



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 853 OF 2012

MICHAEL ANYANGO OTUKO.....PLAINTIFF

VERSUS

JOSEPH MUINAMI KINYANJUI.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. The Plaintiff filed the Motion dated 28th November, 2019 seeking for Joseph Muinami Kinyanjui, the 1st Defendant, to be found guilty of disobeying the orders of 24th October, 2019 and 25th November, 2019 and be sentenced to a fine of Kshs.20,000,000 or imprisoned for 2 years and or both for each. The Plaintiff also seeks for costs. The application is based on the eight (8) grounds on its face and the affidavit sworn by the Plaintiff on the 28th November, 2019.

2. The application is opposed by the 1st Defendant through his replying affidavit sworn on the 24th January, 2020.

3. The learned Counsel for the Plaintiff, and the 1st Defendant in person made their oral submissions for and against the application on the 6th February, 2020.

4. That it is the Plaintiff's case that the judgment of 24th October, 2019 granted the Plaintiff 30 days stay. That the 30 days stay were to lapse on the 24th November, 2019. That the 1st Defendant evicted the Plaintiff from the suit land on the 22nd November, 2019 on the strength of a Lower Court order issued in a suit where the Plaintiff herein was not a party. That the Plaintiff came to court on 25th November, 2019 and was granted another 30 days stay on 26th November, 2019. That the order was served on the 1st Defendant on 26th November, 2019 but he proceeded to demolish the house of the Plaintiff on that day at 5.00 p.m. That the Defendant's claims that he had not been served with the order cannot be true.

5. The 1st Defendant's case is that the Lower Court order of 23rd December, 2012 had been issued in a suit where the Plaintiff herein had been enjoined as an interested party and related to parcel 331. That the Plaintiff's claim in the Lower Court case had been dismissed before he filed the current suit. That judgment was delivered on 24th October, 2019 giving Plaintiff 30 days stay which lapsed on 22nd November, 2019. That the 1st Defendant went to the Police on 22nd November, 2019 and was given officers for security as he removed a shed for connecting electricity that Plaintiff had erected on parcel 331. That he was not served with any court order on 26th November, 2019 and did not remove any structure belonging to Plaintiff on that date. That to-date, he has not been served with the Plaintiff's Motion dated the 21st November, 2019 and the order issued thereof.

6. The following are the issues for the Court's determinations;

(a) Whether the Plaintiff has shown that the 1st Defendant was duly served with the extracted orders he is alleged to have disobeyed.

(b) Whether the Plaintiff has shown that the 1st Defendant disobeyed any of the Court orders.

(c) Who pays the costs?

7. The Court has carefully considered the grounds on the application, the affidavit evidence and *annextures* attached, the record and come to

the following findings;

(a) That the judgment dated the 16th October, 2019 was delivered on the 24th October, 2019 in the presence of Counsel for the Plaintiff, and 2nd Defendant, and the 1st Defendant in person. That in the judgment, the Plaintiff's claim was found as ***"unfounded and dismissed with costs"***. That the Court went on to find that the property parcel 331, which is part of L. R. 8500 belongs to the 1st Defendant and issued a permanent injunction against the Plaintiff restraining him from interfering with the suit property. The Court further directed that the ***"Plaintiff to vacate within 30 days, failure to which, the 1st Defendant to forcefully remove the Plaintiff with the assistance of the O.C.S., Langas Police Station"***.

(b) That vide the Motion dated the 8th November, 2019, the Plaintiff sought for stay of the injunction and eviction order of 24th October, 2019 pending the hearing and determination of the application and the intended appeal. The Court directed on the 11th November, 2019 that the application be served in three (3) and be mentioned for further directions on the 21st November, 2019. The 1st Defendant filed his replying affidavit sworn on 20th November, 2019 on the 21st November, 2019. That following a certificate of urgency dated and filed on the 21st November 2019, stay of execution for 30 days was granted on the 25th November, 2019 and inter-partes hearing fixed for 22nd January, 2020. That the order was extracted and issued on the 26th November, 2019. The affidavit of service by Kenneth O. Oduor sworn on the 26th November, 2019 indicates that the 1st Defendant was served with the order but declined to acknowledge receipt. There is no evidence of service of Motion dated 21st November, 2019 upon the 1st Defendant. The 1st Defendant has disputed service of the order and the application. That what followed is the current application dated 28th November, 2019.

(c) That when the Learned Counsel for the Plaintiff and the 1st Defendant appeared in court on the 22nd January 2019, for inter-partes hearing of the application dated 8th November 2019, the 1st Defendant informed the Court that he was yet to be served with the Motion dated the 28th November, 2019. That even though there is an affidavit of service by one Kenneth O. Oduor sworn on 20th January, 2020 that he had served the application on the 1st Defendant on the 28th November 2019, the Court directed fresh service to be effected upon the 1st Defendant and adjourned the hearing of the application to the 6th February, 2020. That come that date, the Court confirmed that the 1st Defendant had filed and served his replying affidavit on the 28th January, 2020. That action by the 1st Defendant makes the Court have doubts with the alleged service earlier said to have been made by the process server referred to hereinabove.

(d) That while the Plaintiff's position is that the judgment of 24th October, gave him 30 days stay, which lapsed on the 24th November, 2019, the 1st Defendant position is that the period lapsed on 22nd November, 2019. That it is obvious that one counting the days from the 24th October, 2019 will arrive at 22nd November, 2019 as the 30th day, while one counting from 25th October, 2019 will find the 30th day is on the 23rd November, 2019. That aside, the order in the judgment of 24th October, 2019 required of the Plaintiff to vacate the suit land within 30 days and in default, allowed the 1st Defendant to seek the assistance of the Langas Police Station, O.C.S. to evict him. The Plaintiff has not informed the Court what preparations or logistics he had put in place to comply with the order to vacate by the 22nd November, 2019 when the 1st Defendant with the assistance of the Police brought down the structure on the suit land to which electricity was connected. That the 1st Defendant position is that he was executing the eviction order issued in Eldoret Chief Magistrate's Court Case No. 27 of 2011 to which the Plaintiff had been enjoined and defeated before he filed the current suit.

(e) That in view of the doubts as to whether the order of 25th November, 2019 and issued on 26th November, 2019 was served upon the 1st Defendant, and the chequered history in this matter, the Court is of the considered finding that the application dated the 8th November, 2019, be set down for hearing and determination before deciding whether or not there has been disobedience. That this is especially so as the Plaintiff has failed to tender proof of above balance of probability that the 1st Defendant was served with the order issued on 26th November, 2019 and had disobeyed it.

8. That in view of the foregoing, the Court finds no merit in the Plaintiff Motion dated the 28th November, 2019. That the application is dismissed with costs to abide the outcome of the Motion dated 8th November, 2019.

Orders accordingly.

Dated and signed at Eldoret this 4th day of March, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Mr. Kandie for Kigama for Plaintiffs.

M/s Lungu for 2nd Defendant.

Court Assistant: Christine