



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 539 OF 2017**

**ERIC TIMOTHY BALONGO.....PLAINTIFF**

**VERSUS**

**PAUL SITEYA LOORKIPONY.....DEFENDANT**

**RULING**

By a Notice of Motion Application dated the 6<sup>th</sup> November, 2019, brought pursuant to section 1A, 1B, 3A, 63 ( c), 75(1), 95 of the Civil Procedure Act; Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, the Defendant seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to stay execution of the Judgement of 6<sup>th</sup> March, 2019 and the Decree herein and other consequential orders or grant conservatory orders pending *inter partes* hearing and determination of this application and to reference of the matter to the learned Chief Justice.

3. That an order be made referring this matter to the learned Chief Justice for him to constitute a bench to hear this application and generally give any directions relating to the hearing hereof.

4. That a declaration that the following judgements, proceedings and ruling issued by the Court were and still contravenes and infringe the Applicants Constitutional fundamental rights and freedoms under Article 2, 12, 20, 22, 23, 47, 50 and 159 of the Constitution;

- a. The exparte interlocutory judgement entered on 6<sup>th</sup> June, 2017.
- b. The formal proof proceedings in the suit
- c. The ex parte judgment entered on 6<sup>th</sup> March, 2019 and consequential Decree issued thereof.
- d. The Ruling delivered on 5<sup>th</sup> November, 2019.

5. That an Order made that All Rulings and Judgements in 3 above are unconstitutional and contra statutes, illegal and the same be declared null and void and of no legal effect.

6. That the Rulings in 3 above be permanently stayed and such orders, writs and/or directives as are just and appropriate to safeguard the constitutional right of the Applicant made and the suit herein stayed and or transferred to Nairobi to be heard together with HCCC 563 of 2015

The application is premised on the grounds on the face of it and the supporting affidavit of PAUL SITEIYA LOORKIPONY where he confirms that he instituted Nairobi HCCC 563 of 2015. He contends that Moly Credit Limited and Regent Auctioneers allegedly and secretly sold suit land to the Respondent on 2<sup>nd</sup> August, 2016. Further, in 2017 the Respondent secretly filed the instant suit. He claims the Nairobi HCCC 563 of 2015 is pending hearing and the status quo orders are still in place pending the outcome of the said suit. He contends that he learnt of the instant suit in April, 2019 and that judgements and other consequential orders were obtained secretly. He avers that vide a Ruling dated the 5<sup>th</sup> November, 2019, the Court dismissed the application dated 26<sup>th</sup> April, 2019 and gave a go ahead for the eviction. He insists the default judgement was unwarranted and the suit herein remains sub judice. Further, that the Plaintiff's claim herein was excluded

from summary default judgement process. He states that due to the constraints in the Rulings above, he has been denied objective, impartial and unbiased justice in the current circumstances. Further, that the Rulings and Judgment have been made in gross violation of the due process of the law and in breach of his fundamental constitutional rights to fair trial, equality before the law and protection of the law.

The Defendant in opposition to the instant application filed a replying affidavit sworn by ERIC TIMOTHY BALONGO where he deposes that the prayers 1 and 2 of the Applicant's Application have been heard and adjudicated upon by this Court in their earlier application dated 24<sup>th</sup> April, 2019 and dismissed. Further, that this is not the right forum to seek the same prayers whose application was canvassed and dismissed. He claims the format of the application is wanting in that it is introducing constitutional matters in a purely civil suit. Further, that if the Applicant is dissatisfied with the orders of the Court, it is incumbent for him to appeal against them. He contends that this Court cannot in law and procedure make the orders sought in Numbers 3, 4, 5 and 6 sought in the instant application. Further, that the Judge cannot be made to make orders challenging her own ruling. He denies being served with pleadings in HCCC 563 of 2015. Further, that there is no contravention of orders issued in HCCC 563 of 2015. He insists there were no orders restraining the selling of the suit property after Lady Justice Nzioka held that the statutory notice was issued. He states that the Applicant's application does not reveal anything that has contravened his fundamental rights and freedoms. He reiterates that there is nothing advanced by the Applicant to warrant the formation of any bench by the Chief Justice to hear the applicant's application. Further, that it is the Respondent's rights that have been infringed upon by denying him occupation of the land he has purchased.

The Plaintiff also filed an application dated the 22<sup>nd</sup> November, 2019 brought pursuant to section 3A of the Civil Procedure Rules seeking that the Court do grant an order directing the OCS Police Station at Kisaju to provide security to SIUMA AUCTIONEERS to visit Defendant's homestead and complete the eviction by clearing the materials lying thereon. It is supported by the Plaintiff's affidavit where he explains that after the judgement and issuance of a Decree, he had commenced execution process by instructing SIUMA Auctioneers to execute the order of eviction, wherein he informed the Court accordingly. He claims when they proceeded to the Defendant's homestead with caterpillar tractors and demolished some houses thereon, the Defendant pleaded with them not to damage his personal belongings and requested to be allowed to look for a place to store them, which they did on humanitarian grounds. He contends that when they revisited the suit land, some of the Defendant's cronies started fighting them using stones and one of their members was injured. He insists the eviction took place and what is left on the ground is to clear the debris.

The Defendant opposed the said application by filing a replying affidavit where he insisted that no execution process had commenced as there is an order of stay of execution in place. Further, that no warrants of execution have been obtained. He contends that the Application confirms the Plaintiff's admission of the illegal and irregular invasion into the suit property without following the due process. He confirms that there was extensive damage to his property. He insists no sale took place in favour of the Plaintiff. He sought for the Court to visit the *locus in quo* to confirm that execution was not successful. He claims to have effected service of the stay orders issued on 12<sup>th</sup> November, 2019 upon the OCS Isinya who declined to receive the same until they secured a certified copy.

The Plaintiff and the Defendant filed their respective submissions in respect to the two applications cited above.

### **Analysis and Determination**

Upon consideration of the applications dated 6<sup>th</sup> November, 2019 and 22<sup>nd</sup> November, 2019 including the parties' affidavits', annexures and submissions the following are the issues for determination;

- Whether the Judgement and Rulings of this Court contravened the applicant's rights and the matter should be referred to the Hon. Chief Justice to constitute a bench to hear and determine this application.
- Whether an order should be issued to the OCS Kisaju Police Station to provide security to SIUMA Auctioneers to finalize execution process.

The Applicant herein also sought for orders of stay of execution of the Decree herein vide his application dated 26<sup>th</sup> April, 2019, which was heard and determined in this Court's ruling dated the 5<sup>th</sup> November, 2019. I will hence not dwell on the issue of stay of execution.

As to whether the Judgement and Rulings of this Court contravened the applicant's rights and the matter should be referred to the Hon. Chief Justice to constitute a bench to hear and determine this application. I note the Applicant herein had already filed an earlier application seeking a stay of execution and to set aside the *ex parte* Judgment which Application was dismissed vide this Court's Ruling dated the 5<sup>th</sup> November, 2019. It is as a result of the said dismissal that culminated in the Applicant filing the instant application seeking more or less the same orders but clothed in constitutional terms. From the Court records and applicant's averments, the suit land had indeed been charged and later sold to the Plaintiff by the Financier Moly Credit Limited and Regent Auctioneers on 2<sup>nd</sup> August, 2016. The Applicant is contending that the Sale was not proper and in reference to my previous Ruling, I had clearly indicated that the issues raised by the Applicant on the irregular sale would be best dealt with in the Nairobi HCCC 563 of 2015 which is still pending. The Applicant now seeks the matter to be referred to the Chief Justice to constitute a bench to hear the Application. I note this matter is already determined and a Decree issued to that effect which is in the process of execution. Further, the Applicant still has another pending matter in Nairobi touching on the sale of the suit land which is yet to be determined.

In the case of **Philomena Mbete Mwilu v Director of Public Prosecution & 4 others [2018] eKLR**, the Judge while dealing with an issue of referring a matter to the Chief Justice to constitute a bench held that: ' **The application seeks certification of the petition as one raising a substantial question of law under Article 165(4) and should thus be referred to the Chief Justice for empaneling an uneven bench to hear it. The application brought by the 1st respondent is supported by the 2nd, 3rd and 4th respondents. 17. The petitioner and interested party oppose the application arguing that there is no substantial question of law raised in the petition because all that the petitioner questions is the 1st respondent's decision to turn a commercial transaction into a criminal case. They hold the view that a single judge of this court can effortlessly hear and determine the petition. 18. Article 165(4) of the constitution provides that a matter certified by the court as raising a substantial question of**

law under clauses 3(b) and (d) should be heard by an un even number of judges being not less than three, assigned by the Chief Justice. The constitution does not define what constitutes a “substantial question of law” thus leaves it to the discretion and interpretation of the court sitting on the matter to determine whether issues raised before it amount to a substantial question of law to warrant reference to the Chief Justice for assignment of uneven bench to hear it. 19. What is however clear from the constitutional text, is that the issue must be one that falls either under clause 3(b) or (d) of Article 165 of the constitution. Clause 3(b) confers jurisdiction on the court to hear and determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened; while clause 3 (d) gives the court jurisdiction to hear any question respecting interpretation of the constitution. In that context, the issue must either be one of violation or infringement of fundamental rights or interpretation of the constitution or even both. 20. Courts have since interpreted the meaning of a substantial question of law and this was best done by the Supreme Court of India in the celebrated case of *Chunilal V Mehta& sons Ltd v Century Spinning & Manufacturing Co. Ltd (supra)* where it was stated that a question of law will be a substantial question of law if it directly and substantially affects the rights of the parties and that in order to be substantial it must be such that there may be some doubt or difference of opinion or there is room for difference of opinion in its interpretation. If however, the law is well-settled by the highest (Apex) Court, the mere application of it to particular facts would not constitute a substantial question of law.’

In the current case, I note the Plaintiff who is the registered proprietor of the suit land only sought for eviction of the Applicant from the said land which he had purchased through an auction. The Applicant is challenging the auction through another forum. This Court proceeded to make a decision that the Plaintiff as the current registered proprietor was entitled to the orders sought in the Plaintiff. From the Applicant’s averment, he has failed to prove how his fundamental rights and freedoms have been infringed upon by this Court’s Judgment and Ruling. In associating myself with the above cited decision, I am unable to find that the Judgement and Rulings of this Court violated the Applicant’s Constitutional rights to warrant the reference of the application to the Chief Justice to empanel a bench. I opine that the Applicant seems to be hell bent on abusing the process of this Court with numerous applications to defeat the execution of the Decree against it. If the Applicant is aggrieved with the decision of this Court, he has recourse to Appeal which process he has commenced as he filed a Notice of Appeal dated the 6<sup>th</sup> November, 2019.

In the circumstance, I find the Application dated 6<sup>th</sup> November, 2019 unmerited and will dismiss it with costs to the Plaintiff. I will proceed to vacate the interim orders that have been in place.

As to whether an order should be issued directing the OCS Police Station at Kisaju to provide security to SIUMA AUCTIONEERS to visit Defendant’s homestead and complete the eviction by clearing the materials lying thereon. Since the process of execution had commenced but could not be concluded as a result of the current application and interim orders which were in place. Further, since one of the roles of the Police is to maintain law and order and based on the Plaintiff’s averments that they had been attacked by goons resulting in one of their members being injured. I find that it would be pertinent for the OCS Police Station Kisaju to offer security to the Siuma Auctioneers to complete the execution process. In the circumstances, I will allow the application dated the 22<sup>nd</sup> November, 2019.

I so order.

**Dated signed and delivered in open court at Kajiado this 26th day of February, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Mirie for the applicant

Kaai for the respondent

Court assistant - Mpoye