



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC MISC APP NO.33 OF 2019

1. ATIK MOHAMED OMAR ATIK
2. ABDALLA OMAR
3. ALI OMAR ATIK
4. ESHA OMAR ATIK.....APPLICANTS

VERSUS

- JOSEPH KATANA
SAMUEL ONGESA.....RESPONDENTS

RULING

1. By this Notice of Motion application, the four Applicants pray for orders as follows:-

1.

2. That this Honourable Court be pleased to direct the Officer Commanding Witu Police Station to provide security to the Applicants while evicting the Respondents and/or any other trespasser(s) from the Applicant's parcel of land known as Plot No. 286 situated at Witu, Lamu County.

2. The Application which is supported by an Affidavit sworn by the 1st Applicant Atik Mohamed Omar Atik is premised on the grounds:-

i) That the Applicants are the absolute proprietors and/or owners of the said parcel of land and have served upon the Respondents a Notice to Vacate as required under Sections 65 and 67 of the Regulations of the Land Act 2017 and Section 152E of the Land Laws(Amendment) Act 2016;

ii) That despite being so served, the Respondent have defiantly refused to vacate and instead have instigated their activities and have even brought more intruders to the said parcel of land;

iii) That when the Process Server went to effect service the Respondent turned violent and were intent on causing harm were it not for the presence of Police Officers; and

iv) That it is therefore only in the interest of justice and equity that the Officer Commanding Witu Police Station (OCS) be directed to provide security during the eviction process.

3. The application was served upon the Respondents but they have neither entered appearance nor filed a response thereto.

4. I have considered the application which is expressed to be brought under Section 152E of the Land Act and Sections 65 and 67 of the Land Regulations, 2017. Section 152E of the Land Act as introduced by Section 98 of the Land Laws (Amendment) Act No. 28 of 2016 provides as follows:-

“152E. Eviction Notice to Unlawful Occupiers of Private Land

(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

(2) The notice under Subsection (1) shall-

a) Be in writing and in a national and official language;

b) In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

c) Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

d) Be served on the Deputy County Commissioner in charge of the area as well as the Officer Commanding the Police Division of the area.

5. According to the Applicants, the two Respondents trespassed into the Applicant's property being Plot No. 286 situated within Witu in Lamu sometimes in June 2013 and have since been carrying on unlawful activities thereon. By a Letter dated 11th April 2019 (Annexure AOA 4) the Applicants Counsel issued notices to the Respondents protesting their unlawful invasion of their clients property and urging them to vacate the property within 90 days from the date of service of the letter.

6. The said Letter was copied to the Area Chief Witu, the County Commissioner Lamu, the OCS Witu Police Station as well as the OCPD Lamu. From an Affidavit of service sworn by one Stephen Muli a Process Server of this Court (annexture AOA 5) the Respondents are said to have been served with the Notices on 12th April 2019 and it was upon the expiry of the said notice that the Applicants moved to Court seeking Police Assistance for their eviction.

7. As it were, the Land Laws (Amendment) Act 2016 which came into operation by virtue of the Presidential Assent on 31st August 2016, brought forth radical changes to the eviction regime. One of the novel features of the Act was the introduction of a procedure that governs evictions of persons deemed to be unlawfully occupying public, community and private land.

8. In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in Court. Under Section 152E of the Land Act, any person or persons served with such notice may apply to Court for relief against the notice.

9. In the matter before me, the Applicants contend that the Respondents were served with the Eviction Notice on 12th April 2019 and that they have since failed, refused and/or neglected to vacate thereby necessitating this application. I have perused and considered the Affidavit of Service sworn by the Process Server aforesaid. It reads as follows at Paragraph 2 to 6 thereof:-

2. That on the 12th April 2019, I received copies of notices dated 11th April 2019 for service upon Mr. Joseph Katana and Mr. Samuel Ongesa, Witu Police Station, OCPD, County Commissioner and Area Chief Witu;

3. That on the same day I proceeded to Witu Police Station for Police Assistance for purposes of providing peace during the service of the notices;

4. That I proceeded to the Applicant's property known as Plot No. 286 Witu where the Respondents reside and in the company of a Police Officer I personally served the said notices on the Respondents in person;

5. That the Respondents accepted service by tendering copies thereof but declined to sign on my copies;

6. That at the time of service of the notices the Defendants turned violent to me and if it were not for the Police Officers who accompanied me the Respondents could have caused harm to me.

10. That Affidavit of service does not disclose the name, number or rank of the Police Officer who accompanied the Process Server nor does it state what action was taken by the Police following the alleged violence visited upon the Process Server in the presence of the officer. More fundamentally, the Affidavit does not disclose how the Process Server identified the Respondents before service of the Notices.

11. Given the obvious repercussions of such an Eviction Notice wherein persons may now be evicted in the absence of a formal Court order, this Court will be reluctant to endorse such an eviction in the absence of the clearest of indications that the would-be evictees were duly served and granted adequate notice to remove themselves from the concerned parcel of land.

12. In the circumstances herein, I was not satisfied that the Respondents were served as by law required. Accordingly I decline to grant the orders sought herein.

13. I make no orders as to costs.

Dated, signed and delivered at Malindi this 5th day of December, 2019

J.O. OLOLA

JUDGE