



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 94 OF 2016**

**BETWEEN**

**BRUCE JOSEPH BOCKLE ..... APPELLANT**

**AND**

**COQUERO LIMITED ..... RESPONDENT**

*(An appeal from the ruling of the High Court of Kenya at Mombasa (Omollo, J.) dated 8<sup>th</sup> December, 2015*

**in**

**E.L.C No. 59 of 2006)**

**\*\*\*\*\***

**JUDGMENT OF COURT**

1. Before us is an appeal challenging the exercise of the learned Judge's (Omollo, J) discretion under **Section 94** of the **Civil Procedure Act**. As such, subject to the requirement that discretionary power must be exercised judiciously, this Court will be slow to interfere with the exercise of discretion by a Judge. In **United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A 898** Madan J.A (as he then was) enunciated the principle as follows:

***“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”***

2. The pertinent facts of this appeal are that the appellant's mother, Tima Joseph Thaddle Bockle (Tima) was the registered owner of a parcel of land described as LR No. 24 Section IV (original title) measuring 24 acres. Pursuant to a power of attorney she had donated to her husband, Joseph Thaddle Bockle (Joseph), Joseph sold the parcel to one Abdalla Zubedi (Abdalla). As would be expected, Abdalla applied

for consent for transfer of the title from the Kilifi Land Control Board which was rejected on account of an objection by Tima. He then lodged an appeal at the Coast Province Land Control Appeals Board which granted the requisite consent on condition that a portion of 4 acres be allotted to Tima. This time round, Tima lodged an appeal at the Central Land Control Board which was dismissed and the decision of the Coast Province Appeals Board was upheld. It is on that basis that the parcel was subdivided and L.R No. 491 (suit property) was registered in favour of Abdalla.

3. Subsequently, Abdalla sold the suit property to the respondent. It appears that efforts by the respondent to construct a perimeter wall were thwarted by the respondent. This instigated the respondent to file suit being H.C.C.C No. 59 of 2006 claiming that the appellant was a trespasser and seeking several orders. By a judgment dated 27<sup>th</sup> February, 2013 the trial court issued the following orders: -

***a. A mandatory injunction is hereby granted requiring the defendant (appellant herein) to forthwith pull down and remove from the said land the said construction and remove all his property of whatever nature as well as his workmen, servants or agents from the plaintiff's said land.***

***b. An injunction is hereby granted restraining the defendant by himself his servants or agents or otherwise howsoever from preventing the plaintiff from erecting the boundary wall on the said land and from trespassing onto the plaintiff's said land.***

***c. An injunction is hereby granted restraining the defendant by himself, his servants or his agents or otherwise howsoever from remaining on or continuing in occupation of the said land.***

***d. The defendant is given 60 days from the date of this decision to comply with the orders of this court failing which the plaintiff shall be at liberty to apply for its enforcement.***

4. Aggrieved by the foregoing, the appellant filed an appeal before this Court being Civil Appeal No. 41 of 2013. The Court of Appeal, differently constituted, dismissed the same. Unrelenting, the appellant filed an application for review of that decision by a five Judge bench of this Court and a Constitutional Petition No. 28 of 2014.

5. Be that as it may, the respondent filed an application dated 8<sup>th</sup> April, 2015 before the trial court under the provisions of **Section 94** of the **Civil Procedure Act** seeking *inter alia*:

***a. The plaintiff be allowed to execute the decree dated 25<sup>th</sup> September, 2013 against the defendant before taxation of costs.***

***b. The defendant be evicted from the suit property in enforcement of the judgment delivered on 14<sup>th</sup> March, 2013.***

***c. The County Commander, County Government of Kilifi and the area District Officer to supervise in the enforcement of the orders of this court and to maintain law and order.***

6. The application was premised on the grounds that the appellant refused/neglected to comply with the judgment of the High Court and went ahead to invite squatters into the suit property with the aim of frustrating the enforcement of the judgment. The respondent continued to suffer immense economic losses due the hindrance in utilizing the suit property. It was highly likely that the taxation proceedings for ascertaining costs may take a considerable period of time and lastly, that no prejudice would be occasioned to the appellant if the orders sought were granted.

7. In opposing the application, the appellant deposed that execution ought to await the determination of the pending application for review before this Court and the Constitutional Petition. Besides, he had developed the suit property extensively and had sentimental attachment to the same.

8. The learned Judge (Omollo, J.) in her considered ruling dated 8<sup>th</sup> December, 2015 allowed the respondent's application and issued the following orders:

***a. The plaintiff be and is hereby allowed to execute the decree dated 25<sup>th</sup> September, 2013 against the defendant before taxation of costs.***

***b. The officer in charge of the nearest police station to ensure law and order is maintained during the eviction exercise.***

9. It is the foregoing decision that provoked the appeal before us which is based on the grounds that the learned Judge erred both in law and fact by-

***i. Issuing an order of eviction which had not been sought in the plaint thus acting without jurisdiction.***

***ii. Issuing orders which were not in conformity with the judgment dated 14<sup>th</sup> March, 2013.***

***iii. Authorizing eviction with the assistance of the police without any justification.***

***iv. Failing to appreciate that eviction would amount to commission of serious acts of illegalities since survey on the ground had not taken place to identify the suit property or where the appellant's parents' graves were.***

10. The appeal was disposed of by written submissions as well as oral highlights by the parties' counsel. According to the appellant, the learned Judge in granting the eviction order not only acted without jurisdiction but also reviewed the judgment of the trial court contrary to the law. In buttressing that line of argument this Court's decision in ***Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR*** was cited. Elaborating further, Mr. Gikandi, learned counsel for the appellant, submitted that the injunctive orders did not direct the appellant to vacate from any known property. The judgment in question never identified the property hence the issuance of warrants of eviction in respect of the suit property was without basis. He argued that there was no justification for the involvement of the police in the eviction. The same was drastic and draconian.

11. More importantly, the trial court had made a finding that the subdivision and resulting title over the suit property was obtained irregularly. Therefore, eviction could only take place after a fresh subdivision had been done to ascertain the suit property. In that regard, the appellant relied on ***Mistry Amar Singh vs. Kulubya [1963] E.A*** wherein the East African Court of Appeal expressed: -

***“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense and expresses clear and well recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the attention of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the plaintiff has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”***

Furthermore, the exact location of the appellant's parents' graves could only be ascertained after proper subdivision was done.

12. The respondent contended that it was not in dispute that it had obtained an order for delivery of possession of suit property. Equally, it was not in dispute that the appellant had failed to deliver the said possession. As per the judgment dated 14<sup>th</sup> March, 2013, the respondent was at liberty to apply for enforcement of the same in the event the appellant failed to comply. Ms. Ngigi argued that the enforcement of the judgment in question could only be through delivery of suit property which entailed

eviction of the appellant who had refused to vacate. The same was in line with **Order 22 Rule 29** of the **Civil Procedure Rules, 2010** which provides in part,

***“Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or such person as he may appoint to receive delivery on his behalf, and, if necessary, removing any person bound by the decree who refuses to vacate the property...”****Emphasis added.*

Consequently, the learned Judge had jurisdiction to issue the eviction order.

13. Justifying the presence of the police, Ms. Ngigi submitted that the appellant had refused to vacate the suit property and his conduct is what necessitated his forceful removal. In addition, the appellant did not deny that he had brought squatters into the suit property. Nevertheless, the mere presence of police didn't by itself amount to using them to execute civil processes. Their presence was principally to maintain law and order as required under **Section 24** of the **National Police Service Act**.

14. As far as the issues of legality of the title, subdivision and the grave sites were concerned, Ms. Ngigi contended that these issues were never raised before the learned Judge; that these are new issues and ought not to be entertained at this time. Reliance was placed on this Court's decision in **Openda vs. Ahn [1983] KLR**. In any event the issues of survey, subdivision and illegalities were conclusively dealt with by the trial court and this Court. She urged us to dismiss the appeal.

15. We have considered the record, submissions by counsel and the law. **Section 94** of the **Civil Procedure Act** empowers a court to allow execution of a decree before costs are ascertained by taxation. The court allows such execution in circumstances it considers just. In this case, the learned Judge found, rightly so, that the trial court as well as this Court had conclusively determined that the respondent had indefeasible title over the suit property hence there was no reason to deny execution of the orders issued in the judgment and expressed in the resultant decree dated 25<sup>th</sup> September, 2013.

16. We agree with Ms. Ngigi that issues regarding survey, subdivision and illegality of the title to the suit property were dealt with by the trial court and this Court in Civil Appeal No. 41 of 2013. Both Courts found that the respondent was an innocent purchaser for value without notice and the appellant had not demonstrated any irregularity or fraud on the part of the respondent or in the title to the suit property. As a result, these issues could not be entertained by the learned Judge or this Court in this current appeal. To do so, would be tantamount to sitting on appeal of those decisions of which neither the learned Judge nor this Court has jurisdiction.

17. In our view, the pending review application before this Court and the Constitutional Petition did not bar execution of the decree. In point of fact, they went to confirm that ascertaining of costs may take time warranting the execution sought. In **Mercedes Sanchez Rau Tussel vs. Samken Ltd, Abercrombie & 2 others [2002] eKLR**, Kuloba, J., as he then was, expressed;17.

***“... aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review to apportion liability amongst judgment-debtors, no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment.***

***Indeed, the very fact that the judgment-debtor is still pursuing appeals or reviews, would prevent the preparation of a reasonable bill of costs; for, until those challenges are pursued to conclusion, a bill of costs when fights are still going on at whatever level of the courts might only present a very inaccurate and deceptive picture; and might result in unnecessary and expensive piecemeal taxations – one on the judgment, and another after appeal or review. That is inconvenient and unjust. Unless the later proceedings are***

***so intertwined with the awarded judgment award that the whole thing must be done only once, there is no good reason to hold up a party's right to an ascertainable part."***

18. Looking at the orders issued in the judgment dated 14<sup>th</sup> March, 2013 and in particular the mandatory injunction, it is clear to us that they required the appellant to give vacant possession of the suit property to the respondent. Enforcement of such an order could only be by way of eviction as stipulated under **Order 22 Rule 29** of the **Civil Procedure Rules**. Therefore, we find that the learned Judge correctly issued an order of eviction of the respondent from the suit property.

19. Last but not least, ideally, police officers ought not to be used in enforcement of civil processes. However, in this case the respondent demonstrated that the appellant had refused to comply with the court orders; he had at one point hindered respondent from erecting a perimeter wall and also that he had put in squatters in the suit property. Taking into account those circumstances, we see nothing wrong with the learned Judge directing the police to maintain law and order during the eviction process. This is a clear case where police involvement and the observance of law and order is necessary. The learned Judge was correct in making such orders.

20. Based on the foregoing, we see no reason to interfere with the learned Judge's exercise of discretion. In the end, the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered at Mombasa this 21<sup>st</sup> day of September, 2017**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K.KOOME**

... ..

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**