



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO 111 OF 1973

JOHANA OSURA ONYIENGO & 4 OTHERS.....PLAINTIFFS/ DECREEHOLDERS

VERSUS

JACKTON OYARO WOGA.....DEFENDANT/ JUDGMENT DEBTOR

RULING

1. By a notice of motion dated 2.10.18 brought under Section 1A and 1B of the Civil Procedure Act and Article 50 and 159 of the Constitution of Kenya, the defendant/judgment debtor prays for orders that

1.Spent
2.Spent
3.Spent
4. **That the court be pleased to set aside the proceedings and orders of eviction issued on 26th September, 2018**
5. **Costs of this application be provided for**

2. The application is based on the grounds among others that the applicant was served with an eviction order without being given a hearing.

3. The application is supported by an affidavit sworn by the applicant on 2.10.18 in which he reiterates the grounds on the face of the application. In addition, he avers that he attended court for the Notice to Show Cause on 26.9.18. He avers that he went to the registry to inquire why the file had not been taken to court and he met Mr. Nassif who is a clerk to the respondent's advocate and Mr. Aura Otieno, a court clerk, who informed him that the file would not be taken to court because the application dated 6.9.18 was fixed for hearing on 23.10.18.

4. The application is opposed on the grounds set out in a replying affidavit sworn on 2.10.18 by Gerald Omori Kimanga, advocate for the respondent. He avers that applicant did not attend court for the Notice to Show Cause and that the order of eviction was lawfully issued. He further avers that the applicant has done everything within his capacity to frustrate the respondent/decree holder.

5. I have considered the application in the light of the affidavits on record. I have also considered the cases cited by the applicant.

6. This is indeed one of the oldest files in our courts. The parties herein have been in court for the last 45 years. The case was decided in favor of the respondents but they have been unable to realize the fruits of their judgment. The Notice to Show Cause why the applicant should not be evicted in execution of a court order was scheduled for hearing on 26.9.18 and the applicant was well aware of the date. Applicant did not attend and an eviction order was issued.

7. An order of eviction has far reaching consequences. (See *Satrose Ayuma & 11 others v Registered trustees of the Kenya Railways Staff retirement benefits scheme & 3 others [2015] eKLR*). Applicant explains that his failure to be present when the eviction order was issued was occasioned by information received from Mr. Nassif who is a clerk to the respondent's advocate and Mr. Aura Otieno, a court clerk, who informed him that the file would not be taken to court because the application dated 6.9.18 was fixed for hearing on 23.10.18. Neither Mr. Nassif nor Mr. Aura Otieno swore affidavits and the applicant's averments are therefore not controverted.

8. I have considered the holding in the case of *Philip Chemuolo & Another vs Augustine Kubenbe (1982-1988) KAR 103* and Article 50 and 159 of the Constitution of Kenya which gives this court inherent power to make such orders as may be necessary for the ends of justice and I find that it would be in the interest of justice to grant the applicant an opportunity to be heard on the Notice to Show Cause so that this matter can be settled without any further delay.

9. The upshot of my analysis is that the notice of motion dated 2.10.18 is allowed. The proceedings and orders of eviction issued on 26th September, 2018 are hereby set aside. It is hereby ordered that the Notice to Show Cause be listed for hearing before the Deputy Registrar of this Court not later than 7 days from today's date.

10. Costs shall be in the cause.

DATED AND SIGNED AT KISUMU THIS 4th DAY OF October 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Applicant/Judgment debtor - Mr Omondi/Mr Mwamu

For Respondent s/Decree holders - Mr Kimanga