



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 265 OF 2013

SPARKLE PROPERTIES LIMITED.....PLAINTIFF

VERSUS

JOHANA NGAI & 8 OTHERS.....DEFENDANTS

RULING

(Application by decree holder for police protection in execution of decree; respondents opposing the application inter alia on the ground that the decree ought not to be executed prior to taxation of costs; Section 94 Civil Procedure Act; necessity for Section 94 queried but application declared premature for want of compliance with Section 94; application dismissed)

1. The application before me is that dated 24 August 2020 filed by the plaintiff. It is an application that is brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. There is only one substantive order that is sought, and that is to have the Office Commanding Voi Police Station to provide security to the plaintiff while executing the decree herein, which includes, but not limited to, demolishing and/or pulling down structures on the suit property, which is LR No. 1956/506 located in Voi. The application is opposed by the 1st to 7th defendants/respondents who are the persons sought to be evicted. The 8th and 9th defendants have not opposed the application.

2. To put matters into perspective, the applicant filed this suit seeking orders inter alia to have the respondents demolish the structures that they have put up, and vacate, the land LR No. 1956/506 (the suit land) which the applicant claimed to own. The applicant had purchased this land from the 8th defendant, Bata Shoe Company Limited. The 9th defendant is the Attorney General sued on behalf of the Land Registrar. The case was heard and judgment delivered on 24 February 2020 by Omollo J. She entered judgment for the applicant and ordered the respondents to give vacant possession. She also ordered each of the respondents to pay damages totalling to KShs. 1,050,000/=. The respondents filed a Notice of Appeal and filed an application for stay pending appeal. I delivered ruling on that application on 22 July 2020 and I dismissed it, principally on the ground that the Notice of Appeal was filed late, and in my view, could not anchor an appeal. It is then that this application was filed.

3. The supporting affidavit is sworn by Jitendra Popatlal N. Mashru who has described himself as the director of the applicant. He has annexed a copy of the decree and some photographs said to be of the land showing the claimed structures. He has deposed that the respondents have refused to comply with the decree and that now the applicant wishes to execute the decree by demolishing and/or pulling down the structures on the suit property and evicting the illegal occupants. He has deposed that the intended exercise is most likely to be met with hostilities, resistance, and possible violence, and requires the police to provide security.

4. The respondents have opposed the motion through the replying affidavit of Fatuma Mwamburi, the 2nd respondent. She has deposed inter alia that there is no evidence of directorship by Mr. Mashru and his capacity to swear the affidavit is disputed. She has deposed that they have filed an appeal being Mombasa Civil Appeal No. 42 of 2020 and she has annexed a record of appeal. She has deposed that the applicant has failed to disclose that it has been served with the record of appeal. She has averred that the 7th respondent is deceased. She has stated that the photographs annexed by Mr. Mashru are not a true and correct reflection of the suit property. She has stated that the suit property contains more than 900 permanent houses, mosques and burial sites, and has annexed some photographs of her own to depict this. She has averred that there is an application for stay pending appeal, pending before the Court of Appeal, and that it will be in the interests of justice that the applicant awaits the determination by the Court of Appeal. A copy of an order issued by the Court of Appeal is annexed.

5. Counsel filed written submissions on the application and I have considered the same. Mr. Oloo, learned counsel for the applicant, in his submissions, submitted inter alia that there is nothing stopping the applicant from executing the decree. He submitted that the mere fact that there is an appeal pending before the Court of Appeal is not a bar. He submitted that the application by the applicants before the Court of Appeal was only certified as urgent without injunctive orders being issued. He submitted that no cause has been shown by the respondents as to why they should not be evicted.

6. On his part, Mr. Nyange, learned counsel for the respondents, inter alia submitted that the replying affidavit demonstrates that the suit property is occupied by more than 900 individuals with properties, who are not parties to this suit, and as such, eviction cannot issue against them. He annexed various authorities to support the point that a decree cannot be executed upon strangers to the suit. He submitted therefore that the orders should only issue as against the 1st – 7th defendants and that the applicant has a duty to identify with certainty the houses and structures of the 1st – 7th respondents and not any other property. He further submitted that the order cannot issue against the 7th respondent who is deceased. He submitted that the application offends Section 94 of the Civil Procedure Act, as it seeks to execute the decree before taxation of costs, yet leave to do so has not been sought. He further submitted that the respondents have demonstrated that they are serious with pursuing their appeal but could not secure a hearing date due to a shortage of judges. He submitted that their application before the Court of Appeal will be rendered nugatory if the orders herein are issued. He submitted that the land forms part and parcel of the respondents who also have buried their kin on the land. He submitted that the pain and emotional suffering is incapable of monetary compensation. He annexed various authorities to support his submissions which I have considered.

7. The first issue that I need to determine is the submission that this application is premature because of want of compliance with Section 94 of the Civil Procedure Act, which provides as follows :-

94. Execution of decree of High Court before costs ascertained

Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

8. Mr. Nyange in his submissions, did assert that before execution proceeds in the absence of taxation, the court first ought to give leave, and that this has to be the result of an application, either orally at the passing of the decree, or thereafter formally, so that the opposing party may be heard. He relied on the case of *Joyce Wambui Karuu vs Kenya Nut Company Limited (2020) eKLR*. In that case, an application was filed to protest an execution without first having taxed the bill of costs and without first issuing a notice to show cause under Order 22 Rule 18 (1). There was judgment in that case for a monetary award of KShs. 368,976/=. Onyango J, allowed the application on the ground that leave to apply for execution before costs were taxed had not been sought.

9. It is indeed correct that Section 94 of the Civil Procedure Act stipulates that the court ought to first find it “necessary” that a decree passed should be executed before taxation. The Act does not define what “necessary” is, though “necessary” by itself must be said to be quite a strong word. On my part, I can’t quite grasp the philosophy behind Section 94, save probably for monetary decrees, so that the judgment creditor does not need to face execution twice, once for the money in the decree, and secondly for the money in the costs. That is the only reason that I can see apparent on the face of Section 94. But where the decree is not for money, I really find it difficult to see the reason behind Section 94. If, assuming, the decree is for delivery of a chattel, say a car, why should the decree holder have to wait until the costs are taxed for him to execute for the delivery of the car ? And if he has another car for use for his daily errands, would it be considered “necessary” for him to execute for delivery of the car before taxation of costs ? In decrees for delivery of land, why should a decree holder wait, until the costs are taxed for him to execute for possession of the land ? On my part, I find little or no correlation between the delivery of the land and the payment of the costs. I think it is time we relooked the necessity of Section 94.

10. Having said the above, Section 94 is still in our statute books and I am bound by the law. Mr. Oloo did not make any submissions on why I should sidestep Section 94 and the application herein does not cite Section 94, and the respondents may have a point in saying that they will not have been heard on the issue whether execution should proceed in absence of taxation. On that technicality, if I am to call it so, and despite my doubts over the practicality of Section 94 in matters such as possession of land, I will consider this application premature and therefore decline the order for execution. On that ground, the application will be dismissed.

11. There were various other issues raised by the respondents but in light of the above, it is not necessary to make a decision on them.

12. Each party will bear his/her own costs.

DATED AND DELIVERED THIS 5 DAY OF NOVEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA