REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 440 OF 2017

(FORMALLY NKU HIGH COURT CIVIL CASE NO. 212/2005)

STANLEY THEURI (Suing as the legal Representative of

the Estate of FRANCIS K. MWAI.....PLAINTIFF

VERSUS

DAVID KAMAU KARIUKI (Sued as the legal Representative

of the Estate of ESTHER WAIRIMU KIRII).....1ST 1ST DEFENDANT

DISTRICT LAND REGISTRAR NYANDARUA.....2ND 1ST DEFENDANT

HON ATTORNEY GENERAL.....3RD 1ST DEFENDANT

RULING

1. What is coming up for determination are four (4) Applications, the first being the one filed by the Plaintiff herein dated the 10th June 2019, in which the Plaintiff sought for orders that the Officer Commanding Station (OCS) Miharati, Kipipiri Police station provides sufficient police protection during the eviction of the 1st 1st Defendant /Respondent, his agents, servants and anyone claiming through him and the estate of the late Esther W. Kirii, from the suit land being parcel No. Nyandarua/Wanjohi/249. This Application in essence was seeking for enforcement of the Judgment by the court wherein the Applicant sought for eviction orders as directed by the court on the 7th May 2019.

2. The second Application dated the 14th June 2019 by the 1st 1st Defendant herein sought for orders of stay of execution of the orders arising out of the court's judgment of 7th May 2019.

3. The 3rd Application dated the 15th August 2019 by the 1st Defendant also sought for orders of stay of execution arising for the Court' judgment of 7th May 2019 where the Applicant sought for the Application to be heard during vacation.

4. The last Application by the 1st Defendant dated the 24th June 2019 also sought for the same orders of stay of execution of the court's decree and for leave to file his a defence and comply with the provisos of Order 11 of the Civil Procedure Rules. In essence it sought for review of the judgment and re-opening of the entire case.

5. By consent parties agreed to have all the four Applications disposed of by way of written submissions.

The Plaintiff/Applicant's submissions

6. The Plaintiff submitted that in order to dispose of the said Applications the issues that presented themselves for determination were as follows;

i. Whether the 1st Defendant's Application dated the 14th June 2019 had met the legal threshold for the honorable court to grant a stay of execution of the judgment delivered on the 7th May 2019.

ii. Whether the 1st Defendant's Application dated 15th August 2019 seeking for a Review had met the mandatory legal threshold for the said Review.

iii. Whether the Plaintiff's Application dated the 10th and June 2019 for execution of the judgment delivered on 7th May 2019 was merited and should be allowed.

iv. Who should bear the costs of the said Applications?

7. On the first issue for determination, the Plaintiff vehemently opposed the 1st Defendant's Application via their replying affidavit sworn by the Plaintiff's Counsel on the 9th July 2019.

8. It was the Plaintiff's submission that in order that an Applicant be granted a stay of execution of judgment pending appeal, they must satisfy the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules wherein the court could exercise its discretion as was enumerated in the case of **Elena Doudoladova Korir vs Kenyatta University [2014] eKLR.**

9. That the 1st Defendant had utterly failed to state and explain to the satisfaction of the court how his intended appeal would be prejudiced should the Application be dismissed. No evidence was tendered in court to support, justify and/or prove the same. That what was evident in this matter was that the 1st Defendant undoubtedly sought to continue occupying and making use of the suit portion of land having done so prior to the institution of the suit in the year 2005. It was the Plaintiffs submission that in the unlikely event that the 1 st Defendant's intended Appeal were to be successful, then the said portion of land would be handed back to him.

10. That the said Application was filed more than 30 days after the judgment had been delivered despite the 1 st Defendant having been fully aware of the delivery of the said judgment whereby he had even filed a Notice of Appeal within a few days after delivery of the judgment. That the delay had not been explained to the satisfaction of the court and therefore it was to be construed as proof of disinterest in the said Application and prayers therein. The Application was thus an afterthought.

11. On the second issue for determination, the Plaintiff drew the court's attention to the Notice of Motion and submitted that it was highly irregular for one to pretend to pursue an appeal and a review of the same decisions simultaneously. That the 1st Defendant ought to have elected to withdraw one of the two given that the Notice of Appeal was filed in the first instant. It was the Plaintiff's submission that the Application for review ought to be struck out.

12. That further, Order 45(2) of the Civil Procedure Rules were clear to the effect that a party who was not pleading from a Decree or Order may apply for a review of judgment. The Plaintiff relied on the case of **Serephen Nyasani toMenge vs Rispah Onsase [2018] eKLR** to buttress their submission. That without prejudice to the foregoing, if the Application was to be considered by the court, the test that it ought to be put through was found in the provisions of Order 45 Rule 1 of the Civil Procedure Rules wherein it would be discovered that the three alternative grounds were not present in the Application at hand; there is no new evidence, there is no mistake apparent on the face of the record and quite clearly there were no other sufficient reasons to warrant the court to interfere with its judgment and directions so far. That the 1st Defendant had made his intentions clear by praying for a fresh hearing under the guise of an Application for Review which amounts to an abuse of the court process. In so submitting, the Plaintiff relied on the decided case of **Arjit Kumar Rath vs State of Orisa & Others Supreme Court Case 596:**

13. It was further the Plaintiff's submission that the Application for Review had been plagued by inordinate delay the judgment having been delivered on the 7th May 2019 and the Application for review of having been filed on the 15th of August 2019. There was no explanation for such a delay which was inordinate. The Application was an afterthought aimed at spinning the wheels of justice in unending circles of one unnecessary Application after another.

14. On the third issue for determination, it was the Plaintiff's submission that the Application had a strong footing in the age-old principal that there must be an end to litigation. That this matter was instituted in the year 2005 and had gone through all the motions of trial despite the unnecessary long period of time. That the proceedings spoke for themselves. The 1st Defendant had not taken a particularly keen interest in participating in these proceedings. The judgment rendered by the court on the 7 May 2019 spoke in express terms that the 1st Defendant was in illegal occupation of the suit portion of land and ought to vacate the same within 30 days failure to which the eviction orders would issue.

15. That given the failure of the 1st Defendant to make out his case in the Applications for the court to set aside, review, vary and/or halt the execution of its judgment, the instant Application only sought to implement its express terms and conclude the suit placed before this court.

16. On the last issue as to who was to pay costs, it was the Plaintiff's submission that the court finds guidance in the case of **Republic vs. Rosemary Wairimu Munene, Ex-parte applicant vs Ihururu Dairy Farmers Co-operative Society Ltd** to find that the Plaintiff is inevitably entitled to costs of with respect to the Application addressed herein. That the 1st Defendant's Applications were devoid of merit as they were meant to frustrate the conclusion of this matter. That the same should be dismissed and the 1 st Defendant condemned to pay costs. That the Plaintiff should be allowed to execute the terms of the honorable court's judgment so as to bring an end to this matter.

1st Defendant's submissions

17. The preamble to the 1st Defendant's submission was that there be stay of execution of the orders arising from the judgment delivered by the honorable court on 7th May 2019 and Decree thereto including any execution proceedings that have been commenced. That the Application also sought to have the judgment, decree and any other consequential orders set aside, varied and/or reviewed.

18. That the 1st Defendant's Application also seeks to have this honorable court be set aside, vary and/or review you're the proceedings of 29th November 2019 which proceedings closed the Plaintiff and the 1st Defendant's case before the 1st Defendant had an opportunity to

interrogate the Plaintiff's witnesses and adduce evidence to counter the Plaintiffs allegations.

19. That the re-opening of this case would give the honorable court a perfect opportunity to consider the Plaintiffs case alongside 1st Defendant's case and make a determination having had the benefit of the insight of the latter which the court did not have prior to writing its judgment.

20. That the 1st Defendant had always worked and stayed far from the precincts of the court where he had always relied on his previous Advocates to provide information regarding the case. That the failure by his previous advocates to comply with the laid down procedures and informing him of the date when the case was proceeding, should not be visited upon him and his family. That the 1st Defendant and his extended family should not be allowed to suffer such momentous punishment of losing the land they have lived on all their lives because of a mistake and incompetence by his previous advocate. He thus prayed for a chance to present his evidence and call his witnesses so as to avoid irreparable loss to him, his nuclear and extended family as a result of representation of a non-existent claim by the Plaintiff.

21. That there were serious triable issues raised by the 1st Defendant in his defence which issues required to be interrogated in terms of allowing the 1st Defendant to present testimonies and evidence in court to prove his case.

22. The 1st Defendant relied on Order 45 Rule 1 of the Civil Procedure Rules as well as Section 80 of the Civil Procedure Act to submit that the said provisions of the law gave the trial court unfettered discretion to allow a review on any sufficient reason which reason may relate to not only the law, but also to facts as they may emerge from adducing evidence. In so submitting, the 1st Defendant also relied on the decided case of **Shanzu Investments Ltd vs Commissioner for Lands Civil Appeal No. 100 of 1993.**

23. That there was no inordinate delay in the filing of the present Application although he believed that at all times an Appeal had been lodged by the previous Advocates who had communicated to him as such. Having noted that there was no appeal filed, he had moved with speed and had appointed another advocate who upon perusal of the court file had advised that the best route would be to seek a Review and the setting aside of the judgment and any consequential orders which was then done within a reasonable time.

24. That the issue of inordinate delay was discussed in the case of **Mwangi S Kimenyi vs Attorney General & Another [2014] eKLR** where it was held that there was no precise measure of what amounted to inordinate delay save that it would differ from case to case. The 1st Defendant urged the court to find the reason given for the delay to be reasonable and that the same was not inordinate in any way.

25. It was further the 1st Defendant's submission that there would be no prejudice suffered by the Plaintiff should the Review orders issue in favour of the 1st Defendant. That in the unlikely event that there would be any prejudice suffered, the same could be compensated by way of awarding costs. That the 1st Defendant was ready to abide by any conditions for costs that may be set by the honorable court in pursuit of substantive justice. That the court be guided by the curative Article 159(2) (d) of the Constitution which provided that the principles of justice shall be undertaken without undue regard to procedural technicalities.

26. That although there had been a notice and a draft Memorandum of Appeal had been filed, the same had since been withdrawn through a notice of withdrawal dated the 3rd October 2019, and hence there was no Appeal in place. The Application for Review was therefore properly on record and the issues raised ought to be considered on their merits.

27. That in regard to their Application dated the 10th June 2019, it was the 1st Defendant's submission that although the Plaintiff had sought for orders that the Officer Commanding Station (OCS) Miharati, Kipipiri Police station provides sufficient police protection during the eviction of the 1st Defendant /Respondent, his agents, servants and anyone claiming thorough him and the estate of the late Esther W. Kirii, from the suit land, there had been no eviction orders in place since the Plaintiff had not made the appropriate Application. The Eviction could not therefore take place in the absence of orders.

28. The 1st Defendant withdrew their Applications dated the 14th June 2019 and relied on the replying affidavit of the Application dated the 24th September 2019

Determination.

29. Basically what is before the court for determination is the Plaintiff's Application seeking orders for sufficient police protection during the eviction of the 1st Defendant and his extended family from parcel of land No. Nyandarua/Wanjohi/249 pursuant to the court's orders in its judgment of 7th May 2019.

30. The 1st Defendant having withdrawn the other Applications in their submissions, relied on their Application dated the 15th August 2019 and the replying Affidavit to the Application dated the 24th August 2019 where he sought that there be stay of execution of the orders arising from the judgment delivered by the honorable court on 7th May 2019 and Decree thereto including any execution proceedings that have been commenced. Secondly the 1st Defendant also sought to have the judgment, decree and any other consequential orders set aside, varied and/or reviewed.

31. The matters that give rise to the following situation being that this court, vide its judgment, which was based on the Plaintiff's evidence and the findings of the land Registrar as well as the Surveyor's report dated the 16th September 2013, held that the 1st Defendant had encroached onto the Plaintiff's land, following which on the 7th May 2019, it gave orders that the 1st Defendant vacate the 6 acres of plot No. 249, within 30 days upon delivery of its judgment, failure to which an order of eviction shall be issued against him.

32. Upon consideration of the Applications before the court as well as the submissions and the authorities therein cited, the matters that emerge for determination are as follows;

i. Whether there should be stay of execution of the Judgment of the court delivered on 7th May 2019.

ii. Whether the judgment delivered on the 7th May 2019 and the subsequent decree and/or orders should be set aside, varied and/or reviewed.

iii. Whether the Plaintiff's Application dated the 10th June 2019 for execution of the judgment has merit.

33. On the first issue for determination, according to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, an order of stay of execution can be granted if the court is satisfied that substantial loss may result to the Applicant unless the order is made and when the Application has been made without unreasonable delay. The Applicant is also required to give security for the due performance of the decree.

34. In the case of **CFC Stanbic Bank Ltd vs John Kungu Kiarie & another, Court of Appeal No. 62/2016 (Nairobi)**, the court while dealing with an Application for stay of execution of a decree, held that;

> ***"The court balances two parallel positions first, that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without a just cause. The second factor is that if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay on terms".***

35. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the applicant to demonstrate what kind of substantial loss he will suffer if the stay order was not made in his favour.

36. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

> **"Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."**

37. The applicant contends that he would suffer irreparable loss if he is not granted the stay of the execution. No evidence was however provided on the kind of irreparable loss he would suffer if the order of stay was not granted. There was no evidential documentation by the Applicant on the court record as regards any alleged existence of developments put up by the 1st Defendant on the suit land. No appeal had also been filed and neither was there any threat by the Respondent that they were going to dispose and/or alienate the suit land. In this case, I find that no substantial loss has been demonstrated. In any event, there was no evidence that the Plaintiff herein was bent at disposing and/or alienating the subject suit land. The implementation of the decree herein will not occasion the applicant substantial loss.

38. On the second issue of delay I wish to state that the judgment was delivered on the 7th May 2019 and the current Application was filed on 15th August 2019 which indicates that the Application was filed without unreasonable delay.

39. On the issue of security for the performance of the decree, I have noted that although none has been offered by the applicant, yet they were ready to abide by any condition set by the court, but since the subject matter is land, the issue of security is not as significant in matters involving a pecuniary decree.

40. **On the Second issue for determination as to** whether the judgment delivered on the 7th May 2019 and the subsequent decree and/or orders should be set aside, varied and/or reviewed, I find that the provisions of Order 12 Rule 7 of the Civil Procedure Rules are clear to the effect that:

> *Where under this Order judgment has been entered or the suit has been dismissed, the court, on Application, may set aside or vary the judgment or order upon such terms as may be just.*

41. In the present case, it is clear that the main ground upon which the applicant seeks to set aside the judgment of this court is for sufficient cause. As to what constitutes sufficient cause, to warrant the exercise of the court's discretion, the Supreme Court of India in case of **Parimal vs Veena *2011 3 SCC 545*** *attempted to describe what* **sufficient cause** *was* when it observed that:-

> *"**Sufficient cause**" is an expression which has been used in large number of statutes. The meaning of the word "**sufficient**" is "**adequate**" or "**enough**", in as much as may be necessary to answer the purpose intended. Therefore the word "**sufficient**" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "**sufficient cause**" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "**not acting diligently**" or "**remaining inactive.**" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

42. From the court record, it is clear that this case was filed on the 10th August 2005 and amended on the 30th August 2012 wherein 1st Defendant entered appearance on the 24th August 2005 and filed her defence on the 9th September 2005. In the pendency of the trial, the original 1st Defendant passed away wherein an Application dated the 19th July 2012 was filed seeking for her substitution. By consent, the

same was allowed

43. On the 6th February 2014, the hearing of the surveyor's report proceeded. 8th October, 2014, parties sought directions to comply with the provisions of Order 11 of the Civil Procedure Rules. On the 2nd October 2017, when the matter came up for hearing, the although 1st Defendant was absent his Counsel was present but they had not complied with the provisions of Order 11 of the Civil Procedure Rules, the matter proceeded for hearing irrespective of the 1st Defendant's absence wherein the Plaintiff's witnesses where cross –examined by the 1st Defendant s Counsel. Suffice to point out that at the time the Plaintiff closed its case, the 1st Defendant had not complied with the provisions of Order 11 of the Civil Procedure Rules as directed and neither had they indicated that they would be calling any evidence. Their case were thus closed on the 29th November 2018 and both parties filed their submissions.

44. The test to be applied is whether the 1st Defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the 1st Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. The 1st Defendant did not demonstrate sufficient cause why they never appeared in court on the several occasions the matter was coming up for either mention or hearing. His advocate however was present and participated fully in the trial.

45. The court while deciding whether there is a sufficient cause or not, must bear in mind the object of doing substantial justice to all the parties concerned. In this case, when the date set for hearing was served upon the 1st Defendant, only his Counsel and the Plaintiff attended court for the hearing, the 1st Defendant was absent hence the court ordered its case closed and parties were directed to file written submissions. The mere filing of the defence without any evidence to support the positions taken by the 1st Defendant is nothing. A party must tender evidence in support of the allegations**.**

46. The Court of Appeal decision in the case of **Richard Nchapai Leiyangu vs. IEBC & 2 Others**, where the Court expressed itself as follows:-

> *"we agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."*

47. In the present suit, I find that the 1st Defendant deliberately failed to attend the hearing and prosecute his case and thereby refusing to avail itself of the court process. Further that no evidence was placed on the record even by way of witness statements or documents.

48. I find that the Application is an afterthought, a waste of judicial time and an abuse of the court process to vex the Plaintiff and put him to expense. The Plaintiff is being gravely prejudiced by the 1st Defendant and therefor there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice. The court is not powerless to grant relief, when the ends of justice and equity so demand, to this effect, I find that the Application dated 15th August 2019 has no merit.

49. On the Application by the 1st Defendant to review the courts judgment delivered on the 7th May 2019, the court in the case of **Francis Origo & another v. Jacob Kumali Mungala** (C.A. Civil Appeal No.149 of 2001 (unreported), dismissed an Application for review because the Applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the Applicants had filed an Appeal which was struck out before the filing of the Application for Review.

50. The court of Appeal stated:-

> *"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction.*

51. The provisions of **Section 80 of the Civil Procedure Act** grants the court the power to make orders for review, **Order 45** of the Civil Procedure Rules sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason

52. The discovery of new and important matter or evidence apparent on the face of the record or for any other sufficient reason in Order 45 rule 1 of the Civil Procedure Rules relates to issues of facts which may emerge from evidence. The exercise of due diligence referred to in Rule 1 refers to discovery of facts which were not within an Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made. The 1st Defendant in this case has not advanced any such evidence. In the circumstances.

53. I therefore find no merit in the 1st Defendant's Applications dated the 14th June 2019, 15th August 2019 and 24th June 2019 and proceed to dismiss them with costs to the Plaintiff.

54. The third issue for determination was whether the Plaintiff's Application dated the 10th June 2019 for execution of the judgment has merit. This suit was commenced by the Plaintiff who sought for an order of permanent injunction against the 1st Defendant, her agents or servants occupying, interfering or dealing in any manner however with the Plaintiff's peaceful and quiet enjoyment of all or any part of that parcel of land known as Nyandarua/Wanjohi/249. After hearing the matter, this court, in its Judgment of 7th May 2019 found that 1st Defendant had encroached onto the Plaintiff's parcel of land by 6 acres wherein the Court directed the Applicant to give vacant possession of the 6 acres of plot No. 249 within 30 days upon delivery of this judgment failure to which an order of eviction shall be issued against him.

55. It is based on the ground that judgment has already been entered in favour of the Plaintiff for the eviction of the 1st Defendant, and that despite having knowledge of the existence of the judgment and decree, the 1st Defendant has failed to give vacant possession. That it is apparent that the 1st Defendant will not vacate the suit properties unless forcibly evicted. That the Plaintiff/decree holder now seeks orders for warrants of eviction to be executed by the Officer Commanding Station (OCS) Miharati, Kipipiri Police station.

56. The said Application is herein allowed, the (OCS) Miharati, Kipipiri Police station is herein authorized to enforce compliance of the orders of this court and maintain peace upon eviction as per the provisions of Section 152 E and 152 G of the Land Act.

Dated and delivered at Nyahururu this 3rd day of December 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE