchaser particularly one Peter Koine Watuthu to stay away from the suit lands pending hearing and determination of the application dated 1/11/2020.

(vi) That it is in the best interest of justice that the orders sought be granted.

(vii) That unless the orders sought are granted, the dignity of the Court shall be put into disrepute.

Statements of the Facts

The appellant/applicant in his supporting affidavit stated as follows:-

- (1) That the Court issued orders on 30th July 2020 ordering the parties to maintain status quo prevailing on 30th July 2020.
- (2) That the respondent has since interfered with the prevailing status quo through his agents/purchaser particularly one Peter Koine Watuthu and has since sought protection and enforcement of the said order from this Honourable Court through the application dated 30th July 2020 and 1st October 2020.
- (3) That the Court directed the said application dated 1st October 2020 be served for hearing on 4th November 2020.
- (4) That the respondent through his agents/purchaser particularly one Peter Koine Watuthu continue wanton acts on the suit land by felling/cutting down trees and fencing off the applicant's parcel of land greatly prejudicing the applicant.
- (5) That he prays this Honourable Court prevails upon the respondent and/or his agents/purchaser and/or anyone else particularly one Peter Koine Watuthu from further interfering with the status quo pending hearing of the applications dated 30th July 2020 and 1st October 2020.
- (6) That the Nyeri County Commander of Police, Nyeri OCPD and/or OCS Mweiga Police Station ensure compliance and maintenance of peace during the prevailing period pending hearing and determination of the application dated 30th July 2020 and 1st October 2020.
- (7) That the respondent will suffer no prejudice by granting of the orders sought.

Defendants Statements of Facts

The respondent filed a replying affidavit in opposition to the said application and stated as follows:-

- (1) That the application dated 15th October 2020 is frivolous, vexatious and an abuse of Court process.
- (2) That the applicant is just a busy body bent on harassing him with endless litigation and force him to incur undue costs as he already has two other applications still pending before this Honourable Court.
- (3) That the application dated 15th October 2020 is bad in law, fatally defective and a non-starter that should be dismissed with costs to him.
- (4) That the persons referred to in paragraph 3 of the affidavit in support of the application dated 15th October 2020 more specifically one Peter Koine Watuthu is not his agent.
- (5) That the said person being a purchaser and him a mere vendor, he has no control over how he wishes to exercise the proprietary rights over his land.
- (6) That he no longer lives on the suit land or even visit it and he does not understand why the applicant is insisting on dragging him into his issues with the registered proprietor or other persons who remain unknown to him.
- (7) That the orders sought herein are untenable and an abuse of Court process as they are sought to regulate the activities of persons who are not parties to this application.
- (8) That having already stated on oath that he is not involved in the activities, the applicant is referring to and neither are the persons said to be engaged in those activities his agents, then it would be improper for the orders sought to be granted against him.
- (9) That the applicant is put to strict proof of the averments made in his supporting affidavit and the agency relationship referred to in his affidavit.

Written Submissions by the Applicants

The applicant through the firm of Gitonga Muthee & Co. Advocates submitted that on 30th July 2020, this Honourable Court ordered that the status quo prevailing at the time be maintained but the respondent in breach of the orders and disposed off the suit land to third parties to defeat the ends of justice. The applicant also submitted that Court orders are not made in vain but intended to preserve the dignity of the Court and the rule of law. The applicant further submitted that in addition, the respondent disobeyed the status quo orders by cutting down trees and allowing strangers to enter into the suit land and started harassing him which acts are in contempt of the orders of the Court and that this Honourable Court has the duty to ensure its dignity is protected. He cited the case of *Priscillah Wanja Kibui Vs James Kiongo & Another (2014) e K.L.R.*

Respondent's Submissions

The respondent on the other hand filed his submissions through the firm of Muchiri Wa Gathoni & Co. Advocates and submitted that the suit land had been sold and transferred to an innocent third party one Peter Koine Watuhu before the ex-parte orders for status quo were obtained

on 30th July 2020. He argued that in his earlier replying affidavit dated 2nd November 2020 filed in this suit, he was able to annex a consent to transfer land to the said Peter Koine Watuhu obtained on 26th February 2020 showing his final discharge of obligation towards the purchaser Peter Koine Watuhu. The respondent further submitted that he even explained to this Honourable Court that he had no interest with the land and had not even visited the same.

The respondent also argued that having transferred the land to the new registered owner, he had no any control over the suit land or the persons who utilize the same. The respondent stated that this application is defective in that it seeks issuance of orders against persons not parties to this suit and not represented in this application and that they are not even enjoined as parties to this suit. He further stated that judgment in this case was delivered on the 19th February 2020 and no explanation has been given why the applicant waited until 30th July 2020 to obtain ex-parte orders for status quo or even file this application on 15th October 2020. He stated that equity aids the vigilant and not the indolent. It is further submitted that the applicant has not proved that the persons allegedly on the suit land are the respondent's agents or that the respondent is in anyway associated with the activities on the suit land.

He argued that the applicant is dragging him through unnecessary litigation while abusing the Court process in obtaining orders against third parties not the registered proprietor or his agents. He cited the case of *Republic Vs National Land Commission & 2 Others Ex-parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) (2018) e K.L.R.* In conclusion, the respondent submitted that the reliefs sought are in bad faith as they are meant to be enforced against persons who are not registered owners and who are not aware of these proceedings.

Legal Analysis and Decision

I have considered the Notice of Motion dated 15th October 2020 and the supporting affidavit of the applicant sworn the same date. I have also considered the replying affidavit sworn by the respondent on 16th November 2020. The applicant is seeking orders to punish the respondent for failing to comply with Court orders issued by the Court on 30th July 2020. In the said application which was filed under certificate of urgency, the applicant had sought the grant of stay of execution of the judgment by the trial magistrate in the subordinate Court Case No. 151 of 1989 (Nyeri) between the Appellant and the Respondent entered on 19th February 2020. When the said application was placed before the duty Judge the same day on 30th July 2020, it was directed that the application was not urgent but the same to be served upon the respondent. The duty Judge also directed the application be disposed off by affidavit evidence and written submissions which she gave time lines for the parties to comply. Pending the determination of that application, the Judge ordered the parties to maintain the status quo as existed that day. The applicant in the present application is complaining that the respondent disobeyed the orders of the Court issued on the said 30th July 2020 and want this Court to enforce those orders. The question I ask myself is, what was the status quo ante prevailing previously before 30th July 2020? The answer to that question is important considering that the subject of this appeal is a judgment and decree which was delivered by the trial magistrate on 19th February 2020. It was therefore imperative to establish whether the decree had been executed and who exactly was in possession and occupation on the ground before issuing the status quo orders. Since the status quo ante was not established before issuing the status quo orders, it is nigh impossible to enforce the orders issued on 30th July 2020. Consequently, the Notice of Motion dated 15th October 2020 lacks merit and the same is hereby dismissed. Each party to bear his/her own costs. it is so ordered.

READ and SIGNED Via Video link at Kerugoya this 5th day of February, 2021.

E.C. CHERONO

E.L.C JUDGE

In the presence of:-

- 1. Mr. Mshila for Respondent*
- 2. Mr. Muthee for Applicant*
- 3. Kabuta, Court clerk.*