



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 8 OF 2017

WILFRED KELI NDOLO.....PLAINTIFF

VERSUS

JESCA GATAKAA AMBOKA.....1ST DEFENDANT

JACKSON AMBOKA WANYUNGU.....2ND DEFENDANT

RULING

1. By a notice of motion dated **14/1/2020** and filed on the same date, the plaintiff/applicant sought the following orders against the defendants:

(1) ...spent

(2) That leave be granted to the auctioneer (Kennedy Kwetu Shikuku T/A Eshikhoni Auctioneers) to open the 6 metres wide road of access which serves all the plots subdivided from Title No. Kitale/Municipality Block 16/36 and Kitale Municipality Block 16/14 in compliance with the judgment delivered by the honourable court on the 30/9/2019, by removing the iron sheet barriers and building materials placed on the said road.

(3) That the Officer Commanding Kitale Police Station do provide security to Kennedy Kwetu Shikuku T/A Eshikhoni Auctioneers while executing the task.

(4) That costs of this application and the execution of the decree herein be borne by the defendants/judgment debtor.

2. The grounds upon which the application is based are that judgment was delivered in this matter on the **30/9/2019** directing that the defendants to, inter alia, forthwith open the road of access which serves all the plots subdivided from Title No. **Kitale Municipality Block 16/36** and **Kitale Municipality Block 16/14**; that this court refused to grant stay of execution in the matter; that the respondents were unsuccessful in a similar application for stay at the appellate level; that to date the defendants have, with what the applicant terms as “*arrogance and impunity*,” refused to open the road of access thus causing suffering to the plaintiff and numerous other persons, approximated at **200**, who were using the said road and that the defendants have no intention of opening the said road.

3. The application is supported by an affidavit of counsel for the applicant sworn on **14/1/2020**. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

4. The respondents filed a replying affidavit dated **4/2/2020** sworn by their advocate. Their response is that the application is not urgent; that the numerous persons mentioned are not parties herein and that in any event they must have bought their plots after the defendants bought theirs; that prayer **No. 2** is overtaken by events as the barriers were removed by agents of the plaintiff; that the application for execution of decree should have been placed before the Deputy Registrar rather than the court for disposal and therefore it is not brought in good faith.

5. In response to Kepher Nakitare’s replying affidavit dated **4/2/2020**, the plaintiff filed supplementary affidavit filed on **10/2/2020** stating that the defendants were bound by the judgment to open the road themselves and were enjoined from in future obstructing or interfering with the road and that those final court orders should have been obeyed; that any further discussion as to whether the road serves all plots subdivided from **Kitale Municipality Block 16/36** and **Kitale Municipality Block 16/14** and should be opened is baseless and frivolous; that whether the road is used by persons other than the plaintiff does not matter because the court has declared it to be a public road; that the response by the defendants demonstrates that they are not intent on complying with the judgment and decree; that though the barriers were removed by the defendants’ son and worker respectively on **8/1/2020** the same were returned to their former position later in the evening of the same day.

6. In brief the affidavit suggests that the judgment and decree are yet to be complied with by the defendants.

7. The defendants filed their submissions on 25/2/2020. The plaintiff filed his submissions on 27/2/2020.

8. I have considered the application and the response as well as the submissions of both parties.

9. The plaintiff submitted that an application such as this one is permissible under the provisions of **Sections 1A and 1B** of the **Civil Procedure Act** as read with provisions of **Order 22 rule 7 (2) (j)(v)** of the Civil Procedure Rules.

10. The respondents submitted that under **Order 49** of the **Civil Procedure Rules** the Deputy Registrar should hear applications under **Order 22** other than those brought under **Rules 28** and **75**. He submits that it is only applications brought under **Order 22** regarding decree for specific performance or for an injunction and application to set aside sale that should be brought before the Judge. He cited the case of **Julius Mwirigi Manyara -vs- Alexander Kithure [2014] eKLR** to support his argument

Determination

11. The issues for determination in the instant application are as follows:

(a) Whether leave should be granted to the auctioneer (Kennedy Kwetu Shikuku T/A Eshikhoni Auctioneers) to open the 6 metres wide road of access in compliance with the judgment delivered by the court on the 30/9/2019, by removing iron sheet barriers and building materials placed on the said road.

(b) Whether Officer Commanding Kitale Police Station should provide security to Kennedy Kwetu Shikuku T/A Eshikhoni Auctioneers while executing the task of reopening the road.

(c) Who should bear the costs of this application?

(a) Whether leave should be granted to the auctioneer (Kennedy Kwetu Shikuku T/A Eshikhoni Auctioneers) to open the 6 metres wide road of access in compliance with the judgment delivered by the court on the 30/9/2019, by removing the iron sheet barriers and building materials placed on the said road.

12. There is no doubt that there exists a judgment of the court that has not been stayed or successfully appealed against by the defendants. The orders of this court were in peremptory terms, giving the defendants no room to dither over whether those orders should be obeyed or not. Indeed the first observation that this court makes herein is that had the defendants complied with the judgments either alone or in conjunction with the plaintiff, there would have been no need for the instant application.

13. It is noteworthy that the defendant's objection to the application is merely technical: that the wrong procedure has been employed by the plaintiff. However time and again courts have indicated that no person has a vested interest in procedure and in this dispensation the court is inclined to retain sight of the current policy that substantive justice must be upheld above procedural technicalities. The provisions of **Article 159(2) (d)** are emphatic on this current approach to litigation.

14. In the case of **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016]eKLR** the court stated thus:

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.” (emphasis mine).

15. In my view the vital stages in the conduct of this litigation at which procedure would have been said to be crucial are long since over. It is for the defendants, as law abiding citizens of this Republic, to comply with the judgment of the court and this requires, as I see it, no special procedure on their part save positive action, to reopen the road as the decree compels them to. This is not to state that the observance of the rules of procedure in relation to all execution does not matter, for that kind of observation would be tantamount to endorsing in chaos in the execution process. Indeed nothing demonstrates this fact better than this court's insistence on meticulous compliance with the rules of procedure on execution in the case of **Robella Betty Ayode Omaido v Eliphineas Jackson Ekim Omaido, Eshikhoni Auctioneers & 2 others [2019] eKLR** where this court observed that:

“22. In our justice system compliance with procedure especially with regard to service of process that is bound to affect the constitutional and property rights of a citizen as happened in this case is mandatory. It is to be observed that a proper notice under Section 12(1) (c) of the Auctioneers Rules 1997 would have afforded the applicant a chance to remit the decretal sum and costs to the respondents and thereby avert the embarrassing spectacle of physical seizure of her goods under the process of execution. Execution without notice does not observe or protect a citizen's right to protection of property and amounts to arbitrary deprivation thereof yet under Article 40 (2) (a) not even Parliament can enact a law that empowers any person to

arbitrarily deprive a citizen of his property.

23. I find it difficult to comprehend the respondents' argument that this court can countenance the retention by the respondents of goods seized contrary to the relevant rules on execution and the constitutional safeguards contained in Article 40. It matters not that a successful process of execution may issue again. In the meantime this court must uphold the rights of the applicant to her property until it is seized after due observance of process.

24. In the circumstances the only remedy that presents itself is to quash the faulty procedure and order the restitution of the seized properties and subject the parties, if they must, to a fresh exercise in which none of them will cry foul.” (emphasis mine)

16. In my view greater care is required to distinguish the two scenarios, for in the **Robella case (supra)** the judgment debtor owned the goods yet in the instant case the defendants have no private and disposable interest in the public road of access. The distinction between the executions is that, in the **Robella case (supra)**, the execution sought to be enforced was by way of attachment of the judgment creditor's goods while in the instant case it concerns the re-opening of a public road of access which the plaintiff happens to rely on for access to his properties.

17. Though I entertain serious doubt that **Order 22 rule 7 (2) (j) (v)** of the **Civil Procedure Rules** is, by its very construction of any avail to the plaintiff in this application, I also entertain considerable doubt that referring the execution issue to the Deputy Registrar under order **49(b) (x)** of the **Civil Procedure Rules** may aid any of the parties who will continue with their needless and protracted squabbles over execution of the judgment in the suit.

18. It will be a sad day indeed when on an application like the one currently before me, the court will turn away the applicant on the basis that the proper procedure has been followed, yet the application should not even have been before this court in the first place had the defendants complied with the very clear orders of the judgment of the court.

19. I have considered the claim of the defendants that the plaintiff attempted or did reopen the road as ordered by the judgment; however, the response shows that the road was opened and closed again and in any event that allegation is not a sufficient response to the instant application. Any other allegations of wrongdoing on the part of the plaintiff during the alleged execution may not be the subject of trial herein, this court being *functus officio* save in respect of matters execution.

20. It would appear that of late there have been increasing cases of reluctance to comply with final court decrees. In the case of **Jeremiah Matoke Vs Kenya Commercial Bank and Another Kitale ELC No. 127 of 2017** the 2nd defendant failed to transfer the suit land or produce the documents to enable registration of the plaintiff as ordered. This court referred to the case of **Nakuru HCCC No 12 of 2010 Simon Nganga Njoroge Vs Daniel Kinyua Mwangi** where a similar situation had arisen and where the court had stated as follows:

“I think we are dealing with a unique circumstance where a person who has lost a case, now wants to make it difficult for the successful party to procure registration in his name.

I think it is only fair that I order the Land Registrar to dispense with the production of the original certificate before proceeding to register the plaintiff as proprietor of the suit property”.

21. Compared with the cases cited above in which compulsive measures were taken, there is a serious mischief engendered in the defendants' reliance on procedure in this matter while the subject matter is a road of access to which they do not hold any title. I find that the defendants have no cogent defence to the instant application. Therefore prayer No. (1) in the instant application is well deserved.

(b) Whether Officer Commanding Kitale Police Station should provide security to Kennedy Kwetu Shikuku T/A Eshikhoni Auctioneers while executing the task of reopening the road.

22. As to the second prayer, it is clear that the presence of security apparatus on the ground as the road of access is being reopened is a necessity given the situation the obstreperous defendants have created herein. I find that the prayer is also deserved.

(c) Who should bear the costs of this application?

23. As to who should bear the costs of the instant application, I find that the defendants are to blame in the circumstances as they failed to comply with the court's judgment and prompted the instant application. They should be condemned to costs.

24. Consequently I allow the application dated **14/1/2020** in terms of prayers Nos. **(2), (3) and (4)** with costs to the plaintiff.

Dated, signed and delivered via Teleconference at Nairobi on this 30th day of April, 2020.

MWANGI NJOROGE

JUDGE

Delivered in the presence of :

Mercyline Lobia, Deputy Registrar.

N/A for applicant.

N/A for the respondents.