



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. NO. 239 OF 2015

PAUL NJERU MWATHE.....APPLICANT

VERSUS

VIDYA THIRA MWATHE.....1ST RESPONDENT

CATHERINE MUTHONI.....2ND RESPONDENT

MARY WARUE JOHN.....3RD RESPONDENT

ALOIS NYAGA MBOGO.....4TH RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 30th July 2020 expressed to be brought under Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law, the Applicant sought the following orders:

a) Spent

b) Spent

c) That there be an order restraining the respondents, their agents and/or servants from evicting the Applicant from the portion he occupies on land parcel Nos. Kyeni/Mufu/7142 to 7148.

d) That the District Surveyor Embu be ordered to determine the exact position of the portion occupied by the Applicant on land parcel Nos. Kyeni/Mufu/7142 to 7148.

e) That the Defendant/Respondent be ordered to transfer 2.6 acres from land parcel Nos. Kyeni/Mufu/7142 to 7148 from the portion where the Applicant occupies and/or has developed.

f) Costs be awarded to the Applicant.

B. THE APPLICANT'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 Applicant, Paul Njeru Mwathe, on 30th July 2020. The Applicant contended that the Respondents had tried to evict him from a portion of the suit properties to which he was entitled as per the decree of this court dated 3rd March 2017. It was further contended that the Respondents had purported to allocate him a portion of land far away from his comfort zone which he claimed to have developed extensively.

3. The Applicant created the impression that he was eager to have the decree dated 3rd March 2017 fully implemented and executed so that he may obtain his portion of 2.6 acres out of the suit properties. He appeared to shift blame to the Respondents for the delay of over 3 years in the implementation of the decree.

C. THE RESPONDENTS' RESPONSE

4. The Respondents filed grounds of opposition dated 7th September 2020 in opposition to the said application. It was contended that the instant application was yet another attempt by the Applicant to frustrate execution of the decree. The Respondents further contended that the properties in respect of which the Applicant sought relief were no longer in existence.

5. The Respondents also filed a replying affidavit sworn by the 1st Respondent, Vidya Thira Mwathe, on 8th September 2020. She stated that she was the mother of the Applicant and the 2nd and 3rd Respondents. She gave a detailed history of the original suit property and the various unsuccessful applications the Applicant had filed in a bid to forestall execution of the decree dated 3rd March 2017.

6. The 1st Respondent further stated that when she sought to subdivide the original suit property for the purpose of executing the decree the Applicant objected thereto before the Land Control Board. She stated that upon the intervention of the Deputy County Commissioner and the local administration, the surveyor was advised to redraw the mutation in such manner as not to interfere with any of the Applicant's developments and the surveyor duly complied. It was therefore contended that the instant application was yet another ploy by the Applicant to forestall execution of the decree.

D. THE APPLICANT'S REJOINDER

7. The Applicant filed a further affidavit sworn on 2nd October 2020 in response to the Respondents' replying affidavit. The Applicant disputed that his concerns had been catered for in the surveyor's mutation. He stated that when he engaged his own private surveyor, he discovered that some of his developments would still fall outside the 2.6 acres the Respondents intended to allocate him. He, therefore, wanted the court to assist him to get his preferred portion of the suit properties.

E. DIRECTIONS ON SUBMISSIONS

8. When the application was listed for hearing on 9th September 2020, it was directed that the same shall be canvassed through written submissions. The Applicant was granted 14 days within which to file a further affidavit and written submissions whereas the Respondents were granted 7 days upon the lapse of the Applicant's period to file and serve theirs. The Applicant filed his submissions on or about 6th October 2020 whereas the Respondents filed theirs on or about 22nd October 2020.

F. THE ISSUES FOR DETERMINATION

9. The court has perused the Applicant's notice of motion dated 30th July 2020 together with the supporting affidavit and annexures thereto, the Respondents' grounds of opposition and replying affidavit in opposition thereto, the Applicant's further affidavit as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

- a) *Whether the Applicant has made out a case for the grant of the orders sought.*
- b) *Who shall bear costs of the application.*

G. ANALYSIS AND DETERMINATIONS

a) Whether the Applicant is entitled to the orders sought

10. The court has considered the material on record on this issue. The first order sought by the Applicant is an injunction to restrain the Defendants from evicting him from the portion of the suit properties he is currently occupying. The material on record indicates that the Applicant is apprehensive that his entitlement of 2.6 acres might be curbed out of a portion away from his current location where he resides and which he has developed. The purpose of the instant application is really to ensure that he is given a convenient and comfortable location.

11. The court has noted the Respondents' response to the Applicant's apprehension. It was contended that his concerns were taken care of upon the intervention of the Deputy County Commissioner and that a new mutation was drawn by the surveyor to enable the Applicant to retain his current location. The Respondents exhibited a copy of a mutation to that effect. The court has noted that the Applicant in his further affidavit disputed the Respondents' response on this issue.

12. The court is of the opinion that the Applicant has failed to demonstrate a *prima facie* case with respect to the prayer for a restraining injunction. The Applicant has utterly failed to demonstrate that any of his legal rights are threatened with violation by the Respondents. The mere fact that the Applicant is apprehensive that his entitlement of 2.6 acres may be located on a portion which is inconvenient cannot be a legitimate reason to grant an order of injunction.

13. The court also finds no good reason to justify the order for the District Surveyor to determine the exact position of the portion of land occupied by the Applicant. In any event, the judgement and decree dated 3rd March 2017 merely granted the Applicant 2.6 acres out of the suit properties. It did not direct that the Applicant should be allocated the area he was occupying or any particular location thereof. The Applicant is simply trying to introduce additional terms and conditions which were not part of the judgement and decree of the court.

14. The Applicant's prayer for an order directing the Respondents to transfer to him 2.6 acres out of the suit properties is merely superfluous. There is no need for an order to direct the Respondents to execute the decree. There is no evidence on record to demonstrate that the Respondents have refused to execute the decree in a lawful manner. On the contrary, there is clear evidence on record to demonstrate that ever since the decree was passed on 3rd March 2017 the Applicant has filed a plethora of applications to frustrate execution of the decree as pointed out in the ruling of 11th November 2019. The Applicant has employed every trick in the book to delay and forestall

execution. There is evidence to demonstrate that the Applicant recently objected to sub-division of the suit properties before the Land Control Board. So, the Applicant is simply trying to create a false impression that it is the Respondents who are unwilling to implement the decree.

b) Who shall bear costs of the application

15. 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)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the application. The Applicant has a history of filing frivolous applications to forestall execution. Accordingly, the Respondents shall be awarded costs of the application to be borne by the Applicant.

H. CONCLUSION AND DISPOSAL ORDER

16. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 30th July 2020 hence the same is hereby dismissed in its entirety with costs to the Respondents. It is so ordered.

RULING DATED and SIGNED in Chambers at EMBU this 29TH DAY of OCTOBER 2020 and delivered via Microsoft Teams platform in the presence of Mr. Andande for the Applicant and Ms. Wairimu for Rugaita & Co. Advocates for the Respondents.

Y.M. ANGIMA

JUDGE

29.10.2020