



**REPUBLIC OF KENYA**

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

**E&L CASE NO.114 OF 2016**

**DAVID KIPKOSGEI KIMELI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**TITUS BARMASAI.....DEFENDANT/ APPLICANT**

**RULING**

This ruling is in respect of an application dated 27<sup>th</sup> February, 2020 seeking for the following orders: -

- a) That the plaintiff/ respondent herein be evicted from the parcel of land known as **KIPKABUS SETTLEMENT SCHEME/47**.
- b) That the **OCS KAPTAGAT POLICE STATION** be and is hereby ordered to provide police escort to **PAUL OLE YIALLE T/A NASIOKI AUCTIONEERS** for the purpose of peace and order during the process of eviction of the plaintiff, his agents, employees or servants in KIPKABUS SETTLEMENT SCHEME/47.
- c) That costs be in the cause

Parties agreed to canvass the application by way of written submissions which were duly filed

**APPLICANT'S SUBMISSIONS**

Counsel for the defendant/applicant submitted that the application is based on the grounds that the plaintiff has failed to vacate the suit property as per this Honourable court's judgment delivered on 13<sup>th</sup> May, 2019 and that the plaintiff/Respondent has failed to comply with the conditional of stay of depositing Kshs. 300,000/ with the firm of Kalya & Company Advocates from 21<sup>st</sup> November, 2019.

Counsel submitted that the 30 days' period granted to the plaintiff/Respondent to vacate the suit land pursuant to this Honourable court's orders of 13<sup>th</sup> May, 2019 lapsed on 21<sup>st</sup> December, 2019. That it is now over 10 months from the date of judgment and the plaintiff/Respondent has refused, failed and maliciously declined to grant vacant possession of the suit property to the defendant/applicant.

Miss Cheso counsel for the applicant that instructions they gave instructions to PAUL OLE YIALLE T/A NASIOKI AUCTIONEERS to carry out the eviction and that unless the auctioneers are provided with police assistance to keep peace and order during physical eviction of the plaintiff/Respondent, there is a likely to be breach of peace and will be unable to evict the Respondent.

Counsel cited the case of **KIMUTAI LELEI VS HOSEA BITOK** where the court granted orders of eviction and police assistance with security.

Miss Cheso counsel for the applicant relied on the case of **Butt vs Rent Tribunal (1982) KLR** as one of the leading authorities for the grant of stay o/ execution pending appeal. It sets out the principles for the granting of stay of execution pending appeal. The court in **Amal Hauliers Limited v Abdulnasir Abukar Hassan L20171 eKLR** quoted the said principles. One of the 5 principles reads thus:-

- a. The court ill exercising its potvers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application but either party or on its oven motion. Failure to put security for costs as ordered Will cause the order for stat/ of execution to lapse.

Counsel urged the court to allow the application as prayed as the court has powers to grant such orders.

**PLAINTIFF/RESPONENT'S SUBMISSIONS**

Counsel for the plaintiff/Respondent submitted that the court should grant the defendant more time to comply with a conditional order of stay pending appeal. That the respondent filed an application for stay and the court granted a conditional stay where the respondent was to deposit Kshs. 300,000/ to the decree-holder's advocates for the due performance of the decree within 30 days, failure to which the stay lapses.

Ms Kipsei counsel for the plaintiff/respondent submitted that the respondent failed to pay the security for costs as was ordered by this Honourable court therefore the orders for stay of execution automatically lapsed. That the reason for the delay was that the respondent was not able to raise the money due to COVID 19 pandemic that had hit the country. Counsel also relied on the provisions of Article 159 (2) (c) which provide that:-

"In exercising judicial authority the courts and tribunals shall be guided by the following principles. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted"

Ms Kipsei submitted that the judicial system now embraces, mediation and arbitration and the plaintiff has deponed in his affidavit that he has requested the defendant to allow him retain a portion of the land by purchasing the same. Counsel therefore urged the court to give the respondent time to comply with the order of stay of execution

### **ANALYSIS AND DETERMINATION**

The issue for determination is whether the applicant is entitled to the order sought for eviction of the plaintiff and an order for police assistance to the auctioneers to carry out the eviction

This court delivered a judgement in favour of the defendant on 13<sup>th</sup> May 2019 and gave the plaintiff 30 days within which to vacate the suit premises. The plaintiff later filed an application for stay pending appeal and the court gave a conditional stay whereby the plaintiff was to deposit Kshs. 300,000/ with counsel for the applicant within 30 days failure to which the stay would lapse.

The stay lapsed and the applicant filed the current application for the plaintiff to give vacant possession of the suit land. It is now more than 6 months since the stay lapsed and the plaintiff in his affidavit wants a review of the order through the backdoor for more time to comply with the order of the conditional stay.

The plaintiff/respondent averred that the eviction would be done in an inhuman way and would embarrass family. Part 4 of the Ministry of Lands Eviction and Resettlement Guidelines of October 2009 provides for Eviction and Resettlement Guidelines. The guidelines provide that the Government shall set appropriate procedure: protection and due process to be followed during all evictions. These guidelines among many others include, the presence of Local government officials or their representatives during eviction or demolitions and the presentation of formal authorization for the action. The court can also order that the eviction be done during the day and in a humane manner.

Rule 9 of the Auctioneers Rules,1997 also provides that an Auctioneer who believes that there may be a breach of peace resultant from seizure or repossession or attempted seizure or repossession of any property is to request for police escort from the nearest police station in order to carry out their duties peacefully. Such an application is supposed to be made to the court.

*In the case of **Joseph Nyakundi Orina v Joseph Ambuka [2019] eKLR** where the application was brought seeking inter alia, an eviction order against the defendant against whom judgement had been entered but who had refused to vacate the suit property despite being served with a decree to do the same. The Honourable Justice Munyao Sila in granting the orders sought and also ordered the OCS Bondeni Polices Station to provide the court bailiff/ auctioneer with police escort to effect the eviction. The Judge added that the applicant was entitled to the fruits of the judgment which he would not be able to enjoy if the respondent continued to be in occupation of the suit property.*

*Further in the case of **Lucy Ghati v Alex Wambura John & another [2019] eKLR** the application that was brought before the Honourable court sought inter alia, eviction orders against the respondents who, despite judgment being entered against them and the applicant following the procedures that were set out in the judgment had refused to vacate the suit property. The Honourable Court in granting the orders sought said that the applicant had complied with the judgment and since the judgment had not been set aside, varied or challenged on appeal or at all an eviction order had to be issued.*

Counsel for the plaintiff respondent relied on Article 159 of the Constitution on alternative dispute resolution and sated that the plaintiff would like the defendant to leave for him the portion that he resides on. This kind of negotiation should have been done before the case was concluded or he should have engaged the defendant and come up with a consent for adoption by the court.

Currently the court cannot make such orders as it is functus officio. I find that the defendant's application has merit and is therefore allowed as prayed.

**DATED and DELIVERED at ELDORET this 24<sup>th</sup> DAY OF September, 2020**

**DR. M. A. ODENY**

**JUDGE**