



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 55 OF 2018

MAINGI UVYU MWALALE.....PLAINTIFF/APPLICANT

=VERSUS=

JAMES MUTUKU KYUMBUA.....DEFENDANT/RESPONDENT

R U L I N G

1. The application for ruling is the one dated 25th October, 2019 and filed in court on the 29th October, 2019 by the Counsel for the Plaintiff/Applicant seeking the following orders: -

1) THAT leave do issue for an auctioneer or court bailiff to enforce the eviction order issued by this honorable court vide the judgement delivered on 1/10/2019 instead of the Officer in Charge of Police Department (O.C.P.D) Makueni.

2) THAT leave do issue for an order directing the Makueni County Police Commander to provide adequate security during the eviction exercise.

3) THAT the costs of this application be provided for.

2. The application is predicated on the grounds on its face and is expressed to be brought under section 3A of the Civil Procedure Act (cap 21) and all other enabling provisions of the law. It is further supported by the affidavit of Maingi Uvyu Mwalale, the Plaintiff/Applicant herein, sworn at Machakos on 25th October, 2019.

3. James Mutuku Kyumbua, the Defendant/Respondent herein, has opposed the application vide his replying affidavit sworn at Machakos on the 29th September, 2020 and filed in court on 30th September, 2020.

4. The application was canvassed by way of written submissions.

5. In paragraphs 2, 3, 4, 5, 6 and 8 of his supporting affidavit, the Plaintiff/Applicant has deposed that he is aware that this court delivered a judgment in his favour on 1st October, 2019, that among other orders, this court issued a declaration that he is the lawful owner of all that parcel of land known as KITETA/KAKUSWI/478 measuring approximately 2.6 hectares, that further, this court held that the Defendant's continued presence on the land in question is illegal and that it constitutes trespass, as such, an order of eviction was issued, that as per the said court order, it is the O.C.P.D Makueni who is supposed to enforce the eviction order, that he is advised by his advocates that this being a civil matter and there being a sum of Kshs. 100,000/= due from the Defendant as damages for trespass, it is best that the court order be enforced by an auctioneer or a court bailiff, that it is in the interest of justice that the orders sought be granted.

6. The Defendant/Respondent has deposed in paragraph 3, 4, 5, 6 and 8 of his replying affidavit that he confirms that this Court pronounced itself through judgement delivered on 1st October, 2019 which was in favour of the Plaintiff who was awarded the orders sought in his pleading, that being dissatisfied with the entire judgement of this court, he preferred an appeal against the said judgement having filed the requisite Notice of Appeal, that the orders sought in the instant application are very prejudicial on the part of the Respondent as he alongside his family will end up being evicted from the ancestral land which they have known to be home for the longest period of time, that in the event execution follows this would result in the appeal being rendered nugatory as it would defeat its purpose therein, that he is willing to abide with any conditions that this Court will find and deem just to grant and/or issue.

7. The Counsel for the Plaintiff/Applicant submitted that the orders sought in this application are intended to enforce and implement the judgement of this Court. The Counsel went on to submit that courts have held that such orders ought to be issued to ensure that whenever a defendant fails to obey court orders, the Plaintiff gets assistance to ensure compliance. The Counsel relied on the case of **Njeru Mugeru vs. Eminah Nkirote Njagi [2016] eKLR** where a similar application had been made and the Court stated thus: -

“I find that the application seeks to implement the judgement of the Court. The application is allowed.”

8. It was further submitted on behalf of the Plaintiff/Applicant that although the Defendant filed a notice of appeal, the same was filed out of time as provided under the Appellate Jurisdiction Act and Rule 75(2) of the Court of Appeal Rules, 2010. The Counsel pointed out that the judgement herein was delivered on the 1st October, 2019 while the notice of appeal was filed on the 1st November, 2019 which was outside the 14 days provided for in law. The Counsel quoted **Rule 75 of the Court of Appeal Rules** which provides thus: -

“(1) any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the Superior Court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

9. Lastly, the Counsel for the Plaintiff/Applicant submitted that there is no appeal to the Court of Appeal and neither is there stay of execution of orders from the Superior Court and added that this is a proper application for the Court to allow. The Counsel relied on the case of **Charles Kaburu vs. Munyua Ndatho [2020] eKLR** where the Court stated as thus: -

“5. The Judgement of this court delivered on 25/04/2018 was clear that L.r. Abothuguchi/ Kariene/601 was to be divided into two equal shares, where one share was to be registered in the name of Charles Kaburu comprising the portion of land he is already occupying while the other equal share was to be registered in the name of Munyua Ndatho.

6. The defendant has since filed a notice of appeal dated 4/05/2018. Besides the notice of appeal there is no indication that an appeal has since been filed. The Defendant has not also moved this court or the superior court to stay the judgement and consequential Orders made on 25/04/2018. There is therefore nothing to hinder this court from issuing the orders sought by the plaintiff/ applicant.

7. The Orders sought by the applicant do not in any way embarrass the defendant but are necessary in order to maintain peace and security during the survey and subdivision process.

8. The upshot of this Ruling is that I find merits in the plaintiff's application dated 7/11/2019. The said application is allowed but each party is to bear their own costs of the said application.”

10. On the other hand, the Counsel for the Defendant framed one issue for determination, namely whether the order sought in the application will render the appeal nugatory.

11. The Counsel submitted that this Court was informed during trial that the subject property is the only home that the Defendant/Respondent and his family have known and that the orders sought by the Plaintiff/Applicant in his pleadings would have dire consequences. The Counsel went on to submit that the Defendant/Respondent stands to suffer substantial loss if the eviction order issued by this Court on 01st October, 2019 is implemented by the Auctioneer as requested in the instant application. The Counsel further submitted that if the order of eviction is implemented, this would render the appeal which has higher chances of success nugatory. The Counsel relied on the case of **Stephen Mwangi Kariuki & Another vs. Mwangi Tirus [2017] eKLR** which cited with approval the case of **Rhoda Mukoma vs. John Abuoga in Civil Application No.95 of 1987 [1988] KLR** where the Court of Appeal held thus: -

“where a party is exercising his undoubted right of appeal, the Court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard.”

12. The Counsel urged the Court to dismiss the application.

13. Having read the application together with the replying affidavit as well as the rival submissions by the Counsel on record for the parties herein, my finding is as follows: -

14. Whereas I do agree with the Defendant's/Respondent's Counsel that the court ought to ensure that the appeal is not rendered nugatory by preserving the status quo until the appeal of a party who is exercising his undoubted right of appeal is heard, there is nothing to show that apart from filing the notice of appeal out of time, the Defendant/Respondent ever filed the appeal itself. I see no reason why the Court should refrain to grant the orders sought since the Defendant/Respondent is yet to make up his mind on whether or not he will file the appeal. As to whether the appeal will have high chances of success, that is not within the province of this Court to determine.

15. I associate myself with the authorities cited to me by the Plaintiff/Applicant and find that since there is no order of stay of judgement and consequential orders from either the Superior Court or this Court, there is no reason why the orders sought by the Plaintiff/Applicant cannot be granted.

16. The upshot of the foregoing is that the Application has merits and I hereby proceed to allow it as hereunder: -

1) THAT leave is hereby issued for an Auctioneer or Court Bailiff to enforce the eviction order issued by this Court vide the judgement delivered on 1/10/2019 instead of the Officer in Charge of Police Department (O.C.P.D) Makueni.

2) THAT leave is hereby issued for an order directing the Makueni County Police Commander to provide adequate security during the eviction exercise.

3) THAT the costs of this application be provided for.

Signed, Dated and Delivered at Makueni via email on this 23rd day of November, 2020.

MBOGO C. G.,

JUDGE.

Court Assistant: G. Kwemboi