



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 346 OF 2017

LUCY GHATI.....APPLICANT/PLAINTIFF

VERSUS

ALEX WAMBURA JOHN.....1ST RESPONDENT/DEFENDANT

CHARLES MATINDE NYAKOBOSA.....2ND RESPONDENT/DEFENDANT

RULING

1. On 29th January 2019, the plaintiff Lucy Ghati (the applicant herein) through M/s Abisai and Company Advocates initiated an application by way of a Notice of Motion dated 19th October, 2018 under sections 3 3A of Civil Procedure Act, Order 51 of Civil Procedure Rules and section 152B, 152E (1) of the Land Act, 2016 (2012). She is seeking the following orders that:-

a) The respondents be jointly and severally evicted from part of LR NO. Bukira/Bwisaboka/598 upon which the respondents jointly and severally occupied without any colour of right.

b) The cost of this application

2. The application is premised on the annexed affidavit sworn on 19th October 2019 by the applicant and grounds 1 to 5 set out on it's face. The applicant stated, among other things, that on 30th May 2018, the court entered Judgment in terms of orders (a), (b) and (c) sought in the plaint dated 18th April, 2017. That the court directed that eviction be undertaken in accordance with sections 152 B, 152 E, and 152 (1) of the Land Act, 2016 (2012) against the respondents jointly and severally. That the respondents have refused to vacate part of the suit land, LR NO. Bukira/Bwisaboka/598. That the applicant is likely to suffer irreparable damage if the application is not allowed hence the same be allowed in the interest of justice.

3. In his replying affidavit sworn on 23rd April, 2019, the 1st respondent, Alex Wambura John who appears in person, opposed the application and urged the court to disallow the same. He averred, inter alia, that the applicant is frivolous, vexatious and an abuse of the court process. That he is an innocent buyer of five (5) acres from the suit land, which he occupies and has invested all his income thereon. That the suit land was still co-owned and registered in the names of Nyamasero Maroa and Kinyaku Maroa.

4. On 10th February, 2019, the 2nd respondent Charles Matinde Nyakobosa was duly served with the application as revealed in an affidavit of service sworn on 18th February, 2019 by Aggrey Ogiri Nyansimora, an authorized process server. However, the 1st respondent failed to file and response to the application in spite of extended timelines in his favour on 8th April, 2019.

5. On 25th July, 2019, this court directed that the application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014.**

6. Accordingly, on 5th August 2019, learned counsel for the applicant filed submissions of even date. Counsel gave brief facts of the suit, framed an issue for determination namely whether the application meets the threshold for issuance of eviction Orders sought therein and reference was made to **sections 152B, 152 E (1) to 152 I of the Land Act, 2016 (2012)**. Counsel relied on the case of **Kenya Reinsurance Corporation –vs- National Land Commission (2018) eKLR** where the court addressed its mind to **section 24 (a) of the Land Registration Act, 2016 (2012)** regarding absolute ownership of the land and Article 40 (1) of the Constitution of Kenya, 2010 in respect of protection of right to property. Counsel urged this court to allow the application in terms of the orders sought therein.

7. The respondents failed to file and serve submissions or at all in the instant application. They did not comply with the directions of the court given in their presence on 25th July, 2019.

8. **Article 50 (1) of the Constitution of Kenya, 2010** stipulates the right to fair hearing which can not be curtailed under Article 25(c) of the same Constitution. This court had the duty to hear the respondents who were granted abundant opportunity to reply to the application and submit thereon. Quite plainly, only the 1st respondent responded to the application by way of his said replying affidavit. In my view, there was no violation of the **audi al teram partem rule** (right to be heard) regarding this application as observed in **Re Heptulla Properties Ltd (1976-80) 1 KLR 1195 at 1204**.

9. I have duly considered the application in its entirety, the replying affidavit of the 1st respondent and the applicant's submissions. To that extent, I approve the view of learned counsel for the applicant that the issue for determination is whether the applicant has met the threshold for the grant of the orders sought in the application.

10. The application emanated from the Judgment of this court rendered on 30th May 2018 in favour of the applicant. I note the entire Judgment and in particular, paragraphs 15 to 18 of the same.

11. The rights of the applicant are absolute and indefeasible **under section 24 (supra)**. Moreover, **Article 40 (1) of the Constitution (supra)** anchors the applicant's right to the suit land, LR NO. Bukira/Bwisaboka/598; see **Kenya Reinsurance Corporation case (supra)**.

12. The 1st respondent claimed in his replying affidavit that he is an innocent purchaser of the suit land and that the instant application is incompetent. This court is aware of the decision in **Fletcher –vs- Peck 10 U.S 87 (1810)** with regard to the rights of third persons who are purchasers without notice for valuable consideration and the application of the principles of equity enshrined under **Article 10 (2) (b) of the Constitution (supra)**.

13. Be that as it may, paragraph 4 of the Judgment is pretty clear that the respondents were duly, served for hearing of the suit which has been determined in favour of the applicant. The Judgment remains steadfast.

14. Additionally, learned counsel for the applicant filed an eviction notice on 11th October 2018. The notice was duly served on the respondents as revealed in the affidavit of service sworn on 16th January 2019 by Aggrey Ongiri Nyansimora, a licenced process server.

15. In the premises, I find that the applicant considerably complied with the terms of the Judgment regarding eviction of the respondents from the suit land. The Judgment has not been set aside, varied or challenged on appeal or at all.

16. Wherefore, the application dated 19th October 2018 be and is hereby allowed for an eviction to issue against the respondents jointly and severally with costs as sought therein.

17. The OCS Kehancha Police Station shall execute the eviction forthwith and this order be served accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 17th day of DECEMBER 2019

G.M.A.. ONGONDO

JUDGE

In presence of :-

Ms. L. Okota learned counsel for the applicant/plaintiff

1st and 2nd respondents/defendants present in person.

Court Assistant – Tom Maurice