



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CASE NO. 76 OF 2006

CHARLES WANGUHU.....1ST PLAINTIFF/APPLICANT

MARK MWAURA MWANGI.....2ND PLANTIFF/APPLICANT

JOHN WAWERU MWANGI.....3RD PLAINTIFF/APPLICANT

VERSUS

COSMAS KITI AND 46 OTHERS.....DEFENDANT/RESPONDENT

RULING

1. By this Notice of Motion dated 8th November, 2018, the Objector/Applicant prays for orders : -

3. That pending the hearing and determination of the Objection Proceedings herein, the Plaintiffs/Respondents be restrained from erecting a perimeter wall and/or interfering with the Objector's presence or occupation in the suit property.

4. That the Court Bailiff in person (Mr. Isaac Tongai) and the Plaintiffs be ordered to pay and/or compensate the Objectors of all losses and damages occasioned to them as a result of illegal demolition of their houses at the current valuation (sic).

5. That the costs to this application be provided for.

2. The application is supported by an Affidavit sworn by one the Objectors – Kahosa Ngoka Mwaro and is premised on the grounds: -

i) That the Plaintiff sued a total of 47 people out of all those who reside on the suit property and obtained Judgment against them;

ii) That having obtained warrants of vacant possession against the 47 Defendants, the Plaintiff and the Court Bailiff were required at the time of execution to identify the Defendants' houses before proceeding with the execution exercise.

iii) That on the contrary, the Court Bailiff proceeded to demolish and/or execute against more than 400 families including the Objectors herein.

iv) That while the demolitions were going on the Court Bailiff was served with a Stay of

Execution in Objection Proceedings but he ignored, refused and/or failed to honour the same.

3. In a Replying Affidavit sworn by John Waweru Mwangi (the 3rd Plaintiff), the Plaintiffs aver that as at the time the notice of objection proceedings were served upon their Advocate and the Court Bailiff, the process of execution had been completed.

4. The Plaintiffs further aver that only the 47 Defendants were in the suit premises as at the time this suit was filed and the Applicants/Objectors were never on the suit property. It is further their case that if indeed the Objectors were on the land, they had ample time to take necessary steps to assert their rights.

5. I have considered the application and the response thereto. I have equally considered the written submissions and authorities filed herein by the Learned Advocates for the parties.

6. In regard to the issue of objection to an attachment, Order 22 Rule 51 of the Civil Procedure Rules provides as follows: -

“(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.”

7. In their Notice of Objection dated and filed herein on 2nd November, 2018, the 57 Objectors herein claim to be the owners of houses intended to be demolished in execution of the decree and give notice as follows: -

“TAKE NOTICE that the objectors herein who are residents of the suit property and who have been suit (sic) and having lived and occupied the suit property for a very long period and whose houses have been identified for demolition in execution of the decree herein where they are not party objects to the execution of the decree herein.”

8. Upon being served with the Notice of Objection, the Plaintiffs Decree-holder in apparent compliance with Rule 54 of Order 22 proceeded on 5th November, 2018 to file a Notice of Confirmation of Execution stating as follows: -

“Pursuant to this Honourable Court’s Decree issued on 24th November, 2015 the Plaintiffs herein do confirm having commenced the execution process by way of eviction against the Defendants. The Plaintiffs decree-holder do confirm that pursuant to (sic) the eviction process had been effected they are in possession of the suit land.”

9. From a perusal of the record herein, it is apparent that when the Notice of Objection was filed, the same was not paced before the court and no order of stay was issued as would have been required under Rule 53 of the said Order 22. It would however appear that the Objectors treated the filing of the objection as effectively amounting to an order of stay. That would explain the curious situation why even though the file was never formally placed before the court on that day, there emanated an Order apparently signed by the Deputy Registrar of this Court stating as follows: -

“Notice of Stay of Execution

TAKE NOTICE that a valid Notice of Objection has been received by the court. Execution proceedings are hereby stayed for 14 days and the decree-holder is hereby required within 15 days from the date hereof to intimate to the court and the Objectors in writing whether they propose to proceed with the execution.”

10. This is the 'Order' that was apparently served upon Court Bailiff on the date of execution urging a stop to the demolitions which were said to be taking place. As it were, the court was obligated to make an

order of stay under Rule 53 and the mere filing of a Notice of Objection could not hoist such an act to the status of a Court Order. The reality is that there was no order of stay issued herein.

11. Whatever the case, according to the Plaintiff/Decree-holders notice filed herein on 5th November, 2018 above, the execution process had been completed and they were now in possession. While the Plaintiffs were by virtue of that notice acting in compliance with the necessary consequence of receipt of a notice under Rule 53, they were not expressing an intention to proceed with execution. Rather, they were reporting a fait accompli; telling the court and the Objectors that the event the order was intended to forestall had already occurred.

12. That being the case, it was apparent to me that the application before me and the objection proceedings were commenced after the horse had bolted and left the stable. At any rate, the Objector was required under Rule 56 to, within 10 days of receiving the decree-holder's intimation of intention to proceed, to take proceedings to establish their claim. Those proceedings would be by summons in Chambers. That has not been done herein.

13. The long and short of it is that while the Objectors may as well have a valid claim against the Plaintiffs/Decree-holder, the straight forward provisions of Order 22 of the Civil Procedure Rules were not complied with and their remedy must lie elsewhere. Again, while the Decree-Holder now states that the Objectors are back on the suit property after the evictions, I did not think that their remedy lies within the current proceedings.

14. Similarly while an order was sought against the Court Bailiff in person, the Objectors did not lay any basis why he should be so faulted and ordered to compensate them. He was not even enjoined or served with the application and to make any orders against him in the circumstances would be tantamount to condemning him unheard.

15. The upshot is that I did not find any merit in the application dated 8th November, 2018. The same is dismissed with costs to the Plaintiffs/Decree-holder.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE