



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**E.L.C. CASE NO. 398 OF 2017**

**JOHN MATHENGE GICHUHL.....PLAINTIFF**

**VERSUS**

**CYRUS NDUNG'U.....1<sup>ST</sup> DEFENDANT**

**ABIGAIL MUTHONI GITARI.....2<sup>ND</sup> DEFENDANT**

**SAMUEL MAINA GACHENI.....3<sup>RD</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. This is a ruling in respect of two applications. The first is the Plaintiff's application for stay of execution of the judgment and decree of the court dated 23<sup>rd</sup> July, 2019 pending the hearing and determination of an intended appeal to the Court of Appeal. The second is the Defendants' application for review of the same decree and for various other consequential orders.

**B. THE PLAINTIFF'S APPLICATION**

2. By a notice of motion dated 23<sup>rd</sup> September, 2019 expressed to be based under **Articles 50 and 159 (2) of the Constitution of Kenya, 2010, Order 22 Rules 22, 25 & 48, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (the Rules), Sections 1A, 1B, 3A and 50 of the Civil Procedure Act (Cap. 21)** and all other enabling provisions of the law, the Plaintiff sought an order for stay of execution of the decree and orders of the court dated 23<sup>rd</sup> July, 2019 pending the hearing and determination of an intended appeal to the Court of Appeal.

3. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 20<sup>th</sup> September, 2019 and the annexures thereto. The Plaintiff contended that the Defendants had embarked on execution of the decree passed on 23<sup>rd</sup> July, 2019 whereas he had already filed a notice of appeal against the same. It was contended that he would suffer prejudice and substantial loss if execution was allowed to proceed and that his intended appeal, if successful, might be rendered nugatory.

**C. THE DEFENDANT'S RESPONSE**

4. There is no indication on record of the Defendants having filed and a response to the Plaintiff's said application.

**D. THE DEFENDANTS' APPLICATION**

5. By a notice of motion dated 17<sup>th</sup> September, 2020 expressed to be brought under **Sections 1, 1A, 3, 3A & 80 of the Civil Procedure Act (Cap. 21), Order 45 Rule 1 (b) & 2 (1); and Order 51 of the Rules, and all other enabling provisions of the law**, the Defendants sought the following orders;

(a) Spent

(b) That the Honorable Court be pleased to review its decree delivered on 23<sup>rd</sup> July, 2019 and issued on the 24<sup>th</sup> July, 2019, and issue orders of eviction against the Plaintiff/Respondent from all that parcel of land knowns as Land Ref. *Laikipia Marmaret/Settlement Scheme/No. 712 (now the resultant subdivisions No(s). Laikipia/ Marmaret/Extension/1202, 1200 & 1199)*.

(c) That upon the grant of Prayer No. 3, the Honorable Court be pleased to authorize the Applicants to harvest the maize planted by the Respondent on their 5 Acre Piece of the suit premises.

(d) That an order authorizing Tango Auctioneers & General Merchants of P.O. Box 2129 – 20100 Nakuru, to evict the Respondent if necessary by force and demolish any structure on the suit premises.

(e) An order directing OCPD Laikipia and OCS Kinamba Police Station to ensure that the orders of the Honorable Court are fully complied within a period of 14 days from the date of issue of the ruling and/or orders of this application.

6. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1<sup>st</sup> Defendant on 17<sup>th</sup> September, 2020 and the annexures thereto. It was contended that after the decree dated 23<sup>rd</sup> July, 2019 was passed the District Surveyor visited the suit properties and marked out the boundaries thereof as per the decree but that the Plaintiff had refused to vacate the Defendants' portion and relocate to his own adjacent parcel of land.

7. It was further contended that even after passage of the decree, the Plaintiff had in violation of the decree proceeded to cultivate and utilize the portion adjudged to belong to the Defendants and was about to harvest the farm produce thereon. The Defendants, therefore, wanted the terms of the decree dated 23<sup>rd</sup> July, 2019 fully implemented and the Plaintiff evicted from the land decreed to be theirs.

#### **E. THE PLAINTIFF'S RESPONSE**

8. The Plaintiff filed a replying affidavit sworn on 25<sup>th</sup> September, 2020 in opposition to the Defendants' said application on several grounds. First, it was contended that the application was incompetent and misconceived since the Defendants had not complied with the provisions of **Order 9 Rules 9, 10 & 11 of the Rules** on change of advocates after judgment. Second, it was contended that the 3<sup>rd</sup> Defendant was deceased hence the entire application was incompetent and bad in law. Third, that the Defendants had failed to demonstrate grounds for review and that, in any event, the court became *functus officio* upon delivery of judgment.

#### **F. DIRECTIONS ON SUBMISSIONS**

9. It would appear from the material on record that it was directed that the said applications shall be canvassed through written submissions. The parties were consequently given timelines within which to file their respective submissions. The record shows that the Plaintiff filed his submissions to both applications on 29<sup>th</sup> October, 2020 whereas the Defendants' submissions were not on record by the time of preparation of the ruling.

#### **G. THE ISSUES FOR DETERMINATION**

10. The court has considered the Plaintiff's notice of motion dated 23<sup>rd</sup> September, 2019, the Defendants' notice of motion dated 17<sup>th</sup> September, 2020 and the submissions on record. The court is of the opinion that the following issues arise for determination;

(a) *Whether the Plaintiff has made out a case for the grant of a stay pending appeal.*

(b) *Whether the Defendants' application is misconceived and incompetent.*

(c) *Whether the Defendants have made out a case for review of the decree dated 23<sup>rd</sup> July, 2019 and for the consequential orders sought.*

(d) *Who shall bear costs of the two applications.*

#### **H. ANALYSIS AND DETERMINATIONS**

##### **(a) Whether the Plaintiff has made out a case for stay of execution pending appeal**

11. The court has considered the submissions and material on record on this issue. Although the Plaintiff cited several provisions of the law in support of the application, an application for stay pending appeal is primarily premised on **Order 42 Rule 6 (2) of the Rules** which stipulates as follows:

*“No order for stay of execution shall be made under sub rule (1) unless;*

*(a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”*

12. The main issues which arise for determination herein are whether the Plaintiff has demonstrated the risk of substantial loss and whether the application was filed without unreasonable delay. Whereas the court is prepared to hold that an event or circumstance which may render the outcome of an appeal nugatory would result in substantial loss, there is no material on record upon which the court may reach such a

conclusion. The only reference to substantial loss in the Plaintiff's application is to be found in paragraph 8 of the supporting affidavit whereby he states as follows;

*"8. THAT I am informed by my Advocates on record which advice I verily believe to be true that orders of stay of execution ought to be granted where it's demonstrated that an appeal has been preferred, substantial loss will occur and/or any other sufficient cause is established."*

13. The court is of the opinion that such a statement by an Applicant as to the legal advice received from his advocates is not a demonstration of substantial loss by any standards. The mere fact that the Plaintiff is residing on the suit properties by itself is not necessarily indicative of substantial loss being sustained in the absence of a stay order. There was no demonstration that the suit properties might not be available for restitution upon conclusion of the intended appeal either. The court is thus of the opinion that the Plaintiff has failed to demonstrate substantial loss within the meaning of **Order 42 Rule 6(2) of the Rules**.

14. The court has also considered the material on record as to the timelines of filing the application for stay. Although the decree was passed on 23<sup>rd</sup> July, 2019 the Plaintiff did not file the application for stay until 23<sup>rd</sup> September, 2020. There was absolutely no explanation for the delay of 2 months in filing the application even though the Plaintiff was able to file a notice of appeal within 14 days from the date of judgment. Nevertheless, the court is of the view that such delay, though unexplained, was not so prolonged or inordinate as to disentitle the Plaintiff from seeking a stay of execution.

15. The above notwithstanding, the court is of the opinion, that the Plaintiff is disentitled to an order of stay for another reason. The Plaintiff appears to have displayed remarkable impunity in his dealings with the suit properties. The material on record shows that even after the decree was passed on 23<sup>rd</sup> July, 2019 the Plaintiff continued to behave as if the decree did not exist. He flagrantly continued to cultivate and even plant crops on the portion of land which was adjudged to belong to the Defendants. He blatantly refused to relocate to his parcel No. 711 even after the District Surveyor marked out the boundaries between the parcels in dispute as per the decree. The court is thus of the opinion that a person who exhibits such impunity is undeserving of favorable judicial discretion.

**(b) Whether the Defendants' application is misconceived and incompetent**

16. The Plaintiff contended that the Defendants' application was misconceived and incompetent for two main reasons. First, it was contended that the Defendants had changed representation after judgment without leave of court as required under **Order 9 Rules 8, 9 & 10 of the Rules**. Second, that the 3<sup>rd</sup> Defendant was deceased hence the 1<sup>st</sup> Defendant could not continue with further proceedings herein without a personal representative being appointed. The Plaintiff further contended that no written authority had been filed pursuant to **Order 1 Rule 13** of the Rules authorizing the 1<sup>st</sup> Defendant to prosecute the application on behalf of the other two Defendants.

17. The court has considered the submissions and material on record. Although **Order 9 of the Rules** requires a party changing legal representation after judgment to either obtain leave or file a consent signed by the outgoing Advocate, the court is of the opinion that **Order 9** simply deals with procedural matters which do not affect the substance of a suit or proceeding. The court is unable to follow the High Court decision of **Loise Wambui Karigu & Another V Joel Kiragu & Another [2016] eKLR** which was cited by the Plaintiff. This court is obligated under **Section 19(1) of the Environment and Land Court Act, 2011 and Article 159 2(d) of the Constitution of Kenya, 2010** to dispense justice without undue regard to technicalities of procedure.

18. The court is not impressed by the Plaintiff's contention that the 1<sup>st</sup> Defendant ought to have filed a written authority under **Order 1 Rule 13 of the Rules** after judgment has already been passed. The Plaintiff ought to have raised this issue before the hearing and determination of the suit. As matters stand now, there is already a decree in favour of the Defendants and the only outstanding issue is execution thereof.

19. The court has considered the Plaintiff's contention that the application is incompetent on account of the death of the 3<sup>rd</sup> Defendant. The court is aware from the material on record that the 3<sup>rd</sup> Defendant died after judgment had been passed. The only outstanding issue in the suit is execution of the decree. In the circumstances, the court is not satisfied that substitution of the 3<sup>rd</sup> Defendant must be undertaken before execution of the decree.

**(c) Whether the Defendants have made out a case for review of the decree and the consequential orders sought**

20. The court has considered the submissions and material on record on this issue. The Plaintiff has submitted that the Defendants have not made out a case for review within the meaning of **Order 45 Rule 1 of the Rules**. It was further contended that any other sufficient reason referred to in **Rule 1** of the said Order must be analogous to the preceding grounds mentioned therein. The Plaintiff cited the case of **Nasibwa Wakenya Moses V University of Nairobi & Another [2019] eKLR** for that proposition.

21. The court has considered the nature of the application for review and the consequential orders sought. It is apparent that the purpose of the application is to finalize the litigation amongst the parties in order to enable the Defendants to enjoy the fruits of their judgment. It is clear from the judgment and decree of 23<sup>rd</sup> July, 2019 that the court found the Plaintiff to be owner of parcel 711 whereas the Defendants were found to be the legitimate owners of parcel 712 (now subdivided into parcel Nos. 1199, 1200 & 1202). The court further directed the County surveyor and the Land Registrar to restore the boundaries between the parcels in dispute by planting beacons so that the parties may occupy their respective parcels.

22. The court has noted, however, that the trial court did not go ahead to expressly direct that Plaintiff's eviction from parcel 712 upon installation of beacons but it directed that 'all the parties' do comply with the terms of the decree. It is obvious to this court that the trial court found for the Respondents in the suit and it intended to restore parcel 712 to them.

23. It is also apparent from the material on record that the Plaintiff has absolutely no intention of abiding by the terms of the decree. The County surveyor's report dated 12<sup>th</sup> November, 2019 states that the Plaintiff made it clear that he would not vacate parcel 712 at all even upon beacons being fixed as per the decree. It is thus clear that the Plaintiff is out to frustrate implementation of the decree and to undermine the authority of the court even in the absence of an order of stay in his favour.

24. The court is satisfied from the material on record that the Defendants have demonstrated sufficient cause within the measuring of **Order 1 45 Rule of the Rules** for the purpose of giving effect to the decree dated 23<sup>rd</sup> July, 2019. The court is unable to agree with the Plaintiff's submission that 'other sufficient reason' must refer to grounds analogous to the ones expressly mentioned in **Order 45 Rule 1 of the Rules**. In the case of **Wangechi Kimita & Another V Mutahi Wakibiru [1982 – 88] 1KAR 977 and Official Receiver and Liquidator V Freight Forwarders Kenya Ltd [2000] eKLR**, it was held by the Court of Appeal that the phrase 'any other sufficient reason' should not be construed *ejus dem generis* the preceding words since the preceding grounds did not form any distinct category themselves.

25. In the case of **Official Receiver and Liquidator V Freight Forwarders Kenya Ltd [2005] eKLR** the Court of Appeal held, *inter alia*, that:

*"With respect, the learned Judge erred in his conclusion that "for any (sic) sufficient reason" had to be ejusdem generis with the first two grounds set out in Order 44 r. 1(1) or analogous to them. This Court in the well known case of Wangechi Kimita v Wakibiru (1982-88) 1KAR 978, which was determined in 1985, and which was binding on the learned Judge, espoused the contrary view of the law. Nyarangi JA. in his judgment in this case, had this to say on the issue:*

*"I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly s 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words 'for any other sufficient reason' need not be analogous with the other grounds specified in the Order: See Sadar Mohamed v Charan Singh [1959] EA 793.*"

*In his concurring judgment, Hancox JA. as he then was, made the following observation:*

*"I would add that I also agree with the reasoning of Nyarangi JA that the third head under Order 44 r. 1(1), enabling a party to apply for review, namely 'or for any other sufficient reason' is not necessarily confined to the kind of reason stated in the two preceding heads in that sub-rule, which do not in themselves form a genus or class of things with which the third, general, head, could be said to be analogous."*

*Kneller JA's brief concurring judgment was as follows:*

*"Nyarangi JA's judgment embraces the essential facts and the relevant law to be applied to them in this appeal, and, with respect, I am in agreement with the conclusions he has reached."*

#### **(d) Who shall bear costs of the applications**

26. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Jan Mohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigants should not be awarded costs of the application. Accordingly, the Defendants shall be awarded costs of the two applications.

#### **I. CONCLUSION AND DISPOSAL ORDER**

27. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for stay pending appeal whereas it finds merit in the Defendants' application for review of the decree and consequential orders. Accordingly, the court makes the following orders for disposal of the two applications:

**(a) The Plaintiff's notice of motion dated 23<sup>rd</sup> September, 2019 be and is hereby dismissed.**

**(b) The Defendants' notice of motion dated 21<sup>st</sup> September, 2020 to be and is hereby allowed in the following terms only:-**

**(i) The decree dated 23<sup>rd</sup> July, 2019 be and is hereby reviewed and an order for the eviction of the Plaintiff from Land Ref. Laikipia/Marmanet/Extension/1199, 1200 & 1202 is hereby issued.**

**(ii) That Tango Auctioneers & General Merchants of P.O. Box 2129 – 20100 Nakuru are hereby authorized to evict the Plaintiff, if necessary by force, and remove any structures from the suit properties.**

**(iii) An order be and is hereby issued directing the OCPD – Laikipia and OCS Kinamba Police Station to ensure compliance with the orders granted herein within 21 days from the date hereof.**

**(c) The Defendants are hereby awarded costs of the two applications to be borne by the Plaintiff.**

**RULING DATED and SIGNED at NYAHURURU and DELIVERED via Microsoft Teams Platform this 8<sup>th</sup> of December, 2020.**

**In the Present of:**

Mr. Makori holding brief for Mr. Nyagaka for the Plaintiff

Mr. Larabi for the Defendants

Court Assistant: Carol

**Y.M. ANGIMA**

**JUDGE**

**08/12/2020**