REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

HCC CASE NO. 10 OF 2011

JONATHAN BWIRE OJIAMBO.....PLAINTIFF/RESPONDENT

= VERSUS =

ROSEMARY AUMA ABANGI.....1ST DEFENDANT/APPLICANT

HERBERT ODUORI OKUMU.....2ND DEFENDANT/APPLICANT

R U L I N G

1. The Application for determination before me is a motion of notice dated 21/6/2016 filed on the same date by the Defendants/Applicants – **ROSEMARY AUMA ABANGI** and **HERBERT ODUORI OKUMU –** against the Plaintiff/Respondent **– JONATHAN BWIRE OJIAMBO.** The application is expressed to be brought under Sections 1, 1A, 1B, 3, 3A and 63 (e) of Civil Procedure Act (cap 21), Order 51 Rules 1, 3, 4, 10(1) (2), Order 45 Rules 1, 2(2) of the Civil Procedure Rules, and all other enabling provisions of law.

2. The application came with six prayers, three of which – prayers 1, 2, and 5 – are now spent, having been considered earlier at the exparte stage. The prayers for consideration now are as follows:

> Prayer 3: That this court be pleased to review the order of eviction issued on 3/6/2016 as no order subsists either in the judgement and/or court record.
>
> Prayer 4: That the OCS – Port Victoria police station to whom such order of eviction has been directed to, together with Dasemy Auctioneers do comply.
>
> Prayer 6: Costs of this application be in the cause.

3. The application is anchored on grounds, *interalia*, that no order of eviction was issued pursuant to the judgement of this court; that the suit herein was actually dismissed and such order of eviction cannot stand; that there is no suit that the Plaintiff/Respondent would rely upon to warrant the orders of eviction; that the Defendants/Applicants stand to suffer irreparable damage should execution orders be implemented against them; and that fresh issues touching on legality of the title have come to the fore and are being canvassed in Busia HC P&A No. 21 of 2008.

4. The supporting affidavit that came with the application contains averments that amplify the grounds, in particular emphasising that judgement in this case resulted in dismissal and pointing out that the order of eviction cannot therefore hold.

5. The Plaintiff/Respondent filed a response vide replying affidavit dated 22/7/2016. The application was said to be an abuse of the court process as it is aimed at defeating justice. More specifically, it was termed as meant to **"review, vary, set aside, defeat and/or frustrate the execution of Court of Appeal judgement and order dated 17/11/2015 and 10/12/2015".** This court itself was viewed as being called upon to sit in supervisory jurisdiction over an order of a superior court, to wit Court of Appeal, contrary to law.

6. According to the Plaintiff/Respondent, the orders issued by this court dated 24/6/2016 and 6/7/2016 were said to be bad in law, defective, and void since they were allegedly issued in excess of jurisdiction. Further, the eviction order dated 3/6/2016 issued by the Deputy Registrar here was said to be valid and procedural and therefore not amenable to review. And the reason for that is that the order was issued in accordance with Section 4 of the Appellate Jurisdiction Act (cap 9, Laws of Kenya).

7. The Plaintiff/Respondent also averred that the application is defective and bad in law in so far as it is asking for review which, according to Section 80 of Civil Procedure Act, can only be done to a judgement and not an order or decree. According to the Plaintiff/Respondent also, when the court of appeal allows an appeal it in effect also allows the prayers and pleadings in the lower court. In this regard, eviction was also allowed and this court is therefore enjoined by law to enforce it.

8. A position was taken by the Plaintiff/Respondent too that if any review is necessary, it is the Court of Appeal, and not this court, that has the legal mandate to do it. The order issued by the Deputy Registrar here was said to be sound and in the interests of justice. The Defendants/Applicants application; was said to be a mere academic exercise since any order issued is incapable of defeating the Plaintiff/Respondent's order of eviction which, to the Plaintiff/Respondent, is a valid Court of Appeal order. This court was urged to allow the eviction to go on.

9. The application was canvassed by way of written submissions. The Defendants/Applicants filed their submissions on 23/1/2017. The Plaintiff/Respondent's submissions had been filed earlier on 8/11/2016.

10. The Defendants/Applicants submitted, *interalia*, that this suit itself was dismissed. An appeal was made to the Court of Appeal at Kisumu. If the appeal was allowed, the Defendants/Applicants submitted that **"the right court to pursue execution of any orders be it injunction or eviction against the two Defendants, would be in the Court of Appeal file at Kisumu".** And this is because **"this file has no favourable orders for the Plaintiff; his suit was dismissed with costs to the Defendants".** The Plaintiff/Respondent was accused of wrongly approaching **"the Deputy Registrar, allegedly with orders of the Court of Appeal, and convinced her, unprocedurally, to issue an order of eviction against the Defendants? (sic)"**

11. The Defendants/Applicants wondered loudly and questioned the jurisdiction of the Deputy Registrar here to issue **"orders of eviction in a file that does not have such orders? (sic)".** It was pointed out that there is the Deputy Registrar of the Court of Appeal at Kisumu who has powers to issue such orders.

12. The Defendants/Applicants also sought to disabuse the Plaintiff/Respondent of the notion that the application herein amounts to appeal in this court against the court of appeal. They clarified that they are up against the order issued by the Deputy Registrar here on 3/6/2016 in this file. They submitted that they are aware that this court has no jurisdiction over Court of Appeal decisions. And they professed to have knowledge that the Deputy Registrar of this court **"cannot give life to a Court of Appeal directive unless specifically directed by such Court".** Reference was also made to other cases pending elsewhere – specifically P & A No. 21 of 2008 – where injunctive orders already exist against the Plaintiff/Respondent over the same parcels of land. The eviction order was seen an attempt by the Plaintiff to circumvent or defeat the injunctive orders already in force.

13. The Plaintiff/Respondent saw the matter in a radically different way. From his submissions, it is clear that the basis of the challenged order is the result of the Court of Appeal judgement in Kisumu. It is clear the appeal was in the Plaintiff/Respondent's favour. To him, the issues for determination are two namely:

(a) Whether sufficient cause exists to warrant stay of execution.

(b) Whether the order issued by the deputy registrar is amenable to review.

14. On the first issue, the Plaintiff/Respondent cited the provisions of Order 22 Rule 22(1) of Civil Procedure Rules and submitted, *interalia*, that an order of stay is envisaged to be premised on the applicant filing an appeal or seeking any other order against the decree or order arising from judgement. The Defendant/Applicants in this matter were said not to have filed an appeal or sought a review of the Court of Appeal judgement.

15. The Plaintiff/Respondent submitted that the Defendants/Applicants have not met the threshold required for granting of an order of stay. Such threshold being, first, a demonstration of arguable Appeal and, second, the possibility of the success of the intended appeal being rendered nugatory if the order of stay is not granted.

16. Overall, the order of stay being sought was seen as intended **"to deny the Respondent the fruits of the Court of Appeal's judgement".**

17. The Plaintiff/Respondent then turned to the issue of review. The prayer for review was said to be ambiguous. The ambiguity was said to consist in the fact that the existence of the order is first denied while at the same time it is sought to be reviewed. The implication here is that you cannot review what does not exist.

18. Further, the application for review was said to fall short of meeting the tenents of Section 80 of the Civil Procedure Act (cap 21) which envisions a review to be justifiable only if filed before the court that issued the decree or order. This court being not such court was said to be the wrong place to file an application for review. More specifically, the Plaintiff/Respondent submitted that a Court of Appeal order or decree cannot be reviewed by the High Court or this court.

19. The Plaintiff/Respondent then shifted focus to order 45 of Civil Procedure Rules, which also deals with review. He pointed out that the provisions of that order require, first, that the applicant shows discovery of a new and important matter or evidence which was not within his knowledge at the time the decree or order was passed and/or, second, demonstrate an error that exists on the face of record. The Defendants/Applicants were faulted for not meeting any of these requirements.

20. The jurisdiction of the court was also questioned. To the Plaintiff/Respondent, this is a Court of Appeal matter wrongly brought before the court by the Defendants/Applicants. For effect and/or persuasion, the Plaintiff/Respondent cited Article 165(6) of the Constitution of Kenya, 2010, and two decided cases: **ALVIN KAMANDE NJENGA Vs GATHERU [2016] eKLR** and **The Owners of Motor Vessel "Lillians" Vs CALTEX OIL KENYA LTD (1989) KLRI.**

21. Ultimately, the application was said to be **"grossly incompetent as it offends the procedure and substance of the law for seeking stay and review orders".** This court was urged to dismiss it.

22. I have considered the application, the response made to it, and the rival submissions. The disputed order of eviction is one captioned as if arising in this suit – ELC No. 10/2011 – and not Civil Appeal No. 5 of 2015, Kisumu, which should be the correct way to caption it. A casual glance at the order would make it look as it emanated from this court.

23. Any order or decree of a court would, for ease and efficacy in implementation, be clear in terms of content and/or substance. Such substance and/or content should, as a matter of law, be manifestly and expressly derivable and extractable from the relevant judgement or ruling. It cannot be a decree or order by inference. The Plaintiff/Respondent has availed the Court of Appeal judgement from which the alleged eviction order was said to have arisen. I have read and re-read the judgement. It does not give an order of eviction. It only orders the Defendants/Applicants to vacate the land. It appears to me that the Defendants/Applicants are supposed to remove themselves from the land. Eviction is different. It would require that they be removed by someone else. When one considers the content of the Court of Appeal judgement, and if one further considers the way the eviction order is captioned, it becomes easy to understand why the order is easily impugnable. It is also easy to see why it was challenged here.

24. The Plaintiff/Respondent clearly understood the judgement. Records availed by him shows that after the judgement was delivered, he extracted an order dated 17/11/2015 clearly requiring the Defendants/Applicants herein to vacate the land. The order is clearly headed as arising from the Court of Appeal and correctly shown as emanating from the Deputy Registrar of that Court. The content and/or substance of the order is expressly and plainly derived from the Court of Appeal judgement. It is not an order by inference. It is a direct and express order derived from the judgement.

25. This latter order of eviction by the same Plaintiff/Respondent is clearly not like the first. It is an order by inference, it being not directly derivable from the judgement of the court of appeal. Besides, it is incorrectly headed as an order arising from this court. It creates an incongruous situation in this file because while the judgement in this suit was actually a dismissal of the Plaintiffs/Respondents case the order creates the impression that the Plaintiff/Respondent succeeded and/or the court ordered the eviction of the Defendants/Applicants. In my view, it is in this context that the defendants/Applicants application should be appreciated and understood.

26. I now turn to the application. Both sides have expended time, energy, and expertise trying to submit on the order of stay. There is commendable learnability manifest in the submissions. My view however is that the issue of stay required greater discernment than learnability. The order as prayed for is as follows:

> **Prayer 2: That this honourable court do issue a temporary order of stay of the eviction order herein issued on 3/6/2016 pending the hearing and determination of this application interparties.**

A clear reading and appreciation of the order sought would show, first, that it is meant to be temporary and, second, that it is only meant to last or operate if and when the application has not been heard and determined.

27. The hearing of the application is deemed to have taken place when both learned counsel in the matter filed written submissions. This is because the application proceeded by way of written submissions in lieu of oral hearing. This ruling itself is the determination of the application. A clear wording of the prayer shows that it was not meant to last beyond the determination of this application. Yet both learned counsel proceeded as if issuance of the order should be considered at this stage. This was wrong. The order prayed for was meant to operate before the application was heard and determined. It was meant to be issued at the exparte stage.

28. The submissions of both learned counsel on this score is therefore only a neat heap of good words that serve no useful purpose. The prayer of stay is already spent. I myself would like to leave the issue at that lest I also become unnecessarily verbose regarding an otherwise clear position. There is no prayer of stay to consider for this ruling, period!

29. I now come to the prayer for review. I have already pointed out the Plaintiff/Respondent's views on this issue. I do not agree with the views. And here is why: First, the eviction order being challenged is his own product. It is not a product of the judgement of the Court of Appeal. He even fashioned the order as if it is a product of this court here. That is why the order becomes an easy target for contestation. As pointed out by the Defendants/Applicants, the order should have come from the Court of Appeal at Kisumu. Second, it was wrong for the Plaintiff/Respondent to think that Section 4 of the Appellate Jurisdiction Act (cap 9) entitles him to revert to the lower court for crafting or procuring an order based on a Court of Appeal decision.

30. Section 4 of the Appellate Jurisdiction Act (cap 9) is as follows:

> **"4:**
>
> **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".**

The presence of the Court of Appeal is very thin on the ground in this country. Most of its judgement or orders are normally sent to other courts for enforcement and/or execution. What Section 4 envisages is that the courts to which such orders are sent for enforcement or execution should enforce or execute them as if they are their very own judgements or orders. It does not entitle anybody to manufacture orders in the lower court purporting them to the Court of Appeal orders.

31. Most of the times, the High Court itself enforces its own judgements or orders in accordance with order 22 of Civil Procedure Rules. The Plaintiff/Respondent is aware of this and even cited Order 22 Rule 22(1) of Civil Procedure Rules. Where a supposed court of appeal order is then clearly formulated in the lower court file, that order is amenable for review or other kind of intervention in the same court because it

is the wrong kind of order. That is why the eviction order herein, being one issued here, has to be reviewed here.

32. The Plaintiff's/Respondent's appreciation of the scope of the law relating to review is also wanting. To him, review should only happen as spelt out in Section 80 of Civil Procedure Act (cap 21) and Order 45 of Civil Procedure Rules. While this is correct, the Plaintiff/Respondent then selectively proceeds to submit that the above provisions require only that there be discovery of new and important evidence or that there be an error apparent on the face of record. This is the requirement, **YES**, but a reading of Order 45 shows that the scope is much wider than that. Order 45 allows review also for **"for any other sufficient reason".**

33. And sufficient reason exists in this matter because as pointed out earlier, the eviction order herein is not expressly derived, or even derivable, from the Court of Appeal judgement and is infact wrongly formulated as if it is an order of this court. The Defendants/Applicants could not possibly be expected to challenge the eviction order at the Court of Appeal, yet it is clear that the order did not come from there.

34. In my view, what the Plaintiff/Respondent should have done is this: Having given the Defendants/Applicants enough time to vacate the land, and with the Defendants/Applicants still staying put on the land, the Plaintiff/Respondent should have caused his matter to be mentioned at the Court of Appeal to seek directions on the way forward or filed a formal application at the same court seeking other relevant orders intendedly to effectuate the judgement. The eviction order he is purporting to enforce, even after first procedurally extracting an earlier correct order, is actually an unwelcome and unacceptable shortcut and has no backing of procedure and/or the law.

35. The upshot is that I hereby allow review. The review itself leads to rejection of the eviction order. And the order is hereby rejected. Let the Plaintiff/Respondent bring a proper order from the Court of Appeal and, with sworn constitutional and statutory duty, this court will act with all due dispatch to execute and/or enforce it. Each side should bear its own costs of the application.

Dated, signed and delivered at Busia this 30th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Respondent: Absent

Defendants/Applicants: Absent

Counsel for the Plaintiff/Respondent: Absent

Counsel for the Defendants/Applicants: Present

Court Assistant: Nelson Odame