



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 89 OF 1997

WILLIAM K. KOROSS (*Legal Representative of*

ELIJAH C.A. KOROSS**PLAINTIFF**

VERSUS

HEZEKIAH KIPTOO KOMEN**1ST DEFENDANT**

JONATHAN KIPKOROSS CHESANGUR**2ND DEFENDANT**

CHEBIATORI CHEMCHOR **3RD DEFENDANT**

JULIUS KIBET CHEROTICH**4TH DEFENDANT**

KIPSEREM ROTICH **5TH DEFENDANT**

RULING

1. This application was brought by four Applicants who were named in an eviction order given on 6/8/2015 in which they were named as second to fifth Defendants. This eviction order was given pursuant to a decree of the court resulting from a Judgement given on 2/4/1980 in **Kitale HCCC No 89 of 1997 (Formerly Kakamega HCCC No 43 of 1978** between **Elijah C.A. Koross – vs – Hezekiah Kiptoo Komen**

2. The Applicants contend that they were and are not parties to this case and as such, no orders of eviction can be issued against them. They contend that eviction orders can only issue against **Hezekiah Kiptoo Komen** who was the Defendant in that suit. It is on this ground that they have come to court seeking review of the decree with a view to removing their names from the eviction order.

3. The Applicants contend that the decree holder in this case had obtained an *ex parte* Judgement in his favour on 2/4/1980. In 1982, the Plaintiff used the decree to evict some of the Applicants from the suitland. This eviction prompted them to move the court to have them enjoined as Defendants in the counter-claim which had been filed by **Hezekiah Kiptoo Komen** who has since died. Though they were granted orders to be enjoined in the counter-claim as Defendants, they were not formally enjoined as there was no amendment to the pleadings to bring them on board.

4. The counter-claim which the late **Hezekiah Kiptoo Komen** had filed was not addressed in the *ex-parte* Judgement which was delivered on 2/4/1980. It was later dismissed for want of prosecution but the same was later reinstated and it was fully heard and Judgement delivered on the same on 12/2/2013 .The

counter-claim was allowed. This in essence meant that there were two distinct Judgements in the same case one giving the suitland to the Plaintiff and the other to **Hezekiah Kiptoo Komen and 4 others**. The Judge who delivered Judgement in the counter-claim said in his Judgement that the effect of his Judgment in the counter-claim had rendered the Judgment in favour of the Plaintiff obsolete.

5. The Plaintiff/Respondent preferred an Appeal to the Court of Appeal. In a Judgement delivered on 6/3/2015, the Judges of Appeal set aside the Judgement which was delivered on 12/2/2013. In the said Judgement, the Judges made a finding that the Applicants were never sued by the Plaintiff (Respondent herein), were never formally enjoined in the proceedings and never filed any pleadings.

6. The Applicants therefore contend that the counter-claim in which they had interest having been overturned by the Court of Appeal and the court having made a finding that they were not parties to the suit, they cannot therefore be subjected to eviction.

7. The Respondent opposed the Applicants' application based on replying affidavit sworn on 10/9/2015. The Respondent contends that the Applicants had applied to be made parties and their application was allowed. That some of the Applicants gave evidence in the hearing of the counter-claim and that they are now estopped from claiming that they are not parties to this suit.

8. I have carefully considered the Applicants' application as well as the opposition to the same by the Respondent. I must say that this case has had a long and chequered history which has been captured in the Judgment of the Court of Appeal delivered on 6.3.2015. I need not repeat that history. The only issue for determination in this application is whether the Applicants are parties in this case. If they are not found to be parties, then it will automatically follow that no execution will issue against them.

9. There is no dispute that the Applicants made an application to be enjoined in this case. That application was allowed but they were never formally brought into the suit by way of amendment of pleadings and never filed any Pleadings. This fact was alive to the Judges of Appeal when they reached a finding as follows:-

“ By the Defendant we mean the first Respondent herein because the other Respondents were never sued by the Plaintiff, were never enjoined in the proceedings and never filed any Pleadings”.

10. The Respondent's lawyer thought that this was an erroneous finding. He moved to the Court of Appeal and sought a review of that finding. The Court of Appeal dismissed that application on 5/2/2016. The Judges held that the finding was a substantive finding reached after consideration of the facts and could not therefore amount to an error which could be reviewed. The Respondent moved to the court of Appeal after the Applicants had filed the present application. The Applicant did so as he wanted the court to make a finding that the Applicants were parties to the suit so that he could be able to execute the decree against them.

11. Despite the Court of Appeal whose decision is binding on me , the Respondent still insists that the finding of the Court of Appeal was erroneous. The Court of Appeal has made a finding that the Applicants were not parties to the suit. It therefore follows that no execution by eviction can be directed at them. The eviction should only be directed to the Defendant who was properly sued.

12. I therefore find that the Applicants have shown that there is sufficient reason for them to be removed from the eviction order issued on 6/8/2015. The said eviction order is reviewed by removal of the names of the second to fifth Defendants from the said eviction order. The Respondent shall pay the costs of this application to the Applicants.

It is so ordered.

Dated, signed and delivered at Kitale this 11th day of May 2016.

E. OBAGA

JUDGE

In the presence of Mr Karani for Applicants and Mr Analo for Mr Ngeywa for Respondent.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

11/5/16