



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 113 OF 2019

ALI ABDI ALI (Chairman suing on behalf of

KALOENI WELFARE SOCIETY).....PLAINTIFF

VERSUS

RHINE FORWARDERS LTD.....1STDEFENDANT/APPLICANT

SAMMY MUTHUSI (Chairman,

MAKIME SELF HELP GROUP).....2ND DEFENDANT

RULING

1. This Ruling relates to the 1st Defendant's Application dated 15th June, 2020 that was filed under Order 40 Rule 1, 2 and 7 of the Civil Procedure Rules and Sections 1A and IB of the Civil Procedure Act, and all the other enabling provisions of the law. The Application sought the following orders:

a. Spent.

b. That this Honourable Court be pleased to vary and or set aside its orders given on the 29th October, 2019 by clarifying, for the avoidance of doubt and confusion, that the said orders did not in any way authorize the demolition of the Applicant's houses within L.R No. 31990 (Formerly UNS. Agricultural Plot No. "D") Athi River, or their eviction therefrom.

c. Spent.

d. That in the alternative this Honourable Court be pleased to issue an order of injunction restraining the Plaintiff/Respondent from demolishing the Applicant's houses or evicting the Applicant and its members from the suit property being L.R No. 31990 (Formerly UNS. Agricultural Plot No. "D") Athi River, pending the hearing and determination of this suit.

e. That this Honourable Court be pleased to issue such further orders as it shall deem fit and necessary in the unique circumstances of this case.

f. That the cost of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st Defendant's Director who deponed that on 29th October, 2019 the court issued orders of temporary injunction restraining the Defendants from entering into, blocking agents, selling, constructing and or in any other manner interfering with Plot No. 31990 (Formerly UNS. Agricultural Plot No "D" - Athi River - hereinafter "the Suit Property").

3. The deponent averred that the order was to remain in force until the 27th February, 2020 but was extended to the 16th June, 2020 and that on the weekend of the 13th and 14th June, 2020, the Plaintiff/Respondent descended on the suit property with hired goons and embarked on indiscriminate demolition and eviction of the members of the Defendants from the suit property.

4. According to the deponent, the demolitions of the Defendants' houses and the evictions were carried out by hired thugs on behalf of the Plaintiff/Respondent under the supervision of the OCS, Mlolongo Police Station on the basis of the orders of the court given on the 29th October, 2019.

5. It was deponed by the 1st Defendant's Director that this court did not order for the demolition of the Applicants' houses or their eviction

from the suit property; that the Respondent and the police are deliberately misinterpreting the orders of this court by insisting that this court ordered for the eviction of the Applicants; that the ongoing demolitions have exposed the Applicant and its members to adverse weather conditions including exposure to Covid 19 and that the court should stop the said evictions.

6. In opposition to the Application, the Plaintiff deponed that the court granted him a temporary injunction against the Defendants in terms of his Application dated 18th October, 2019; that the Defendants are in contempt of the court order and that the Defendants engaged thugs who assaulted the Plaintiff's members and demolished their houses.

7. The Plaintiff deponed that investigations were conducted into the conduct of the Defendants by the DCIO, Athi River and that the court orders were enforced by the OCS Mlolongo. It was deponed that the 1st Defendant was using the name of its Director, David Mutinda Kivuva, who filed a Constitutional Petition No. 12 of 2020 against him and that David Mutinda Kivuva was taking the court in circles to perpetuate fraud against the property of Kaloleni Welfare Society.

8. The Plaintiff deponed that land parcel 31990 situated in Katani belongs to his Association, Kaloleni Welfare Society; that the Defendants are trying to prevent his Association from distributing the land to its 270 members and that the land that the Defendants were claiming as theirs was LR 24628 which is located in a different location at Mulinge Scheme, and not in Katani Location.

9. The Application was canvassed by way of written submissions. The 1st Defendant/Applicant's advocate submitted that the guiding law on Eviction is provided for under Section 152E of the Land (Amendment Act), 2016 which provides as follows:

“(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

(ii) The notice under section (1) shall-

a) be in writing and official language;

b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.”

10. Counsel also cited the provisions of Section 152F of the Land (Amendment Act) 28 of 2016 which states as follows:

“(i) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.

(ii) The Court, after considering the matters set out in Sections 152C, 152D and 152E may-

(a) Confirm the notice and order the person to vacate;

(b) Cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;

(c) Suspend the operation of the notice for any period the court shall determine; or

(d) Order for compensation 152 G Mandatory procedures during eviction

1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures:

a) be preceded by the proper identification of those taking part in the eviction or demolitions;

b) be preceded by the presentation of the formal authorizations for the action;

c) where groups of people are involved, government officials or their representatives to be present during an eviction;

d) be carried out in a manner that respects the dignity, right to life and security of those affected;

e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;

- f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction.
- g) Include mechanisms to protect property and possessions left behind involuntarily from destruction;
- h) Respect the principles of necessity and proportionality during the use of force; and
- i) Give the affected persons the first priority to demolish and salvage their property

2) The cabinet Secretary shall prescribe regulations to give effect to this section 152H Disposal of property left after eviction

The competent officer of the Commission or County Government, community owning a registered community land or owner of private land shall at least seven days from the date of the eviction, remove or cause to be removed or disposed by public auction, any unclaimed property that was left behind after an eviction from private, community or public land.”

11. It was submitted that in carrying out evictions, accord ought to be made to the United Nations Guidelines on Evictions as stated by The United Nations Office of the High Commissioner for Human Rights in *General Comment No. 7 “The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7. (General Comments).”*

12. On the issue of the grant of interlocutory mandatory injunctions, reliance was placed on the case of *Kenya Breweries Ltd & Another vs. Washington O. Okeyo [2002] eKLR* where the Court of Appeal stated as follows:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4th Edition paragraph 948 which read:- ‘A mandatory injunction can be granted on an interlocutory Application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a match on the Plaintiffs ... a mandatory injunction will be granted on an interlocutory Application.’”

13. The court was urged to allow the Application as prayed.

14. The record shows that the Plaintiff moved this court vide an Application dated 18th October, 2019 for injunctive orders. On 29th October, 2019, the court granted to the Plaintiff an ex parte order of injunction in the following terms:

4. That a temporary injunction be and is hereby issued restraining the Defendants by themselves, servants, legal representatives, agents or howsoever from entering into, blocking agents, selling, constructing and or in any manner interfering with plot L.R. No. 319900 (formerly Uns. Agricultural Plot No. “D” – Athi River, Machakos until 27/2/2020.

5. That the OCS Mlolongo Police Station and the in charge Mlolongo Administration Police Camp do ensure compliance with the orders above.

15. The court granted the said interim injunction restraining the Defendants from interfering with the suit property pending interpartes hearing of the Application on 27th February, 2020. The said orders were extended by the court on 16th June, 2020 until the delivery of the Ruling.

16. The order of the court was clear, and the assertion by the parties herein that there was confusion on what the order meant is a misconception.

17. Indeed, the order of this court did not authorize any demolition of the structures on the suit property. However, the order of the court restrained the Defendants and their agents from entering the suit property. If the Defendants and their agents were in occupation of the suit property, they should have moved the court to have the said orders varied.

18. Considering that this Ruling is not dealing with the Plaintiff’s Application for injunction dated 18th October, 2019, I will not delve into the issue of who is entitled to the suit property for now. The parties should fix the Application dated 18th October, 2019 for hearing.

19. Having found that the orders issued on 29th October, 2019 did not require any form of interpretation by this court, and that the said orders did not order for the demolition of the structures standing on the suit property, I dismiss the 1st Defendant’s Application dated 15th June, 2020 with costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 23RD DAY OF OCTOBER, 2020.

O. A. ANGOTE

JUDGE