



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.LC CASE NO. 918 OF 2016

(FORMERLY KISII HCCCNO. 260 OF 2012)

JAMES THEURI WAMBUGU.....PLAINTIFF

VERSUS

MELLEN MBERA.....DEFENDANT

RULING

Introduction

1. What is before me is the Notice of Motion dated 5.6.2020 brought pursuant to Order 22 Rule 29 of the Civil Procedure Rules seeking an order of forcible eviction against the Defendant/Respondent from the parcel of land known as **L.R TRANSMARA/LOLOCHANI/863**. The said application seeks to enforce the judgment and decree of this honourable court dated 30th September 2016 which was affirmed by the Court of Appeal in Kisumu **Civil Appeal No. 3 of 2017** vide its judgment dated 3rd April 2020.

2. The application is opposed by the respondent through his Replying affidavit sworn on 15th July 2020 in which she deposes inter alia that since the judgment sought to be executed was delivered in 2016, which is more than a year ago it is a requirement of Order 22 Rule 18 of the Civil Procedure Rules that a notice to Show Cause be served upon the Defendant.

3. The Respondent also deposes that the suit property belongs to the estate of the Mochama Ong'ondo deceased and that the deceased's property shares a common boundary with applicant's land and therefore unless the boundaries are ascertained, the exercise may amount to intermeddling with the estate of a deceased person. That it would be premature to proceed with execution before delineating the boundary between the two parcels of land.

4. The application was disposed of by way of written submissions and both parties filed their submissions.

Issues for determination

5. Having considered the Notice of Motion, affidavits and rival submissions the following issues fall for determination:

1. Whether the application contravenes the provisions of Order 22 Rule 18 of the Civil Procedure Rules.
2. Whether this court has the jurisdiction to entertain applications under Order 22 rule 29 of the Civil Procedure Rules.
3. Whether the applicant is entitled to the reliefs sought.

Analysis and Determination

6. I will start by addressing the first issue.

Order 22 Rule 18 of the Civil Procedure Rules provides as follows:

18(1) *Where an application for execution is made:-*

(a) More than one year after the date of the decree

(b) Against the legal representative of a party to the decree or

(c) For attachment of salary or allowance of any person under rule 43

The court executing the decree shall issue a Notice to Show Cause to the person against whom execution is applied for requiring him to show cause on a date to be fixed, why the decree should not be executed against him.

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue.

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment

(2) Nothing in sub-rule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him."

7. Applying the above provision to the instant case, the last order that was made against the Respondent was the judgment of the Court of Appeal which was delivered on 3rd April 2020 therefore the proviso to rule 18(1) is applicable as this application was filed on 5th June 2020 which is a period of two months from the last order. I also agree with counsel for the applicant that under sub-rule (2) the Court has the discretion to issue any process in execution without issuing the Notice prescribed if the issuance of such notice would cause unreasonable delay or defeat the ends of justice.

8. Moving on to the second issue, counsel for the Respondent submitted that the court lacks jurisdiction to entertain applications brought under Order 22 Rule 29 as they fall within the purview of the Deputy Registrar in accordance with the provisions of Order 49 Rule 7 of the Civil Procedure Rules. Whereas I agree that the Deputy Registrar has the power to hear certain applications specified under Order 49 Rule 7 (b) of the Civil Procedure Rules including applications under Order 22 (other than under rules 28 and 75, this does not oust the court's jurisdiction to hear such applications, particularly where the court in its judgment specifies that eviction shall issue upon application. In saying so I am guided by the case of **Bruce Joseph Bockle v Coquero Limited (2017 eKLR)** where the Court of Appeal in considering an application for enforcement of an eviction order held that :

*"Looking at the orders issued in the judgment dated 14th March, 2013 and in particular the mandatory injunction, it is clear to us that they required the appellant to give vacant possession of the suit property to the respondent. Enforcement of such an order could only be by way of eviction as stipulated under **Order 22 Rule 29 of the Civil Procedure Rules**. Therefore, we find that the learned Judge correctly issued an order of eviction of the respondent from the suit property".*

9. In urging the Court to disallow the application, counsel for the Respondent submitted that the application for eviction was premature in view of the fact that the boundary between the applicant and the respondent's land had not been determined. I have carefully read the judgment of the Court of Appeal and at paragraph 14-15 thereof, J. Mohammed JA stated as follows:

"15. I agree with the Respondent's assertion that the Appellant never raised the issue of a boundary dispute between her and the Appellant. In fact this included claims that the suit property belonged to her father, that she was not a trespasser and the registration of the suit property in the name of the Respondent had been done through fraud.

Having failed to raise the issue of a boundary dispute at the trial court, the Respondent cannot fault the trial court for failing to consider it..."

10. It is therefore clear that the issue of whether or not the dispute herein involved a boundary dispute has already been put to rest by the Court of Appeal and it cannot be revived at this late stage. The Respondent having exhausted all possible avenues for ventilating her claim, she ought to accept that litigation must come to an end.

11. The upshot is that I find merit in the application and I grant it and direct as follows:

(a) An order of forcible eviction be and is hereby issued in terms of the judgment and decree of this honourable court dated 30th September 2016 evicting the Defendant/ Respondent from the land parcel known as **L.R TRANSMARA/OLOLCHANI/863** and reaffirmed by the Court of Appeal vide Kisumu Court of Appeal Civil Appeal No. 3 of 2017.

(b) The eviction order herein be executed by M/S Omwoyo Auctioneers.

(c) The O.C.S Kilgoris Police Station to provide the necessary security to facilitate execution, enforcement and/or implementation of the Eviction Decree issued by this Honourable Court.

(d) The Costs of this Application be borne by the Defendant/Respondent.

Dated, signed and delivered at Kisii this 3rd day of November 2020.

J.M ONYANGO

JUDGE