



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 490 OF 2017

LUCY WATIRI MUBURI (legal representative and administrator of the estate
of MATHEWS MUBURI MUYA deceased) **PLAINTIFF**

VS

NJOROGE F.A WACHIRA..... **1ST DEFENDANT**

ALOIS WATIRI MUBURI..... **2ND DEFENDANT**

RULING

1. There are two applications before me ; the Notice of Motion dated the 22/11/19 and filed on even date by the Plaintiff against the Defendants seeking their eviction from the suit land and the Notice of Motion filed by the Defendants against the Plaintiffs dated 13/12/19 and filed on even date seeking interalia that the firm of Maina Makome Advocates be granted leave to come on record in place of their previous Counsels and that the execution of the decree in this suit be stayed pending the determination of this application.

2. On the 24/2/2020 the parties elected to canvass the applications by way of written submissions and urged the Court to hear and determine the two applications simultaneously.

3. Based on the sequence of the record and the orders sought by the parties in both applications, I shall determine the application of the Defendants first. The outcome of the Defendants application will determine whether there will be need to determine the Plaintiffs application aforesaid.

The Notice of Motion dated the 13/12/19 filed by the Defendants.

4. The Defendants application is filed on the 13/12/19 seeking the following orders;

- a. Spent
- b. That the firm of Maina Makome & Co Advocates be granted leave to come on record on behalf of the Defendant /Judgement debtors in place of the firm of KAAI MUGAMBI & Co Advocates.
- c. That execution of the decree herein be stayed pending the determination of this application.
- d. That the Defendants be granted time to respond to the application dated the 22/11/19.
- e. That the status quo be maintained on the suit premises pending the determination of the application dated the 22/11/19.
- f. That the Plaintiff do compensate the Defendants for damages arising out of an illegal attempt to enforce the decree
- g. Costs of the application

5. On the 16/12/19 prayers Nos b and d were allowed by the consent of the parties. What remains for determination therefore are prayers Nos. c, e f and g.

6. The application is supported by the grounds adduced thereto and the affidavit of the 2nd Defendant. He deponed that he has sworn the affidavit on his behalf and that of the 1st Defendant. That being aggrieved by the judgment of the Court this case they instructed their then Advocate to apply for stay of execution and file an appeal which to their disbelief was never filed until they were served with a notice to vacate the suit land by the Plaintiff on the 15/9/2019. A copy of the said notice of appeal was adduced. That they have sought leave to file an Appeal out of time as well as stay of execution vide Appeal Application No 157 of 2019. Further that he and his family live on the land and have no other place to call home and that if the orders are not granted, they shall be evicted and rendered destitute and the intended Appeal shall be rendered nugatory.
7. The application was opposed by the Plaintiff in her Replying Affidavit dated the 8/1/2020 where she deponed that the prayers sought in the application are unmeritorious and stale given that the judgment in this case was issued on the 27/9/18. That filing an Appeal does not act as a stay of execution and that there is no memorandum of appeal filed so far. That the application has been overtaken by events as the suit land is now registered in the name of the Plaintiff as at 20/9/19 and a title issued in her name. That notice was given to the Defendants to vacate the suit land on the 11/9/19 but have continued to defy the Court orders, the decree which was duly served on them and remain on the land contrary to the orders of this Court. That the Defendants on their own pulled down one wooden structure and ferried the timber away leaving the house and the cow shed intact. That the issue of damages to their property is incorrect. That granting the orders in this application is prejudicial to her as she will be denied the opportunity to enjoy the fruits of her judgement.
8. Further that it is only the two Defendants who reside on one small corner of the suit land and not 10 siblings as alleged. That the application is meant to derail the application for eviction of the Defendants and nothing more. In regard to the notice of appeal, she maintained that the same is an afterthought having been triggered by her written demand to the Defendants to vacate the suit land.
9. She faulted the applicant for failing to demonstrate authority to swear the affidavit on behalf of the 1st Defendant and maintained that the affidavit is fatally defective.
10. The parties filed written submissions in respect to the said application which I have read and considered.
11. In respect to the provisions of Order 50 Rule 6 the Defendants argued that they have filed an application in the Court of Appeal at Nyeri seeking to file an Appeal out of time which application is pending fixing of a hearing date or the transfer of the appeal to Nairobi given the shortage of judges in the Appellate Court. That their Appeal will be rendered nugatory if the application is granted.
12. Whilst quoting the provisions of Order 42 Rule 6 on grant of stay of execution, the Defendants submitted that they stand to suffer irreparable loss as the suit land is their ancestral land and home and have a strong attachment to the land and derive their livelihood from the tea bushes thereon. Further the Defendants submitted what could appear as regurgitation of the evidence adduced in the suit. The Defendants relied on the legal authorities; Rose Chepkorir Vs Mwinyi Mohammed Riva & Anor (2015) EKLK; Richard Muthusi Vs Patrick Gituma Ngomo & Anor (2017) EKLK; Nairobi Women's Hospital Vs Purity Kemunto (2018) EKLK.
13. They argued that unless a stay of execution is granted their right to property, decent living and right to appeal will be rendered nugatory.
14. The Plaintiff submitted that the Defendants were served with the decree on the 11/9/19 to vacate the suit lands upon which they started pulling down one of the timber structures and carried away the timber but left other properties intact as portrayed by the photographs marked LWM-4. It is the Plaintiff's case that she did not demolish or destroy any of the Defendants' structures. She faulted the Defendants for misleading the Court and not filing any police report to support any demolition. In respect of the authority of the 2nd Defendant to depone on behalf of the 1st Defendant she argued that the application is defective in the absence of an authority to authorize the deponement.
15. Further the Plaintiff argued that the delay in bringing the application is inordinate. That the evidence was adduced before the Court to show that the defendant's previous Advocate failed to file stay of execution on time. That there is no appeal to warrant stay of execution. That litigation must come to an end and that she stands to suffer costs, failure to develop her land and enjoy the fruits of her judgement.
16. The defendant's application is seeking two key prayers which are; that the execution of the decree be stayed pending the determination of this application dated the 13/12/19. This appears to have been an interim prayer which was not granted and, in my view, lapsed. There were no stay orders granted at the filing of the application.
17. The second prayer sought by the Defendants in their said application is that status quo be maintained pending the determination of the application dated the 22/11/19. It would be noted that since both applications were urged together this prayer becomes superfluous if not moot.
18. That said, the Defendants have contrary to their application argued in their considered submissions for stay of execution pending appeal. I have examined their subject application and there is no such prayer. Parties being bound by their pleadings I am constrained to dismiss the arguments thereto as far as they relate to stay of execution pending appeal. This is because submissions are not a party's pleadings. It is a summary of the pleadings and the case of a party.
19. Back to the prayer of status quo pending the determination of the Notice of Motion dated the 22/11/19, evidence was led by the Plaintiff that she has registered the suit land in her name as evidenced by the copy of the title issued on the 20/8/19. The status quo therefore as at the filing of the Defendants' application dated the 13/12/19 is that the suit land is registered in the name of the Plaintiff and that pursuant to the judgement of the Court issued on the 27/9/18 and the decree thereof of the 2012/18, the Defendants had not vacated the suit land contrary to the orders of the Court. That the judgement of the Court has been executed partly.
20. It is on record that the Defendants filed an application for stay of execution on the 26/11/18 which application was withdrawn vide a letter dated the 21/3/19 in the following terms;

“take notice that the Defendants herein Njoroge FA Wachira And Alois Mwangi Muburi have wholly withdrawn the application dated the 29/10/18 against the Plaintiffs.”

21. On the 28/3/19 the then Advocates of the Defendants moved the Court and obtained orders withdrawing the said application in the presence of the Plaintiff's Advocate. The Court ordered the Motion dated the 29/10/18 withdrawn subject to costs to the Plaintiff.

22. As at the date of determining this application therefore there exists no justifiable reason to order for status quo in favour of the Defendants in view of the judgement of the Court which has not been stayed either by this Court or the Court of Appeal.

23. The Defendants have averred that the Plaintiff has illegally enforced the decree and damaged the Defendants properties. The Plaintiff in her affidavit explained that on being served with the demand letter and the decree in this case the Defendants demolished some structures and carted away the timber and left some structures standing on the suit land. He who alleges must prove. The Defendants have not adduced any evidence to show the properties damaged and that the Plaintiff was responsible for the damage, if any. The allegations remain unproven. Granted, the Court finds that this issue raises a new cause of action which can be pursued independently of this application.

24. In the end the application dated the 13/12/19 fails. It is dismissed with costs to the Plaintiff.

The Notice of Motion dated the 22/11/19 by the Plaintiff

25. On the 22/11/19 the Plaintiff filed an application against the Defendants expressed under Order 22 Rule 82 and 83 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and any other provisions of the law.

26. The Plaintiff sought inter alia orders for eviction of the Defendants from the parcel No LOC9/KANYENYA-INI/574 (suit land), that the OCS commanding the police station of the area in the rank of an inspector of police and or in charge of administration police be authorized to supervise and enforce the exercise to maintain law and order and that JOSEPH KIARIE WATENGA T/A Front Bench Auctioneers be ordered and directed to carry out the eviction.

27. The application is based on the grounds stated in the application and the supporting affidavit of the Applicant deponed on the 22/11/19 where she stated that she obtained judgement in her favour on the 27/9/18 wherein the Defendants were given a period of 90 days to vacate the suit land in default eviction would ensue. That the Defendants have failed refused and ignored to vacate the suit land despite the Court orders as well as demand in writing to do so. A copy of the said demand letter dated the 11/9/19 and marked LWM-3 was annexed to the Supporting Affidavit.

28. That pursuant to the judgement aforesaid, she averred that she caused the suit land to be registered in her name on the 20/8/19 and exhibited a title marked LWM-1 issued in her name. Further that the Defendants are carrying out acts of waste and creating disturbance on the suit land. That the Defendants have persisted in the disobedience of the Court orders and it is just and met that they are evicted. That they stand to suffer no prejudice if the eviction orders are granted.

29. In opposing the application, the 2nd Defendant deponed in his Replying Affidavit that being aggrieved with the judgment of the Court he and his co-Defendant instructed their previous Advocate to file an Appeal. That the said Advocate failed to file the Appeal and only realized when they were served with a notice to vacate the suit land. That they have since filed an Appeal in Nyeri vide Appeal No 157 of 2019 seeking leave to file an Appeal out of time. That it is imperative that the suit land is preserved until the Appeal is determined. That the Defendants have resided on the suit land all their lives and even buried their kin thereon, earn their livelihood and have developed a permanent attachment to the suit land which they term as an ancestral land.

30. Further that the Plaintiff destroyed property on their part of the land using hired goons who illegally executed the orders of the Court.

31. The Defendants urged the Court to stay the execution of the judgment pending the determination of the application for leave to file an Appeal out of time. That the situation on the ground between the parties is volatile and urged the Court to stay the execution of the decree.

32. Parties filed written submissions which I have read and considered.

33. In respect to the decree of the Court, the Plaintiff submitted that the Court granted the Defendants 90 days to vacate the suit land. That upon the expiry of the 90 days they were served with the demand letter to vacate and instead of giving vacant possession, they pulled down one timber shelter and carted away the timber using a pick up and left some structures standing on the land. That they have refused and or ignored to vacate the suit land.

34. In respect to the decree, the Plaintiff submitted that the provisions of Order 22 Rule 18 apply where the decree exceeds one year from the date of issue and not date of judgment. That in the circumstances, there is no necessity of issuing a notice to show cause against the said execution by eviction. That no appeal has been filed by the Defendants and that even if it had been filed it stood no chance of success.

35. The Defendants opposed the application in their submissions and reiterated what seems to be evidence given in the suit which in my respectful view is misplaced in this application. That they require stay of execution to enable them pursue their intended appeal. That the Plaintiff stands to suffer no prejudice as in any event they have lived on the suit land for over 50 years. They accuse the Plaintiff of coming to Court with soiled hands in the manner in which she executed the decree through hired goons who did destroy their property.

36. I have perused the Defendants notice of motion filed in the Court of appeal on the 2/10/19 and note that the only prayers therein being sought are for leave to file an appeal out of time. The Defendant did not seek stay of execution of the judgement of this honourable Court. The Court granted the Defendants 90 days within which to vacate the suit land and in default eviction to ensue.

37. It would be noted that the judgement has been partially executed because the title of the suit land has now been registered in the name of the Plaintiff. What remains is the eviction of the Defendants from the suit land.

38. The Defendants withdrew their application for stay of execution and my perusal of the record is that there is neither an application for stay nor orders for stay from this Court or the Appellate Court. There is therefore no justifiable reason for this Court to stay lawful and valid orders of this Court.

39. I note that the application by the Plaintiff was brought under order 22 Rule 82 and 83 which provides as follows;

“Resistance or obstruction to possession of immovable property. 82. (1) where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction. (2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same. [Order 22, Rule 83.] Resistance or obstruction by judgment debtor. 83. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor, or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and, where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in prison for a period not exceeding thirty days”.

40. It is to be noted that though the Defendants were not summoned to Court to explain the reason why they are still on the suit land, their reasons have been captured in the replying affidavit of the 2nd Defendant deposed on behalf of the 1st Defendant as well. The Defendants were given the opportunity to explain their resistance and obstruction of the Court's orders which the Court has considered above.

41. The action of the Defendants in resisting to vacate the suit land is without any lawful cause. It is to be noted that they actually withdrew their application for stay of execution and their application appears to be an afterthought.

42. In respect to whether or not the decree was stale, the record shows that the decree was issued on the 20/12/18 and the application was filed on the 22/11/19 within the period of one year from the date of the decree. There was no necessity for issuance of notice to show cause against the execution of the decree in this instance.

43. My perusal of the judgement on record shows that eviction had been granted and therefore it serves no purpose to grant the same orders save that the orders prayed under 2 and 3 be and are hereby granted.

44. The costs of the application shall be borne by the Defendants in favour of the Plaintiff.

45. The application is meritorious and is allowed as prayed.

46. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 12TH DAY OF MAY 2020

J.G. KEMEI

JUDGE