



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 228 OF 1999

KALONDU MBUSYA.....PLAINTIFF/RESPONDENT

VERSUS

MARTIN KIMWELI KIKOI.....1ST DEFENDANT/APPLICANT

PAUL MBITHI.....2ND DEFENDANT

PATRICK KILONZO.....3RD DEFENDANT

JASPER MULANDI.....4TH DEFENDANT

DICKSON M. NGOLOLO.....5TH DEFENDANT

SIMON K. NGOLOLO.....6TH DEFENDANT

WAMBUA KIMWELI.....7TH DEFENDANT

JOHN KIMWELI.....8TH DEFENDANT

MWOLOLO KINYOO.....9TH DEFENDANT

SHEM MASIO.....10TH DEFENDANT

NELSON MASIO.....11TH DEFENDANT

PATRICK NDOLO.....12TH DEFENDANT

NDIVO NDOLO.....13TH DEFENDANT

RULING

1. In the Notice of Motion dated 27th January, 2020, the 1st Defendant has sought for the following orders:

a) That the Plaintiff, Kalondu Mbusya, her children, agents and or servants or any other person claiming under her and who enters or remains on land reference No. Makueni/Konza South Block 1/Marwa/70 be punished for a period not exceeding six (6) months imprisonment for contempt of this Court orders dated 29th July, 2003 and the Court of Appeal in Nairobi in Civil Appeal No.344 of 2014 dated 28th July, 2017.

b) That the Officer Commanding Sultan Hamud Police Station (O.C.S) does provide security for the eviction of the Plaintiff/Respondent, her children, agents and/or servants by the Court Bailiff from the Applicant's Land Reference No. Makueni/Konza South Block 1/Marwa/70.

c) That the Respondent to bear the costs of this Application and the costs of the eviction.

2. The Application is supported by the Affidavit of the 1st Defendant who has deponed that by the Judgment of this court delivered on 29th July, 2003, the court declared parcel of land known as Makueni/Konza South Block 1/Marwa/70 (*the suit property*) to wholly belong to her.

3. The 1st Defendant deponed that the Plaintiff/Respondent did file an Appeal against the Judgment of the court and that the said Appeal was finally determined on 28th July, 2017 in which the Appeal was dismissed; that the Plaintiff has continued to deny him and his family access to the land and that the Plaintiff and her agents have refused to give him vacant possession of the suit property despite the orders of this court and the Court of Appeal.

4. In reply, the Plaintiff/Respondent deponed that the Application dated 27th January, 2020 is premature, baseless and ought to be struck out for seeking to enforce eviction orders that do not exist; that it is true that the High Court and the Court of Appeal have since pronounced that the suit property belongs to the Applicant and that the same courts have not declared that she should be evicted therefrom.

5. The Plaintiff/Respondent deponed that the Court of Appeal indeed stayed any move by the Applicant to evict her from the suit premises noting that she had lived on the land for more than 20 years and that due to her undisputed long stay on the land, justice requires that she be allowed sufficient time as opposed to the Respondent's rushed move to seek for her imprisonment and eviction.

6. It was deponed by the Plaintiff that the move by the Applicant to evict her forthwith and cause her arrest and imprisonment is in bad faith because they are members of the same family; that she is not in contempt of any Court Decree or Order as none has directed her to vacate the premises and that the procedure initiated by the Applicant for her committal and eviction is untenable in law since no application for eviction has been heard and determined yet the Applicant has accused her of contempt of court.

7. The Plaintiff deponed that she has not been served with any eviction order nor formally invited to any alleged family meetings; that her stay on the land has been lawful owing to the long litigation process in court and that she has not unjustly denied the Applicant any legal rights to the suit property nor acted violently or threatened anyone with murder as alleged.

8. The Plaintiff deponed that her eviction from the land in the circumstance of this case ought not to be a sudden and spontaneous activity as proposed by the Applicant so as to violate her constitutional rights to privacy, dignity, decent housing, health and security of person more so as an elderly member of the Society.

9. It was deponed that the Application ought to be struck out for the Applicant to file a proper Application for eviction to be heard on merits as part of execution of the impugned Decree of the court. The 1st Defendant's and the Plaintiff's advocates filed submissions which I have considered. I have also considered the filed authorities.

10. It is not in dispute that on 29th July, 2003, Mwera J., (*as he was then*), made a finding that parcel of land known as Plot No. 16/70 (*now known as parcel number Makueni/Konza South Block 1/Marwa/70*) belongs to the 1st Defendant/Applicant. It is also not in dispute that on 28th July, 2017, the Court of Appeal confirmed that indeed the suit property belongs to the 1st Defendant.

11. From the Affidavit of both parties, it would appear that since the Court of Appeal made its determination on the issue of ownership of the suit property on 28th July, 2017, the Plaintiff has never vacated the suit property. The 1st Defendant is now seeking to have the Plaintiff and her children committed to civil jail for disobeying the court order and for the assistance of the police to have the Plaintiff evicted from the suit property.

12. As was held in the case of *Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR*, where the liberty of the subject is or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. The court went further to hold as follows:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactory proved. It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to contempt.”

13. The grounds to be proved in contempt proceedings, according to *G. Bonnie and N. Lowe, “The Law of Contempt” 4th Edition, London Butterworth's, 2010, P.129* are:

- a) *The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding in the Respondent;*
- b) *The Respondent had knowledge of a proper notice of the terms of the order;*
- c) *The Respondent has acted in breach of the terms of the order; and*
- d) *The Respondent's conduct was deliberate.*

14. Although this court and the Court of Appeal decreed that the suit property belongs to the 1st Defendant, the court did not direct the Plaintiff to move out of the suit property. Indeed, the 1st Defendant has not exhibited any Order or Decree directing the Plaintiff to move out of the suit property. That being so, the Plaintiff cannot be said to have disobeyed a clear and unambiguous Order or Decree of the court. On that ground alone, the prayer for the committal of the Plaintiff to civil jail fails.

15. The Plaintiff is aware that both this court and the Court of Appeal has held that the suit property belongs to the 1st Defendant and not

herself. Indeed, the said decisions were made in the year 2003 and 2017 respectively. The said decisions in effect required the Plaintiff to vacate the suit property to enable the 1st Defendant have peaceful possession of the same.

16. Although the Plaintiff's case is that the two courts did not make a finding that she should be evicted from the suit property, and that a proper Application for eviction should be made, it is my finding that the present Application is seeking for the eviction of the Plaintiff from the suit property, with the assistance of the police.

17. Indeed, having perused the decision of this court and the Court of Appeal, and considering that courts do not issue orders in vain, it is my finding that the Plaintiff and her children should vacate the suit land without much ado, so as to bring to an end the long running litigation that has been in this court since the year 1999 between the two parties.

18. The Plaintiff has had since the year 2017 since the Court of Appeal made its decision to move out of the suit property. The issue of him being hurried up to move out the land does not therefore arise.

19. For those reasons, I allow the 1st Defendant's Application dated 27th January, 2020 as follows:

a) The Officer Commanding Sultan Hamud Police Station (O.C.S) does provide security for the eviction of the Plaintiff, her children, agents and/or servants by the Court Bailiff from the 1st Defendant's Land Reference No. Makueni/Konza South Block 1/Marwa/70.

b) That the Plaintiff to bear the costs of this Application and the costs of the eviction.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF NOVEMBER, 2020.

O.A. ANGOTE

JUDGE