



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**PETITION NUMBER 20 OF 2018**

**IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION**

**AND**

**THE CONTEMPT OF COURT ACT AND OTHER ENABLING PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF ARTICLES 2,3,10,21,22,23,27,28,29,35,40,43,45,47,63,65,156,165(30 AND 258 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF EVICTION ORDERS ON CIVIL CASE NO. 111 OF 1973 , OTHER JUDGMENTS AND ORDERS**

**AND IN THE MATTER OF BREACH OF PROPRIETARY RIGHTS AND OWNERSHIP**

**BETWEEN**

**JACKTON OYARO WOGA.....1ST PETITIONER**

**ELKANA NYARIRO.....2ND PETITIONER**

**JANE AWINO WOGA.....3RD PETITIONER**

**RISPER AJWANG NYANDAT.....4TH PETITIONER**

**AND**

**JACKTON OYIENGO OSURA.....1ST RESPONDENT**

**ALLAN OKATCH OSURA.....2ND RESPONDENT**

**PROFESSOR WILLIS KUSURA.....3RD RESPONDENT**

**NATIONAL LAND COMMISSION.....4TH RESPONDENT**

**THE DIRECTOR OF SURVEY KENYA.....5TH RESPONDENT**

**THE ATTORNEY GENERAL.....6TH RESPONDENT**

## RULING

### Background

1. The genesis of this Petition is an order of eviction that was issued on 10th September, 1986 in Kisumu CIVIL CASE NO 111 OF 1973 in respect of land parcel EAST GEM/NYANDIWA/574 (hereinafter referred to as *the suit property*).
2. The judgment debtors in KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973 appealed to the KISUMU COURT OF APPEAL IN CIVIL APPEAL N. 100 OF 1987 and they lost.
3. This Petition filed on 18th October, 2018 has been triggered by a pending Notice to Show Cause why the judgment debtors in KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973 should not be evicted from *the suit property*. The Petition introduces new parties who are not party to KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973.

### Application

4. Simultaneously with the Petition, the Petitioners filed a notice of motion dated 17th October, 2018 which is the subject of this ruling, seeking 8 orders three of which have been spent. The pending prayers are for orders **THAT:-**

- 1) Pending the hearing and determination of this Petition, the Honourable Court be pleased to grant an order of stay against the Judgments and consequential orders delivered by the High Court on 19th September, 1986 in KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973**
- 2) Pending the hearing and determination of this Petition, the Honourable Court be pleased to grant an order of stay against the notice to show cause to evict the applicants and consequential orders delivered by the High Court on 19th September, 1986 in KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973**
- 3) The Honourable Court be pleased to send the file to the Chief Justice to appoint uneven number of judges to hear the Petition due to its constitutional issues of public interest involved**
- 4) The court be pleased to make other orders as the court deems necessary to safeguard the ends of justice**
- 5) Costs**

5. The application is based on the grounds among others that the judgment delivered over 45 years ago has expired and no application for leave was granted to restore the judgment and decree.

6. The application is supported by affidavits sworn on 17.10.18 by Jane Awino Woga and Risper Ajwang Nyadat, the 3rd and 4th Petitioners respectively who reiterate the application and the grounds thereof. The deponents principally aver that they will be rendered homeless if the eviction order is executed.

7. The application is opposed on the grounds set out in a replying affidavit sworn on 26.10.18 by Allan Okatch Osura, the 2nd respondent herein. He recounts the history of KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973 and avers that the Petitioners are in breach of a court order and have continued to infringe on the respondents' fundamental rights and freedom by illegally occupying their land with impunity.

### SUBMISSIONS BY PARTIES

#### Petitioners' submissions

8. Mr. Mwamu learned advocate for the Petitioners while conceding that the Petitioners were not challenging the efficacy of the judgment against them submitted that the judgment is over 12 years old and is therefore time-barred. Counsel contends that the Petitioners have been in occupation of *the suit property* for a long time and their rights need to be protected. It was argued for the petitioners that this petition raises constitutional issues of public interest that ought to be determined by an even number of judges.

9. In support of their case, Petitioners have placed reliance on the following authorities:

- 1) Section 4(4) of the Limitation of Actions Act**
- 2) MISC CIVIL APPLICATION NUMBER 782 OF 200 The Republic V Permanent Secretary Ministry of Livestock and Fisheries Department Exparte Joshua Obudho Otieno**
- 3) Njuguna v Njau [1980] eKLR**
- 4) Malakwen Arap Maswai v Paul Kosgei [2004] eKLR**
- 5) Forced Evictions: Fact Sheet No. 25/Rev.1 – UN-Habitat**

## **Respondents' submissions**

10. Mr. Kimanga learned counsel for the Respondents submitted that the order of eviction does not infringe on the petitioners' rights and will not render them homeless since the order requires them to vacate **the suit property** and move to their land parcel **EAST GEM/NYANDIWA/310**.

11. It was submitted for the Respondents that their efforts to realize the fruits of their judgment have continuously been frustrated by the Petitioners who have repeatedly filed applications to scuttle the process of eviction. Counsel urged the court to find that the Petitioners are in contempt of a court order and are not worthy of protection by the court. The Respondents' counsel urged the court to dismiss the application and strike out the petition.

12. I have considered the application in the light of the affidavits on record. I have also considered the oral submissions made on behalf of the parties and cases cited on behalf of the Petitioners.

13. As I previously stated in a ruling dated 4th October, 2018 in **KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973**, this is indeed one of the oldest cases 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.

14. As stated hereinabove and as acknowledged by the parties, there is a pending Notice to Show Cause why the judgment debtors in **KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973** who include some of the Petitioners herein should not be evicted from **the suit property**.

15. After considering the totality of the material placed before the court, my view is that the Petitioners have been bringing all manner of proceedings so as to continue being in unlawful possession and occupation of the Respondents' land. The Petitioners have totally disrespected the order of the court in **KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973** issued on 10th September, 1986. This petition is another suit filed to litigate the same matter between the same parties seeking similar relief. The Petitioners are determined to pursue by every subterfuge in the civil procedure multiple applications and suits without any intention of bringing this matter to conclusion. In effect the petitioners are re-litigating issues already decided upon.

16. The notice of motion dated 17th October, 2018 and the petition filed on 18th October, 2018 are an abuse of the process of court. Abuse of court process includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice as is the case in the notice of motion and petition herein.

17. The petition herein is in my view therefore not worthy of being referred to the Chief Justice to appoint uneven number of judges for the reason that the issues raised herein can effectively be adjudicated in **KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973** by a single judge.

18. Similarly, the issue of whether or not the judgment in **KISUMU HIGH COURT CIVIL CASE NO 111 OF 1973** is time barred is a matter that can efficiently be adjudicated in that case by a single judge.

## **Disposition**

19. Litigation must come to an end. The notice of motion dated 17th October, 2018 and the petition filed on 18th October, 2018 are a gross abuse of the Court's process intended to vex and unnecessarily embarrass the Respondents. The court must and should invoke its inherent jurisdiction to stop abuse of its process. I therefore have no hesitation in dismissing the notice of motion and striking out the petition on the basis of **Order 2 rule 15 (1) (b) and (d)** of the Civil Procedure Rules.

20. The Respondents will have the costs of the notice of motion and the petition accordingly. Further, the advocates for the Petitioners should note that in following the principle of finality in litigation, they run the risk of being condemned in costs themselves by continuing to advise their client, the Petitioners, to pursue what amounts to an abuse of the Court's process.

**DATED AND SIGNED AT KISUMU THIS 6<sup>th</sup> DAY OF December 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix**

**For Petitioner - Mr Mwamu**

**For Respondent - Mr Kimanga**