



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C.A. CASE NO. 19 OF 2019**

**MARIKO NDWIGA.....APPELLANT**

**VERSUS**

**EDITH MUTHANJE.....RESPONDENT**

*(Being an appeal against the judgement and decree of the Hon. M.N. Gicheru (C.M.) dated 24.6.2019 in Embu CMCC No. 119 of 2018)*

**RULING**

**A. INTRODUCTION**

1. By a notice of motion dated 15<sup>th</sup> May 2020 brought under **Order 51 Rule 1** and **Order 22 Rule 29 (1)** of the **Civil Procedure Rules 2010**, and **Section 3A** of the **Civil Procedure Act (Cap. 21)**, all other enabling provisions of the law, the Respondent sought the following orders against the Appellant:

a) Spent

b) That this honourable court do issue an eviction order against the Appellant/Respondent, his servants, agents, heirs and dependants from land Parcel No. Kyeni/Kigumo/2885 and 2886.

c) That a permanent injunction do issue against the Appellant/Respondent, his agents, servants, heirs or any other person claiming through him from trespassing into parcel No. Kyeni/Kigumo/2885 and 2886.

d) That the O.C.S. Runyenjes Police Station do provide security during eviction.

**B. THE RESPONDENT'S CASE**

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Respondent on 15<sup>th</sup> May 2020. The Respondent contended that she was the registered proprietor of *Title Nos. Kyeni/Kigumo/2885 and 2886* (the *suit properties*) and being the successful party in the appeal she was entitled to immediate possession thereof. It was contended that although the Appellant had filed a notice of appeal against the judgement and decree of this court dated 16<sup>th</sup> January 2020 he had not taken steps to have it prosecuted. The Respondent further contended that she was an elderly and sickly person who should be allowed to enjoy the fruits of her judgement since Appellant had lost both before the Magistrates' court and this court.

**C. THE APPELLANT'S RESPONSE**

3. The Appellant filed a replying affidavit sworn on 26<sup>th</sup> May 2020 in opposition to the said application on several grounds. First, it was contended that the court had no jurisdiction to grant the orders sought since the Respondent had not filed any cross-appeal. Second, it was contended that the proper procedure for seeking an eviction order had not been followed. Third, it was contended that there was no legal basis for involving the police service in a purely civil matter. Finally, it was contended that the Appellant had already filed *Civil Appeal No. 40 of 2020* before the Court of Appeal at Nyeri which was pending admission and directions on the hearing thereof.

**D. DIRECTIONS ON SUBMISSIONS**

4. When the said application was listed for hearing on 28<sup>th</sup> May 2020 it was directed that the same shall be canvassed through written submissions. The Respondent was granted 14 days to file and serve her written submissions whereas the Appellant was granted 14 days to file and serve his submissions upon the lapse of the Respondent's period. The record shows that the Respondent filed her submissions on 4<sup>th</sup> June 2020. However, the Appellant's submissions were not on record by the time of preparation of the ruling.

## **E. ISSUES FOR DETERMINATION**

5. The court has considered the Respondent's notice of motion dated 15<sup>th</sup> May 2020, the Appellant's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following questions arise for determination:

- a) *Whether the Respondent has made out a case for the grant of an eviction order.*
- b) *Whether the Respondent is entitled to a permanent injunction against the Appellant.*
- c) *Whether the O.C.S. Runyenjes Police Station should provide security during eviction.*
- d) *Who shall bear costs of the Application.*

## **F. ANALYSIS AND DETERMINATIONS**

### **a) Whether the Respondent is entitled to an eviction order**

6. The court has fully considered the material on record and the nature of the dispute between the parties which has spanned over 4 decades. Whereas the Appellant is entitled to pursue a further appeal before the Court of Appeal, he has not sought and obtained an order of stay either before this court or the Court of Appeal. It is clear from the provisions of **Order 42 Rule 6 (1)** of the **Civil Procedure Rules** that an appeal or second appeal does not operate as an automatic stay of execution of a decree. The Appellant has to specifically move the court for an order for stay of execution.

7. The court is of the view that the judgement and decree dated 16<sup>th</sup> January 2020 was a final adjudication of the rights of the parties within the meaning of **the Civil Procedure Act (Cap. 21)** even though it is subject to appeal. There was no other issue which was left undecided so far as the dispute over the suit properties was concerned. The Appellant wanted to have the suit property but he lost his bid to retain it. It would be clearly unjust and contrary to the overriding objective of the **Civil Procedure Act** for the Respondent to be compelled to file a separate suit for recovery of the suit property when she has been the successful party all along. There being no order for stay of execution in force, the court finds and holds that the Respondent is entitled to an eviction order.

### **b) Whether the Respondent is entitled to a permanent injunction against the Appellant**

8. The Respondent has sought a permanent injunction to restrain the Appellant, his agents, servants or other persons claiming through him from trespassing upon the suit properties. The court has considered the entire material on record on this prayer. The court is not satisfied that the Respondent is entitled to such an order for at least two reasons. First, an order of injunction cannot issue to restrain a trespasser who is already in possession. The only effective remedy against a person in occupation is an eviction order. If it was intended to plead that upon eviction the Appellant should forever be restrained from re-occupying the suit properties then no legal basis has been laid out in the application for such prayer. It was not alleged that the Appellant's disposition is such that he is likely to return to the suit properties upon eviction. The court is of the opinion that the prayer for a permanent injunction is merely speculative. The court is further of the opinion that it is a substantive prayer which would require a fresh adjudication of the matter. Accordingly, the court finds and holds that the Respondent is not entitled to a permanent injunction.

### **c) Whether the OCS Runyenjes Police Station should provide security during eviction**

9. The Respondent has prayed for security to be provided during the eviction exercise. Although the Appellant objected to the involvement of the police service in the matter, a distinction has to be drawn between their role as agents of eviction and their role as law enforcement officers. The court's understanding is that whereas the eviction order is to be executed by appointed court bailiffs, the role of the police service shall be confined to maintaining law and order to enable the court bailiffs to perform their duties. The OCS of Runyenjes Police Station is not expected to undertake the eviction himself. What the Respondent prayed for is merely provision of security. The court is thus satisfied that the order for provision of security is merited.

### **d) Who shall bear costs of the application**

10. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21)**. As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant in this matter should be deprived of costs. Accordingly, the Respondent shall be awarded costs of the application.

## **G. CONCLUSION AND DISPOSAL ORDER**

11. The upshot of the foregoing is that the court finds merit in the Respondent's notice of motion dated 15<sup>th</sup> May 2020 hence the same is allowed in the following terms only:

- a) An eviction order be and is hereby issued for the eviction of the Appellant, his agents, servants, heirs or any other person claiming through him from *Title Nos. Kyeni/Kigumo/2885 & 2886*.
- b) The OCS Runyenjes Police Station shall provide security to court bailiffs during the eviction.

c) The Respondent's prayer for a permanent injunction is hereby declined.

d) The Respondent is hereby awarded costs of the application.

12. It is so decided.

**RULING DATED** and **SIGNED** in Chambers at **EMBU** this **2<sup>ND</sup> DAY** of **JULY 2020** and **DELIVERED** via Microsoft teams platform in the presence of Mr. Kihoro holding brief for Mr. Mathenge for the Appellant and Ms. Mukami holding brief for Mr. P.N. Mugo for the Respondent.

**Y.M. ANGIMA**

**JUDGE**

**02.07.2020**