



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 321 OF 2012

DANIEL KYALO LUA

WAMBUA LUA - (Suing as Administrators to the

Estate of the late JAMES LUA MAIA).....PLAINTIFFS

VERSUS

RICHARD MUINDIDEFENDANT

RULING

1. There are four (4) Applications before me. The first Application is dated 23rd March, 2018 and is seeking for the following orders:

- a) That the court do issue orders staying the execution of the decree dated the 17/5/2017 together with the Judgment dated 13/3/2015 pending the hearing and determination of the Amended Notice of Motion dated 17/4/2015 [14/4/2015] which had been filed on the 14/4/2015 as a Notice of Motion seeking the setting aside of the Judgment dated the 13/3/2015.***
- b) That the court do order restitution of all the Defendant's possessions and properties already seized by the Auctioneers and the Plaintiffs.***
- c) That the court in the interest of justice do issue directions on the hearing of the Amended Notice of Motion.***
- d) That cost of this Application be provided for.***

2. The orders of temporary stay of execution that were issued by the Court in respect to the Application dated 23rd March, 2018 gave rise to the Application dated 5th April, 2018. In the said Application, the Defendant sought for the following orders;

- a. That this Honourable Court be pleased to summon the OCPD Kilungu and the OCS Kilome Police Station to show cause why they should not be found in contempt of this Honourable Court for disregarding and disobeying express orders of this court issued on 27th March, 2018 and 29th March, 2018.***
- b. That the OCPD Kilungu and OCS Kilome Police Station be held in contempt of this Honourable court express orders of 27th March, 2018 and 29th March, 2018, and the court do proceed to commit them to Civil Jail for periods that the court shall deem fit but not exceeding 6 months.***
- c. That pending the hearing and determination of this Application and the Defendant's applications dated 23/3/2018 and 13/3/2015, the Honourable Court do order a stay of proceedings of Kilungu Criminal Case No.275 of 2018 R-vs-Stella Richard and 13 Others respectively.***
- d. That pending the hearing and determination of this Application and the Defendant's applications dated 23/3/2018 and 13/3/2015, this Honourable Court be pleased to grant orders for the release of the Defendant's properties currently detained by the OCS Kilome Police Station to wit assorted plastic chairs and tents materials all valued at Kshs. 2,000,000/- and motor vehicles KZX 880 Isuzu Lorry and KAS 587 Canter Lorry.***
- e. That this Honourable court be pleased to order the discharge of the accused persons in Criminal Case Numbers 274 and 275 both of 2018 Kilungu.***

3. Concomitant to the Application dated 23rd March, 2018 is the Plaintiffs' Application dated 10th April, 2018 in which they sought for the following orders:

a. That the defendant herein be held in contempt of court for violating the court's Judgment of 13th March, 2015 and decree of 17th May, 2017.

b. That the costs of this application be in the cause.

The Defendant's Case:

4. In the Affidavit sworn on 23rd March, 2018, which is in support of the Application dated 23rd March, 2018, the Defendant deponed that the Plaintiffs, together with their agents, descended on parcel of land known as Makueni/Kilome/2163 to evict him; that he has developed the suit land to the tune of Kshs.55.6 Million and that the eviction was being carried out without any notices having been served on him.

5. It is the Defendant's case that the Notice of Motion dated 17th April, 2015 challenging the Judgment of this court is still pending and that he has many tenants on the suit land who have nowhere to go if the evictions orders were to be implemented. It was the deposition of the Defendant that he was never notified of the Ruling of the court of 2nd March, 2018.

6. In his Supporting Affidavit, the Defendant deponed that the Plaintiffs have never filed an Application for execution; that no warrants of attachment and eviction were ever issued and that because of the eviction order, his dairy cattle had not been fed since the 22nd February, 2018.

7. In his Affidavit in support of the Application dated 5th April, 2018 to have OCPD Kilungu and the OCS of Kilome of Police Station committed to Civil Jail, the Defendant deponed that on 27th March, 2018, the court issued an order staying the execution of its orders for 14 days; that the contemnors refused to accept service of the stay orders and that the contemnors have refused to enforce the express orders of the Court of 29th March, 2018 and 27th March, 2018.

8. According to the Defendant, despite the said court orders, the contemnors arrested his wife and his employees and charged them in Kilungu Senior Resident Magistrates Court in Criminal Case Number 274 of 2018 and that the private property the police are alleging the Defendant's wife and employees trespassed on is the disputed land.

9. In his Supplementary Affidavit, the Defendant deponed that he does not occupy plot No.12 Kilome adjudication section which the Plaintiffs are claiming; that his land is parcel number 2163 which borders parcel No.12, Kilome and that he has no interest in the suit land.

10. According to the Defendant, he has never been served with pleadings in this matter and that he is seeking to set aside the judgment of this court vide his Notice of Motion dated 17th April, 2015. According to the Defendant, the 2nd Plaintiff does not have the requisite *locus standi* to file this suit.

The Plaintiffs' Case:

11. In response to the allegations by the Defendant in his Affidavits, the 1st Plaintiff deponed that the Plaintiffs' claim is undefended; that the Defendant has taken the court in circles ever since judgment was pronounced on 13th March, 2015 and that the eviction that was carried out on 23rd March, 2018 was pursuant to the decree of the court.

12. It is the Plaintiffs' case that the Defendant has always been aware of the existence of the judgment and that the land from which the Defendant was evicted is the same land that the Plaintiffs are claiming.

13. According to the Plaintiffs, they applied to execute the decree of the court and they were allowed to do so by the court; that the decree was executed on 23rd March, 2018 at 5am and that even after the Plaintiffs took over the suit land, the Defendant trespassed on the land on 4th April, 2018 and carried away the property that was on the land.

14. The 2nd Plaintiff finally deponed that his father was always in possession of parcel number 12 Kilome Adjudication Section and that the police cannot be compelled to enforce orders that have already been overtaken by events.

15. I have considered the submissions that were filed by both parties, together with their bundle of authorities.

16. This suit was commenced by way of a Plaint dated 3rd August, 2012. In the Plaint, the Plaintiffs averred that in the year 2007, the Defendant unlawfully entered the suit land and commenced acts of trespass, waste and destruction. The Plaintiffs sought for an order of eviction of the Defendant from parcel of land number 12 Kilome Land Adjudication Section. The record shows that the suit was never defended by the Defendant. On 11th April, 2014, the court heard the Plaintiffs' testimony and delivered its Judgment in favour of the Plaintiffs on 13th March, 2015, including the prayer of eviction of the Defendant.

17. After the delivery of the Judgment of 13th March, 2015, the Defendant filed an Application dated 14th April, 2015 seeking to set aside the Judgment of the Court. The Application is premised on the ground that he was never served with Summons to Enter Appearance. The Application dated 13th March, 2015 was never fixed for hearing. In the meantime, the Plaintiffs filed an Application dated 24th September,

2015 seeking for the transfer of the file from Machakos to Nairobi, which Application was allowed by the Court on 28th September, 2015.

18. However, on 23rd January, 2017, the file was again transferred to the ELC Machakos. Indeed, this court takes judicial notice that between August, 2015 and December, 2016, there was no ELC Judge in Machakos. That is the reason why the file was transferred from Machakos to Nairobi in the year 2015 and then re-transferred to Machakos on 23rd January, 2017.

19. Instead of prosecuting the Application dated 14th April, 2015 which was pending, the Defendant filed another Application dated 14th February, 2017. In the said Application, the Defendant sought for a declaration that the entire suit was a nullity for want of jurisdiction. The Application was dismissed by this Court on 2nd March, 2018.

20. After the dismissal of the Application dated 14th February, 2017, the Plaintiffs sought for an enforcement of the Judgment vide an Application dated 17th May, 2017. After hearing the said Application, the court allowed the OCS Kilome Police Station and the OCPD Kilungu to enforce the decree and final Judgment of the court by providing security and police protection during the enforcement of the decree. It is the Plaintiffs' position that by the time the Notice of Motion dated 23rd March, 2018 was filed and heard ex-parte on 27th March, 2018, the orders of the Court had already been executed and the Defendant had been evicted from the suit land.

21. Indeed, the fact that the order of the court for the eviction of the Defendant had already been undertaken by the police is confirmed the Defendant's second application dated 28th March, 2018 which was allowed ex-parte. After hearing the Defendant's Application dated 28th March, 2018, the Court directed the OCPD and OCS Kilome Police Station to remove the people who had already taken possession of the Defendant's premises. However, it was not until 11th April, 2018 that the court gave a specific order directing the Plaintiffs and their agents to give to the Defendant possession of the suit land.

22. Considering that by the time the Defendants obtained the ex-parte orders staying the Orders of eviction, the impugned eviction had already occurred, I do not see how the police can be held in contempt of the orders of the court. Indeed, when the OCPD of Kilungu appeared before this court on the 11th April, 2018, he informed the court that they had only provided security during the execution of the court order and that the police were not in occupation of the suit premises. Consequently, and considering the initial orders that the police were relying on, I do not see how they can be said to have been in contempt of the orders of the court.

23. If indeed the Defendant's wife and employees were charged with the offence of stealing as shown in the charge sheet, then, the issue of whether they were lawfully charged or not can only be handled by the trial court and not this court. Suffice to say that there was a period that the Defendant and his employees had been evicted from the suit land vide a valid court order.

24. The issue of whether the Defendant is in contempt of the orders of the court and the judgment has also not been proved by the Plaintiffs. There is no evidence before me to show that the Defendant broke into the suit properties on 4th April, 2018 as alleged by the Plaintiffs. In any event, by 4th April, 2018, the order of eviction of the Defendant had already been stayed by this court.

25. In the circumstances, and for the reasons I have given above, I dismiss the two Applications for contempt dated 5th April, 2018 and 10th April, 2018 with no order as to costs.

26. Considering that there is a pending Application by the Defendant dated 14th April, 2015 to set aside the judgment of this court, and the court having directed that the Defendant should be put in possession of the suit land, the judgment of this court should be stayed pending the hearing of that Application.

27. I say so because the Defendant is not only in possession of the suit land, but has also developed the land substantially. It is only therefore fair, and in the interest of justice that the status quo is maintained pending the hearing of the said Application. Indeed, the issue of whether the Defendant has a good Defence to the Plaintiffs' claim, and whether he was served with the Summons to Enter Appearance or not, can only be determined by the Court after hearing the Application dated 17th April, 2015.

28. For the reasons I have given above, I allow the Defendants Application dated 23rd March, 2018 in the following terms:

a) An order staying the execution of the order dated 17th May, 2017 together with the judgment dated 13th March, 2015 be and is hereby issued pending the hearing and determination of the Notice of Motion dated 14th April, 2015.

b) Any possessions and properties already seized by the Plaintiffs' Auctioneers to be returned to the Defendant upon payment of the auctioneers charges by the Defendant.

c) Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16th DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE