



**Kangethe ((Suing as the legal representative of Lucy Njeri Ng'ang'a – (Deceased)) v Mwangi
(Environment & Land Case 29 of 2019) [2023] KEELC 16616 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16616 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 29 OF 2019**

**YM ANGIMA, J
MARCH 28, 2023**

BETWEEN

**JOSEPH MWANGI KANGETHE PLAINTIFF
(SUING AS THE LEGAL REPRESENTATIVE OF LUCY NJERI NG'ANG'A –
(DECEASED)**

AND

ESTHER WANJIRU MWANGI DEFENDANT

RULING

A. Introduction

1. On June 25, 2020 the Hon Justice MC Oundo entered judgment in favour of the Plaintiff by, *inter alia*, cancelling the Defendant's title to the suit property and directing that the same be registered in the name of the Plaintiff to hold it for himself and in trust for members of his immediate family.
2. The Defendant vide a notice of motion dated July 15, 2022 sought the setting aside of the *ex parte* judgment of June 25, 2020 and leave to defend the suit. The said application was heard by this court and dismissed vide a ruling dated March 2, 2023 for lack of merit.

B. The Plaintiff's Instant Application

3. Upon dismissal of the Defendant's said application the court directed that the Plaintiff's notice of motion dated March 23, 2022 be canvassed through written submissions. The said application was based upon Section 1A, 1B, 3A & 34 of the *Civil Procedure Act* (cap 21), order 22 rule 29 & order 51 rule 1 of the *Civil Procedure Rules, 2010*, and all other enabling provisions of the law seeking the following orders:
 - a. That the Defendant/Respondent together with members of her family, servants, agents or any other person claiming through her be forcibly evicted by M/S Tango Auctioneers from LR No



Nyandarua/Kiriita Mairo-Inya Block 2 (Ngaindeithia)/653 which was decreed to the Plaintiff/Applicant.

- b. That the O.C.S. Mairo-Inya Police Station do provide security during the eviction exercise.
 - c. That costs of the eviction and this application be borne by the Defendant/Respondent.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff, Samuel Mwangi Kangethe, on March 23, 2022. It was contended that although the Defendant was not in occupation of the suit property at the time of delivery of judgment, she subsequently invaded the suit property and forcibly evicted the Plaintiff and his family members therefrom using hired goons with a view to defeating the decree in his favour. The Plaintiff further contended that although he was now the registered proprietor of the suit property, he was unable to utilize and occupy the same hence the application.
5. The Plaintiff further stated that upon taking over the suit property the Defendant occupied his houses and also erected additional structures thereon. The Defendant is also said to have demolished his toilet and destroyed his crops upon taking over occupation of the suit property.

C. The Defendant's Response

6. The Defendant filed a fairly lengthy replying affidavit sworn on March 9, 2023 in opposition to the application. She gave a detailed history of the suit property in a bid to demonstrate that it was she and not the Plaintiff or his late mother who was entitled to ownership of the suit property. She asserted that the suit property was originally owned by her late husband before it was transferred to her. The rest of the contents of the affidavit related to matters which were raised in her application for setting aside the *ex parte* judgment which were determined by the court vide its ruling of March 2, 2023.
7. It is noteworthy that the Defendant did not in her replying affidavit dispute the Plaintiff's allegation that she invaded the suit property and forcibly evicted him and his family members using hired goons. She did not dispute the Plaintiff's allegation that she destroyed the Plaintiff's toilet and crops upon forcibly taking possession of the suit property without the sanction of a court order. It is also noteworthy that the Defendant did not exhibit a copy of a certificate of confirmation of grant for the estate of her late husband which would have enabled her to lawfully obtain registration of the suit property.

D. Directions on Submissions

8. The record shows that on March 2, 2022 the parties were granted timelines within which to file and exchange their respective submissions. The record, however, shows, that none of the parties had filed submissions by the time of preparation of the ruling.

E. The issues for determination

9. The court has considered the Plaintiff's notice of motion dated March 23, 2022, the Defendant's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
- a. Whether the Defendant has made out a case for the grant of the orders sought.
 - b. Who shall bear costs of the application.



F. Analysis and Determination

a. Whether the Defendant has made out a case for the grant of the orders sought

10. The court has considered the material on record on this issue. The Plaintiff in this suit is seeking recovery of the suit property from the Defendant who reportedly forcibly took possession thereof using hired goons after judgment and without the sanction of a court order. As indicated before, the Defendant did not deny in her replying affidavit that she invaded the suit property using hired goons and forcibly evicted the Plaintiff and his family members.
11. There is no doubt from the material on record that the decree passed in favour of the Plaintiff is still in force, the Defendant's application for setting aside the decree having been dismissed. There is no indication on record of the Defendant having appealed against the dismissal order of March 2, 2023. At least the Defendant did not allege in her replying affidavit that she had appealed. Moreover, there is no indication on record of the Defendant having obtained an order staying her eviction from the suit property. In the premises, the court finds no legitimate reason why the decree of the court should not be given its full effect. Accordingly, the court is satisfied that the Plaintiff has made out a case for the orders sought in the application.

b. Who shall bear costs of the application

12. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful party should be deprived of costs of the application. Consequently, the Plaintiff shall be awarded costs of the application.

G. Conclusion and Disposal Order

13. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated March 23, 2022. Accordingly, the said application is hereby allowed in the following terms:
 - a. An order be and is hereby issued for the eviction of the Defendant, Esther Wanjiru Mwangi, together with members of her family, servants, agents or any other persons claiming through her from Title No. Nyandarua/Kiriita Mairo-Inya Block 2 (Ngai Ndeithia)/653.
 - b. That the said eviction should be undertaken by M/S Tango Auctioneers and the Defendant shall bear the costs of the eviction.
 - c. The OCS Mairo-Inya Police Station shall provide security to the auctioneer during the eviction.
 - d. The Plaintiff is hereby awarded costs of the application.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU THIS 28TH DAY OF MARCH, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Ndegwa for the Plaintiff

Mr. Wambugu for the Defendant



C/A - Carol

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Y. M. ANGIMA

JUDGE

