



Waswa v Samoei & another; Kenya Commerical Bank (Interested Party) (Environment & Land Case 158 of 2017) [2023] KEELC 547 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEELC 547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 158 OF 2017
FO NYAGAKA, J
JANUARY 30, 2023**

BETWEEN

ROBERT JUMA WASWA PLAINTIFF

AND

KIMAIYO ARAP SAMOEI 1ST DEFENDANT

EMMANUEL SAMOEI KIPCHUMBA 2ND DEFENDANT

AND

KENYA COMMERICAL BANK INTERESTED PARTY

RULING

1. I have considered the sentiments by both counsel present. I note that indeed the Application herein was served on November 15, 2022. There is an Affidavit of Service showing that the Directions of this Court were received by both the firm of Arusei, Chepchumba & Co. Advocates and the Kenya Commercial Bank, (K.C.B), Kitale Branch, on the same date. The affidavit of Service was sworn on November 20, 2022 and filed on November 22, 2022.
2. Again on November 22, 2022 the plaintiff's Advocate and Mr. Arusei for the respondent appeared before me and took today's date by consent. Thereafter, the plaintiff/applicant once again served the Kenya Commercial Bank, Kitale Branch with a hearing notice for today. The Hearing Notice is attached to the affidavit of service sworn by one Raphael Nyongesa on November 24, 2022 and filed in court on November 26, 2022. The Notice is stamped by the Branch Manager of K.C.B, Kitale. Thus, I am satisfied as to the service of the Application before me and today's hearing.
3. An Application has been made for adjournment. The reasons given are not sufficient to warrant the instant Application being adjourned. While we appreciate that family emergencies do occur from time, the one that befell the Respondent's counsel is not stated so as to make the Court appreciate its nature.



4. Additionally, Mr. Bungei who is engaged in this matter for the respondent has been appearing before this court on a number of other matters subsequent to the November 22, 2022 when this matter was last in Court and he took today's date by consent. It is not explained why for over two (2) months he cannot and could not file a response to the instant Application whose date he took by consent. Needless to say, that the matter is his client's and not against the Advocate. There is no explanation whatsoever as to why the respondents who have had two (2) months and over could not respond to the Application.
5. As argued by counsel for the plaintiff, the instant Application for adjournment is nothing but sheer delaying tactic. The respondents knew well of the decree herein but proceeded to charge the property, the subject of the suit to the Bank, K.C.B. Then after that they began taking this court round in circles with delaying tactics when the plaintiff began executing the decree against their person.
6. In the circumstances, I will allow the Application dated November 10, 2022 because it is not opposed by way of Grounds of opposition, preliminary objection or replying affidavit. I will allow it on the following terms. But before I list them, I note that section 5 of the Judicature Act had been repealed by the Contempt Act, No. 46 of 2016. That Act was declared unconstitutional. Thus, the provision still stands and is in our laws. About Order 40 Rule 3(1) of the Civil Procedure Rules, the provision is only relevant to injunctions, not the case herein.
 - (i) Prayer No. (2) thereof is allowed, to the effect that the 2nd defendant herein is to be committed to civil jail and/or his goods or items be seized in satisfaction of the Orders of this court, to be given when he is arrested and arraigned in court.
 - (ii) Prayer No. (3) is granted in the sense that Kenya Commercial Bank is hereby enjoined as an interested party herein post judgment for purposes only of either contesting or consenting to an Application to be filed against the parties herein together with the said Interested Party for purposes of determining whether or not there should be a declaration that the charging of title No. Kitale Municipality Block 1/Lessos/1558 to Kenya Commercial Bank after the decree was herein illegal, null and void.
 - (iii) That Prayer No. (4) of the Application dated 10/11/2022 is struck out as it was brought against a party which had not been enjoined in the proceedings herein and this court cannot deny them their right to be heard by granting the prayer *ex parte* or without service thereof after enjoinderment.
 - (iv) The costs of this Application shall be to the applicant.
 - (v) The Applicant to file an Application as directed herein.
 - (vi) This matter shall be mentioned on February 27, 2023 for further orders.

RULING DATED, SIGNED AND DELIVERED AT KITALE THIS 30TH DAY OF JANUARY, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE

