



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU

ELC NO. 129 (OS) OF 1994

ANJERO KINOTI MUTHAMIA.....PLAINTIFF/APPLICANT

VERSUS

MONICA KINYA KINOTI (Sued as the administratrix

of the estate of SILAS KINOTI M'ITONGA.....DEFENDANT/RESPONDENT

RULING

Background

1. The applicant was the plaintiff in Meru HCC 129 of 1994(OS) where she was claiming entitlement to three acres out of land parcel No. Nyaki/Giaki/1073 through the doctrine of adverse possession. Judgement was delivered in her favour on 21.09.2004. Being aggrieved by the said judgment, the then defendant (now the respondent) lodged an appeal in Nyeri Court of Appeal Case No 48. of 2005 where judgement was delivered in her favour on 10.12.2010, where the following orders were given;

- i. The appellant's counterclaim for eviction of the respondent was allowed**
- ii. The current applicant was ordered to vacate the suit premises within three months.**
- iii. The current respondent was awarded costs in the Court of Appeal and in the High court.**

2. Taxation of the ensuing bills of costs was done and a notice to show cause has been taken out against the applicant. That issue of taxation as well as the notice to show cause are the subject matter of this ruling emanating from applications filed by Angelo Kinoti Muthamia.

Application dated 30.07.2013

3. In this application the current applicant is seeking an order of stay of execution of the taxation issued on 14.05.2013, and that he be granted leave to respond and to be heard. Vide this court's orders of 27.11.2019, the application of 30.07.2013 was to be withdrawn upon the filing of a fresh application by close of business on 28.11.2019. This order was complied with as the applicant did file another application on 27.11.2019. **Thus the application of 30.7.2013 stands as withdrawn.**

Application dated 27.11.2019

4. In this application, the applicant is seeking the following orders; **“That the taxation of the defendant's/ respondent's bill of costs dated 16.4.2013 which took place on 16.4.2013 and the subsequent certificate of costs thereof for sh.42 572 dated 5.9.2013 be set aside and the defendants afore-stated bill of costs dated 16.4.2013 be taxed afresh in participation of the plaintiff/applicant”**

5. The applicant contends that he was condemned unheard and that the amount of ksh 42,572 is way too high. He avers that the costs which should have been awarded against him are less than ksh 10,000.

6. The respondent filed grounds of opposition in respect of the said application averring that the notice of taxation was properly served upon the then advocates for the applicant who were still on record by the time an affidavit of service was filed. It is also averred that the applicant's bill of cost was drawn at ksh 87,495 yet what was taxed was 42575.

7. The applicant did not comply with the court's directions given on 25.06.2020 on filing of submissions hence even the respondent did not file any submissions.

Application dated 05.07.2019

8. The applicant prays for a stay and the striking out of the notice to show cause dated 04.06.2019 taken out against him, on the basis that the amount mentioned is Ksh216,372 yet what was taxed was Ksh42,572. The applicant avers that he was not involved in the taxation of the high court matter as well as the Court of Appeal matter. He also contends that the execution of costs in the court of appeal matter should only be initiated in the Court of Appeal before the Deputy Registrar of that court. On this point, the applicant has cited the provisions of section 4 of the Appellate Jurisdiction Act. He also avers that the notice to show cause cannot be taken out to evict a person from his land as that would be an irregular procedure.

9. The application was opposed vide the replying affidavit of the respondent where he avers that the costs in the appeal matter were taxed at Ksh 173,800 on 12.04.2013 as per annexure "IMM3", while the costs at the high court were taxed at Ksh 42,572 hence the total costs amount to Ksh 216,372.

10. The respondent contends that it has been nine years since the Court of Appeal ordered the applicant to vacate the suit land hence if applicant has any concerns regarding costs, he ought to have vacated the land and contest the issue of costs from outside the suit land. He also invokes the provisions of section 4 of the Appellate Jurisdiction Act to support his arguments.

Determination

11. The main points for determination are

1) Whether this court should set the order of taxation made on 16.04.2013 for the sum of Ksh 42 572 and,

2) Whether the court should strike out the notice to show cause dated 4.6.2019. In the circumstances, I deem it necessary to determine both applications at once.

12. On taxation of the bill of costs at the High court, applicant avers that he was not served. However, the respondent has stated that the then advocate for the applicant was served and even filed a bill of costs dated 13.10.2004 drawn at the sum of sh. 87 495. These averments have not been rebutted by the applicant by way of a further affidavit or through submissions. The applicant has also not given any plausible reason as to how he arrived at a figure of sh.10000 as the sum which ought to have been awarded. I find no merits in the prayer to re-tax the bill of costs.

13. On the issue of the notice to show cause, I find that one of the reasons why the same is being challenged is because the applicant disputes the award of Ksh. 42 572. However, the court has already determined that taxation was properly done.

14. The other issue raised with regard to the notice to show cause is that the figure of sh. 216372 has not been explained, that the execution of costs at the court of appeal can only be initiated before that court and that he cannot be evicted through a notice to show cause. I find that the respondent has given an account of how the figure of Ksh 216,372 mentioned in the notice to show cause was arrived at. The high court bill was taxed at Ksh 42,572 while the Court of Appeal bill was taxed at Ksh 173,800. The certificate of courts thereof are on record duly signed by the relevant Deputy Registrars.

15. **Section 4 of the Appellate Jurisdiction Act Cap 9 Laws of Kenya** provides as follows;

“Any judgement of the Court of Appeal given in exercise of its jurisdiction under this Act may be executed and enforced as if it were a judgement of the high court”.

16. The ongoing execution proceedings emanate from the Court of Appeal judgement delivered on 10.12.2010 hence the said proceedings are proper. It is also not lost to this court that no execution proceedings are ongoing at the Court of Appeal. The original file has also disappeared and the Court only has a skeleton file. The provisions of Article 159 (2)(d) implores this court to administer justice without undue regard to procedural technicalities. There is no plausible reason advanced by the applicant as to why the execution of the Court of Appeal judgement should not be undertaken in this court.

17. I have also taken into account that the applicant has approached this court with unclean hands. For the last almost ten years, the applicant has disobeyed the Court of Appeal decision where he was ordered to vacate the suit land within three months as from 10.12.2010. I am in agreement with the respondent that the applicant is simply seeking ways of derailing the execution of the Court of Appeal judgement.

18. In the circumstances, **I find that the prayer to stall and strike out the notice to show cause is not merited.**

19. In the final analysis, I find that both applications dated 05.07.2019 and 27.11.2019 are not merited and they are hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 30.09.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE