



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CONSTITUTIONAL PETITION NO. 15 OF 2018

JONATHAN CHARLES TITI.....PETITIONER

VERSUS

THE PRINCIPAL MAGISTRATE KAPSABET.....1ST RESPONDENT

ROSA JEPKOECH.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The Petitioner filed this application on 26th November 2018 seeking conservatory orders staying the execution of decree in Eldoret E&L case no. 362 of 2016 pending the hearing and determination of this case.

The application was premised on the grounds that the decree in the aforementioned case relates to the Land Parcel No. NANDI/KEMELOI/1154 and the petitioner sold part of his land in the original NANDI/KEMELOI/1008 to the defendants. The defendants have been in occupation and use of the land for 12 years by his consent and the 2nd respondent obtained a decree evicting him from the suit parcel. That the portion in dispute has not been marked out on the ground and that the 2nd respondent has not taken any possession of any part of NANDI/KEMELOI/1008 or of any subdivision thereof. Further that the persons occupying the land and who are named as defendants stand to suffer irreparable loss if execution proceeds.

APPLICANT'S CASE

The applicant filed an affidavit in support of the application and in the said affidavit he averred that he was the 1st registered owner of NANDI/KEMELOI/1008 and further, that the 2nd respondent was awarded 0.2 acres by Aldai Land Disputes Tribunal award no. 43/2006 which was filed in the Principal Magistrates' court as award no. 11/2010 and was adopted on 27th July 2010.

The applicant also stated that at the time the award was filed he had sold most of NANDI/KEMELOI/1008 to Kennedy Gamusa & Aggrey Sakwa. He annexed a copy of the sale agreement.

It was his evidence that the 2nd respondent was registered as an owner of NANDI/KEMELOI/1154 but the same was not reflected on the ground and that the 2nd respondent has a decree against Kennedy Gamusa and Aggrey Sakwa in Eldoret E&L case No. 362 of 2016. The defendants in that case are already in occupation of the land and having allowed them to utilize the suit land he stands to suffer substantial loss if the execution proceeds. The applicant further stated that the title in possession of the 2nd respondent was awarded to her by a body that had no authority to do so.

APPLICANT'S SUBMISSION

Counsel submitted that the applicant did not appeal or file judicial review to set aside or quash the orders of the Tribunal. Counsel further submitted that the tribunal did not have jurisdiction to order subdivision or transfer of the land and as such the decision can still be challenged and cited section 7 of the Civil Procedure Act.

It was Counsel's submission that judicial review is not barred by time and that the court is properly seized of this matter. The applicant admitted that he was not a party to the suit ELC No. 362 of 2016 but the judgment affects him directly as the defendants occupy and use the land courtesy of him.

2ND RESPONDENTS' CASE/SUBMISSIONS

The respondent filed grounds of opposition to the application and submissions.

The 2nd respondent submitted that the petitioner did not have the locus standi to institute the present suit on his own or on behalf of any other party. She cited article 22 of the constitution and submitted that it refers to a party whose rights have been violated. Further, that given that he is not the registered owner of the suit land then it shows that none of his rights have been violated.

Counsel submitted that the applicant was not a party to the Eldoret ELC No. 362 of 2016 wherein the matter in issue was the eviction of Aggrey Sakwa and Kennedy Kamusha Illavuna who were allegedly occupying the respondent's land. The petitioner was not occupying the suit or claiming proprietary interest in the process.

Counsel submitted that the orders of eviction will not affect the applicant directly as they are orders in persona. The petitioner has not stated that he is claiming interest on behalf of another person, he is claiming on his own basis. The respondent posed the question; on what basis is he stating that his rights have been infringed?

Counsel for the applicant submitted that he applicant also stated that a person can file a suit on behalf of others on a representative capacity. She cited order 1 rule 8 of the Civil Procedure Rules which provides for the requirement for representative suits.

The petitioner did not file this application in representative capacity and his right to land was extinguished when he sold the same to the 2nd respondent in 2013. If the petitioner had filed this suit to protect the interest of the beneficiaries he should have obtained leave in terms of order 1 rule 8. He has not done so and that he was not a party to the ELC suit he was under duty to comply with Order 1 Rule 8. The current petition and application cannot stand since the applicant has no locus standi. Counsel urged the court to dismiss the petition with costs to the respondent.

Analysis and determination

The issues for determination in this case are as to whether the application is proper before the court and whether the orders sought by the applicant can be granted and whether the applicant has locus standi to bring this case and finally the applicant met the threshold for grant of stay of execution. The court is at a loss at what the applicant is seeking for.

In one breath the applicant states that the Aldai Land Disputes Tribunal had no Jurisdiction to hear and determine the land dispute that is the subject matter of this petition. He has sued the Principal Magistrates Court Kapsabet without indicating the cause of action against the court.

Whether the applicant has locus standi to file this application

The applicant has filed an application to stop the eviction of two individuals. The two are to be evicted from a piece of land which he has clearly shown he gave up interest by way of sale the suit land and further that he is not a party to Eldoret ELC No. 362 of 2016 whereby the same was heard and determined and judgment delivered. An application was filed by the advocate for the applicant which was heard on merit and dismissed with costs. The orders of stay of execution were declined and they thought it wise or unwise to bring the current application to circumvent the court process. This application on the face of it is an abuse of the court process.

Article 22 of the Constitution provides;

- 1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**
 - (a) a person acting on behalf of another person who cannot act in their own name;**
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;**
 - (c) a person acting in the public interest; or**
 - (d) an association acting in the interest of one or more of its members**

Article 258 of the Constitution provides;

- 1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.**
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**
 - (a) a person acting on behalf of another person who cannot act in their own name;**
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;**
 - (c) a person acting in the public interest; or**

(d) an association acting in the interest of one or more of its members.

In order to enjoy this right, the person must show that he has a right that has been infringed upon or he is acting in a representative capacity. Given that he has shown that he sold the land and has no proprietary interest, the applicant has no rights to protect in this suit or the ELC case. He would therefore be seeking to appear in a representative capacity.

Order 1, Rule 8 of the Civil Procedure Rules states;

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit.

From a perusal of the pleadings no such notice has been filed by the applicant to prove that he acts in a representative capacity. He therefore has no locus to file the present application and by extension, the petition.

The applicant admitted in his supporting affidavit that he sold the land in 2000 therefore he has no proprietary interest in the land. I find that the applicant has no locus standi in to file this suit as he has no interest and that he has not proved which right has been infringed upon.

Whether the application meets the threshold for grant of stay of execution

Having found that the applicant does not have locus standi to bring this suit on behalf of others, it follows that he cannot benefit from the orders of stay of execution. What would be the court staying and yet he was not a party to the suit that he is claiming to stay the orders. If he had an interest then he should have filed an application to be enjoined in that suit and not filing a petition for stay that he his rights have been infringed which he has not established.

It should be noted that an application for stay of execution by the parties in Eldoret ELC No. 362 of 2016 was rejected by the court. The petitioner lodged the petition herein after they lost the application for stay and the OCS Kabujoi Police station was directed to enforce the order. If the parties in Eldoret ELC No. 362 of 2016 were dissatisfied with the dismissal order they had the option of appealing or applying for a review of the orders.

The respondent submitted that the petitioner's right to property under article 40 has not been infringed upon as he lost interest in the suit land once he sold it. The fact that the suit land is registered in the 2nd respondents name is proof that she has proprietary rights in the suit land. There were no allegations to question the authenticity of the 2nd respondent's title or whether the same was acquired fraudulently. The respondent cited sections 25 and 26 of the Land Registration Act in this regard.

This is a clear case of abuse of court process and trying to circumvent the court orders that had been issued in Eldoret ELC No 362 of 2016. I find that the petition lacks merit, it is an abuse of court process and is therefore dismissed with costs to the 2nd respondent.

Dated and delivered at Eldoret on this 19th day of June, 2019.

M.A. ODENY

JUDGE

JUDGMENT IS READ IN OPEN COURT in the presence of Mr.Barasa holding brief for Miss.Ashitsa for the Respondent and in the absence of Mr.Amasakha for Petitioner.

Mr.Koech – Court Assistant