



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 43 OF 2007

JOHN KUNDU KHISA.....PLAINTIFF

VERSUS

KENNEDY KHISA KUNDU.....DEFENDANT

R U L I N G

1. By an application dated 2/1/2018 the plaintiff sought an order that the defendant be found guilty of the offence of contempt of court and that he be committed to civil jail for disobeying the order of this court dated 11/2/2009 and issued on 9/5/2017.

2. The grounds relied upon are that the defendant has trespassed onto the suit premises and thus is in contempt of an order of this court. The plaintiff avers that the defendant was evicted from **Plot No. 50, Sikhendu Market** on 13/12/2017 but on the same day he returned his household goods onto the said plot of which the plaintiff is the owner.

3. Opposing the application, the defendant filed his sworn affidavit dated 19/1/2018 on 19/1/2018. He avers that the order sought to be enforced dated 11/2/2009 lapsed after the expiry of 12 months as per Order 40 Rule 6 of the Civil Procedure Rules. The defendant avers that due to lapse of more than 12 months, Order 22 Rule 18 which requires a Notice to Show Cause before any execution can issue, is applicable. He further avers that he is not on Plot No. 50 but 53D. He avers that the plaintiff has in this suit denied any interest in Plot No. 53D and so he cannot be heard to claim Plot No. 53D without amending his pleadings.

4. However a summary of the events leading to the appearance of "Plot No. 53D" in these proceedings is contained in the Ruling of this court made upon the defendant's application for injunction in **Kitale ELC No. 152 of 2016**. At paragraph 15 of the Ruling dated 13/11/2017, the court stated as follows:-

"The bottom line remains this; the plaintiff must remove himself, or be evicted in default, from some premises which he was occupying at the time the decree and the eviction orders were made. He does not acknowledge in this suit the location, the size, or the documentation of the premises that were the subject matter of HCCC No. 43 of 2007 which case he does not deny exists. He does not deny the existence of a decree or the eviction order in that suit. If he had drawn a clear distinction by way of clear evidence in his supporting affidavits, and this court perchance, found that he was on different premises from those that were the subject of HCCC No. 43 of 2007, or that the two plots had no relation at all, this court may have considered the probability of irreparable damage. In the current situation the mere allegation as to difference in size and number of the Plot No. 50 and 53D does not aid the plaintiff at all".

5. At paragraph 3 of that Ruling this court stated as follows:-

"The defendant's defence to this application is contained in his sworn affidavit dated 7/12/2016. He states that he bought two parcels of land from two different persons which were later consolidated and referred to as No. 53D by the Department of Surveys in the year 2010. Part of this consolidated land measuring 39 x 85 feet had been, prior to the consolidation, the subject matter of High Court Civil Suit No. 43 of 2007 between the plaintiff and the defendant herein. He therefore avers that the subject matter of this suit and of HCCC No. 43 of 2007 remains the same albeit with a different reference number which was obtained recently. He attributes the consolidation and the issuance of a new reference number by the Kitale District Surveyor to misinformation by an unnamed source. However, it is very clear that the plaintiff herein is the sole beneficiary of the alleged consolidation, if it occurred".

6. Then at paragraph 6, this court stated as follows:-

"The plaintiff has concentrated all his effort in showing the Plot No. 53D is not the same as Plot No. 50. However, he has not brought any evidence by way of maps or appropriate documentation that can help the court to establish this fact with simplicity for the purposes of the instant application. He avers that he bought Plot No. 53D from one Gabriel Wanyama

Wachosi. This is a fact conveyed to the court by mere implication and by the exhibition of an alleged sale agreement dated 19/1/2010; the statement in paragraph 7 of the supporting affidavit dated 19/10/2016 does not expressly state that he bought the land. The court is left to inference of the sale only. This is unusual for a litigant who is urging the merits of a claim that Plot No. 53D is different from Plot No. 50. He also exhibits a copy of a Clearance Certificate for plot No. 53D purportedly issued by Chepkorok Farm on 27/10/2010”.

7. As I held in that Ruling I am convinced that the land the plaintiff was occupying at the time the order was made was ascertainable then, and still is, despite a new number being given to it. The matters that occurred during the pendency of this litigation should not render the court's order impotent by a mere change of plot number. The applicant's application has no merit in this respect.

8. The only point that may be worth considering is that no Notice to Show Cause was issued under **Order 22 Rule 18** yet the orders sought to be executed had lasted more than one year old since its issuance. I find this to be a genuine ground.

9. In my view, the orders sought herein against the respondent are serious. Regardless of the findings of the court on the conduct of the respondent herein or the propriety of his defence as outlined in this or other rulings, it would not be proper to issue such orders, against the respondent when the proper procedure had not been followed to the letter as required by **Order 22 Rule 18** during the execution process.

10. Even though the court finds that that process could still have issued without notice under **Order 22 Rule 18(2)**, I believe that in a matter which the subsequent conduct of the respondent may lead to contempt proceedings, such a notice is advisable before execution.

11. In any case, the court would have had to move to consider whether issuance of such notice would in any particular case lead to unreasonable delay or defeat the ends of justice, which was not done here.

12. For those reasons I decline to grant the orders sought in the application dated **2/1/2018**. The application is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 25th day of April, 2018.

MWANGI NJOROGE

JUDGE

25/4/2018

Coram:

Before: Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Applicant

N/A for the Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

25/4/2018