



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 4 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 21, 22, 23, 40, 45, 50 AND 64

**AND IN THE MATTER OF BREACH OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS CONTRARY TO
ARTICLE 40, CHAPTER 4 OF THE CONSTITUTION OF KENYA**

**AND IN THE MATTER OF CONTRAVENTION OF RIGHT TO OWN PROPERTY CONTRARY TO ARTICLE 40 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF LOCAL GOVERNMENT ACT

AND

IN THE MATTER OF THE REGISTERED LANDS CHAPTER 300

AND

IN THE MATTER OF LAND ACT NO. 6 OF 2012, LAWS OF KENYA

AND

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012, LAWS OF KENYA

BETWEEN

RICHARD KIPKEMEI LIMO..... PETITIONER

VERSUS

HASSAN KIPKEMBOI NGENY & 23 OTHERS.....RESPONDENTS

RULING

The applicants pray that the firm of M/s Miyienda & Company be given leave to come on record for the Interested Parties under special circumstances that have arisen out of the order of this Honourable Court issued on 30.7.2018 and dated 2.8.2018, Judgment having been made and that this Honourable Court be pleased to make a clarification of Order No. 1 as set out in the Order given on 30.7.2018 in the ruling and as extracted and served upon the Interested Parties who are just tenants of the Petitioner. The Honourable Court be pleased to clarify that the Order as stated or issued only affects the Petitioner and 1st respondent and the Interested Parties should remain on site pending the hearing and determination of the appeal for which stay has been granted by this Honourable court. That a clarification be made by this Honourable Court that the O.C.S., Eldoret Central Police Station has not been directed by the court to evict the Interested Parties. That upon clarification being made, the Interested Parties will have no further interest in the suit and that costs be in the cause.

The application is based on grounds that the order was served upon the Interested Parties who are tenants of the Petitioner. The O.C.S., Eldoret Central Police Station, who served the order told the Interested Parties/Applicants that he gave them only 6 hours to remove their temporary business structures and vacate the premises which directive is not contained in the court order. The directive by the O.C.S. has put the Interested Parties/Applicants in a state of panic and desperation. This Honourable Court needs to clarify this order.

According to the applicants Since this Honourable court has granted stay of execution of the judgment pending the hearing and determination

of the appeal, the order should not affect the Interested parties. After the clarification of the order by this Honourable court, the Interested Parties have no further interest in the suit and this motion will be marked as settled. The order and the Ruling do not disclose the parcel of land affected for the sake of the Interested Parties. The order has the name of one Enock Kibiwott Kiptanui but the same name is not captured in the Ruling of the court.

In the supporting affidavit, the applicants state through Michael Omondi that they seek a clarification of the court order issued on 30.7.2018. They claim to be tenants of the Petitioner, Mr. Richard Kipkemboi Limo and that their Advocate has further advised them that the order served does not disclose the parcel of land/plot affected or which the order is directed at and the Ruling dated 30.7.2018 does also not mention the affected parcel of land or plot.

That given that the O.C.S., Eldoret Central Police Station has given them ultimatum which their Advocate advises them does contradict the court order, they request that the Honourable court interprets the order and gives a clarification just for their benefit.

They have been compelled to file this application so that this Honourable court can assist clarify the order so that they can know their position as tenants.

That with the ultimatum given by the O.C.S., Eldoret Central Police Station, they are worried that their temporary structures and the items invested or stocked therein stand to be damaged if they have to go by the threat given by the O.C.S., which their Advocate has advised them is contrary to the order. That it is for this reason that they have sought the court's intervention in clarifying the order so that they can know the position and their next course of action.

That subject to the clarification to make by this Honourable court, they beseech the court to safeguard their interests as small Juakali entrepreneurs so that they may also be considered and allowed time to look for alternative business premises in case they may be required to vacate the premises herein.

They have categorically instructed their Advocate on record that after the court's clarification of the order, they shall have no further interest in the suit whichever way the clarification goes. They have made this application in good faith just to have their rights under the law and the constitution be also protected so that they are not harassed and their small businesses demolished without any regard to their interests.

The 1st respondent has filed grounds of opposition that the applicants have no locus standi to present this application or seek the orders sought. The application is premised on an illegality and calculated to defeat the orders that were granted by the Environment and Land Court on 30th August, 2018. The court does not have jurisdiction to hear and determine the application on account of the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap. 301. The orders sought and the application has been overtaken by events. The application is incompetent as drawn and an abuse of the court process.

Moreover, the 1st respondent has filed a preliminary objection on the basis that the court is functus officio and lacks jurisdiction to determine the application.

When the matter came for inter-parte hearing, Mr. Rapando stated that the crux of the preliminary objection dated 7.8.2018 is that the application dated 3.8.2018 has not been presented by proper parties. The jurisdiction of the court starts from the existence of proper parties and yet the applicants are not parties. They have never sought for an order of joinder as parties.

Moreover, the 1st respondent argues that litigation should come to an end, however painful it is. This litigation has to come to an end. The applicants should pay costs. There is no authority to plead at on behalf of the applicants. Costs should be made against one Michael Omondi.

Mr. Mijienda submits that the preliminary objection has no substance as counsel has not given any reasons to show that the court is functus officio. The court made a ruling on 30.7.2018 granting a stay of execution of the judgment pending determination of appeal. Parties are dissatisfied with what has come out of the stay. They have a right to move to court at any time to be heard on their request. It is admitted that the interested parties were not parties. However, they are affected by the decision of the court. The 1st and 6th respondents knew of their existence on the ground. They have sought to be allowed to be heard. The applicants do not deserve to be made parties. They should be heard as tenants of the Petitioner. They do not wish to take part in the whole case. They are not questioning the judgment but are claiming as the tenants of the petitioners.

Mrs. Lorna Tibin submits that the position of the 6th respondent is that all parties should be restrained from utilizing the land. The status quo to be maintained.

I have considered the application and do find that the applicants have not sought an order that they be enjoined in the suit and they do not intend to do so. What they seek is an interpretation of the order made on the 2.8.2018. This court finds that the applicants can only be heard in the dispute if they become parties in the suit and cannot be heard unless they become parties. The dispute before court is between their alleged Landlord and the 1st respondent to 6th respondents who appear to be comfortable with the court order restraining all parties from utilizing the suit parcel. The applicants ought to demonstrate to the court that they have an interest in the matter before they are enjoined and heard. The court must be shown that they are proper parties before they are heard. Moreover, litigation in this matter has come to an end in the Environment & Land Court and the remaining proceedings are for execution which the court has stayed pending appeal.

The terms of the stay are that all parties are restrained from utilizing the land. None of the parties have come for a review of the order and therefore, the court is functus officio.

I do uphold the preliminary objection that having made judgment on 9.2.2018 and ruling on stay of execution on 30.7.2018, this court is

functus officio in respect of the dispute that was before the court. The applicants were not parties to the suit and have no intention to be parties in the suit and therefore, have not demonstrated any interest in the matter to enable them be made parties and be heard. The preliminary objection is upheld, the application is dismissed with costs.

Dated, signed and delivered at Eldoret this 8th day of August, 2018.

A.OMBWAYO

JUDGE