



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 218 OF 2012

JAMIN KIOMBE LIDODO.....PLAINTIFF

VERSUS

EMILY JERONO KIOMBE.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL

[On behalf of Soy Land Tribunal and District Registrar,

Uasin Gishu County].....2ND DEFENDANT

RULING

[NOTICE OF MOTION BY 1ST DEFENDANT DATED 26TH APRIL, 2019 AND THAT DATED 23RD JULY, 2019 BY THE PLAINTIFF]

1. The 1st Defendant seeks for an order for the O.C.S., Moi's Bridge Police Station, to provide security to the auctioneers while enforcing eviction exercise on **L. R. Moi's Bridge/Moi's Bridge Block 8 (Natwana ADC)68**, and costs vide their Motion dated the 26th April, 2019. The application is based on the three grounds on its face and is supported by the affidavit sworn by **Emily Cherono Kionbe** on the 26th April, 2019. That it is the 1st Defendant's case that the court through the Judgment delivered on the 20th December, 2018 declared her as the registered proprietor of the suit land and ordered the Plaintiff to be evicted. That the Decree dated the 19th February, 2019 was extracted, and eviction notice dated the 26th February, 2019 served on the Plaintiff. That the Plaintiff, his servant and or agents continues to defy the eviction notice thereby denying her the enjoyment of the fruits of justice. That there is therefore, need to have the Plaintiff evicted with security provided by the police.

2. The application is opposed by the Plaintiff through the grounds of opposition dated the 9th October, 2019 summarized as follows;

(a) That the Application is misconceived, without merit and bad in law as there exists an order of stay of judgment delivered on 20th December 2018, pending the hearing and determination of the Plaintiff's application dated the 23rd July, 2019.

(b) That the judgment cannot be executed unless the stay order of 23rd July, 2019 are set aside, vacated and or varied.

(c) That the application is an abuse of the Court process.

3. The Plaintiff seeks vide the Motion dated the 23rd July, 2019 for the review, setting aside and or varying the judgment delivered on the 20th December, 2018 and the consequential orders thereof. The application is based on the fourteen (14) grounds on its face and is supported by the affidavit sworn by **Jamin Kionbe Lidodo** on the 23rd July, 2019. That it is the Plaintiff's case that the judgment of 20th December, 2018 has an error apparent on the face of its record as the question on whether the Plaintiff was properly before the Court had been determined on the 11th July, 2013. That after that date, the Court became functus officio on that issue, and as of the date of the judgment, that issue was res judicata. That the Court therefore lacked jurisdiction to review its ruling of 11th July, 2013 *suo moto* without giving the Plaintiff a hearing before making its determination on the issue in its judgment of 20th December, 2019.

4. The application is opposed by the 1st Defendant through her replying affidavit sworn on the 2nd September, 2019. That it is the 1st Defendant's response that the Plaintiff's application has no merit, is frivolous and an abuse of the Court's process, and should be dismissed.

That the issue of whether the Court was functus officio is an issue of law, and not an error apparent on the face of the record, and the only available avenue to challenge it is through an appeal. That there has been delay in filing the application which is meant to prevent her from enjoying the fruits of the judgment. That the issue of jurisdiction was never determined in the ruling of 11th July, 2013. That the Plaintiff submitted on the issue of jurisdiction in his submissions and the Court found he had not complied with **Section 8(1) of the Land Dispute Tribunal Act, 1990.**

5. That on the 18th September, 2019, directions were taken that the two applications detailed above be heard together through written submissions. The applications were then referred to this Court on the 5th December, 2019 by Odeny, J for hearing on the 26th February, 2020. That on that date, the Counsel for the 1st Defendant and 2nd Defendant, and the Plaintiff in person were present and each addressed the Court.

6. The Learned Counsel for the 1st Defendant filed their submissions on the Motions dated 8th May, 2019 and 23rd July, 2019 dated the 9th October, 2019. The Learned Counsel for the Plaintiff filed their submissions on the application dated the 26th April, 2019 and 23rd July, 2019 dated the 18th October, 2019 while the Learned Counsel for the 2nd Defendant filed theirs on the Motion dated on the 23rd July, 2019 on the 22nd October, 2019.

7. The following are the main issue for the Court's determinations;

(a) Whether the Plaintiff has established the requirements of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules for the review of the judgment of 20th December, 2018 to issue as prayed.

(b) Whether the 1st Defendant has made a reasonable case for provision of security in executing the eviction ordered through the judgment of 20th December, 2018.

(c) Who pays the costs of each of the applications?

8. The Court has carefully considered the grounds on the two Motions, grounds of opposition, the affidavit evidence by the 1st Defendant and the Plaintiff, the submissions by the learned Counsel for each of the three parties, and the decided superior Courts' decisions cited therein and come to the following conclusions;

(a) That there is no dispute that the Court in its judgment of 20th December, 2018 set out the main issue for determination as ***"... whether the suit is properly before the Court by way of Plaintiff seeking for orders of declaration that the decision of Soy Land Disputes Tribunal to be a nullity"***. [See 3rd paragraph, at page 9 of the judgment]. The Court then proceeded to refer to the provisions of **Section 3(1) and 8(1) of Land Disputes Tribunal Act, 1990 (Repealed)** before making a finding at the first and second paragraphs at page 10 of the judgment that:

"It is clear from the foregoing that the adoption by the Magistrate's Court, the award of the Tribunal becomes a judgment of the Court that can only be challenged by way of an appeal to the Appeal's Committee and subsequent appeal to the High Court or by Judicial Review. The Plaintiff in this case did not challenge the decision of the Tribunal and its adoption in accordance with the Land Disputes Tribunal Act or by way of Judicial Review. That is the only known procedure for challenging the said decision. This court will not belabor to determine the other issues as there is a valid judgment of the Magistrate's Court which has been executed..."

(b) That the court in the ruling of 11th July, 2013 was pronouncing itself on the two preliminary objections raised by both Defendants, dated 18th April, 2006 and 8th May, 2010. That paragraphs 2 of page 11 of the ruling identified the issue for determination as ***"...whether the Plaintiff could file a suit to declare the decision of the Tribunal illegal"***. That then Munyao J, proceeded to set out the ***"two schools of thought. One school of thought is of the view that only avenues available are appeal to the Appeals Committee or Judicial Review and no more. The second school of thought is that one can still file a declaratory suit..."*** The honourable Judge at the last paragraph at page 12 stated as follows:

"My own opinion of the matter is that there is no bar to filing a suit to declare the decision of a Land Dispute Tribunal null and void. True, the avenues of appeal and judicial review are available, but I am not of the view that these are the sole avenues for relief. I am more inclined to associate myself with the decision of Nambuye J, and that of the Court of Appeal in Entwistle case. With respect, I decline to follow the decision in Emilly Jepkemei. I am of the stand that the Plaintiff is perfectly entitled to file this suit seeking inter alia a declaration that the decision of the Tribunal was made without jurisdiction. I do not at this stage wish to go into the issue of whether or not the Tribunal had jurisdiction to determine the matter. That of course, is the subject matter of the dispute and will not be wise for me to delve into it..."

(c) That the Ruling of the 11th July, 2013 by Munyao J, and the judgment of 20th December, 2018 by Ombwayo J, are Judges of this Court.

(d) That the ruling of the 11th July, 2013 and Judgment of 20th December, 2018 are by Judge of this Court who handled the suit during their respective tours of duty in this station. That the Judge who delivered the judgment of 20th December, 2018 was not sitting on appeal over the ruling of the 11th July, 2013 but was rendering a final determination in the matter after hearing it on merit. That as usual, each of the two Judges exercised their decisional independence in coming to their respective findings, and any party who may be aggrieved or of a differing view to the honourable Judges' decision has recourse as usual, on appeal to the Court of

Appeal.

(e) That the application by the Plaintiff dated the 23rd July, 2019 is primarily based on the claim that there is an error on the face of the judgment delivered on 20th December, 2018 in view of the earlier ruling of 11th July, 2013. That **Order 45 Rule 1 of the Civil Procedure Rules** set out the requirements that an applicant must satisfy. The order provides that an application for review may be initiated where an appeal is allowed, but none is preferred, or where no appeal is allowed but there has been ***“discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced... or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order...”***. That such an application is required to be made ***“without unreasonable delay”***. That from the findings above, it is apparent there is no error apparent on the face of the record of the Judgment delivered on the 20th December, 2018 that may be subject of a review by this Court. That should the position of the Plaintiff be that he was aggrieved by the finding of the Court that he had not moved the Court through the legally allowed avenues to challenge the Tribunal decision, that was later adopted and executed, then the way to go is through an appeal and not a review application

(f) That the Plaintiff has confirmed through paragraph 2 of the supporting affidavit sworn by himself on the 23rd July, 2019 and filed with the Motion of the same date, that he received an eviction notice from the 1st Defendant’s Advocates on the 26th April, 2019. The judgment of 20th December, 2018 had required the Plaintiff to be given 60 (sixty) days’ notice before any eviction is done. That from the 26th April, 2019 when the eviction notice was served, the 60 days lapsed on or about the 26th June, 2019. That this shows by the time the Plaintiff filed the Motion for stay and review dated the 23rd July, 2019, the 60 days’ notice had long lapsed, and there is therefore a high probability that the application was only aimed at buying him more time, and to delay the determination of the 1st Defendant’s Motion dated the 26th April, 2019 under Certificate of Urgency dated the 8th May, 2019.

(g) That as the Plaintiff’s Motion dated the 23rd July 2019 is evidently without merit, and as the sixty (60) days’ notice was served, and has long lapsed, and as the Plaintiff has not shown any willingness to give vacant possession of the suit land, the court finds merit in the Motion dated 26th April, 2019, by the 1st Defendant.

(h) That in terms of **Section 27 of the Civil Procedure Act**, the Plaintiff will meet the Defendants’ costs in both applications as specified below.

9. That flowing from the foregoing, the Court finds and orders as follows:

(a) That the Plaintiff’s Motion dated the 23rd July 2019 is without merit, and is dismissed with costs to both Defendants.

(b) That the 1st Defendant’s Motion dated the 26th April, 2019 under Certificate of Urgency dated 8th May, 2019 has merit and is allowed in the following terms;

(i) *That the OCS, Moi’s Bridge Police Station, do provide security, during the eviction of the Plaintiff, his servants and or agents from L. R. Moi’s Bridge/Moi’s Bridge block 8 (Natwana ADC) 68, upon the usual payment of fees being made by 1st Defendant.*

(ii) *That the Plaintiff do pay the 1st Defendant the costs of the application.*

Orders accordingly.

Dated and delivered at Eldoret this 9th day of April, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in open Court in the absence of all parties/Counsel. The Counsel have filed a consent that the Ruling be delivered and transmitted to them through their given e-mail addresses.

Christine: Court Assistant