



REPUBLIC OF KENYA



Kiptanui v Mwaita (Civil Case 21 of 2001) [2023] KEHC 247 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 21 OF 2001
HK CHEMITEI, J
JANUARY 26, 2023**

BETWEEN

ABRAHAM KIPSANG KIPTANUI APPLICANT

AND

HILLARY KIPKORIR MWAITA RESPONDENT

RULING

1. The Notice of Motion by the applicant dated July 29, 2022 prays for the following orders;
 - (a) That the administrators of the estate of the plaintiff (now deceased) Mary Jeruto Kiptanui and Patrick Kiptanui be deemed to have the locus standi to prosecute this application and or for the enforcement of this courts decree given on June 21, 2007.
 - (b) That subsequently the administrators of the estate of the plaintiff be accorded police assistance by the OCPD Olenguruone police station in order to evict and or remove the 1st defendant whether in person representative and or agent from the suit premises in compliance with the decree dated June 21, 2007.
 - (c) That the 1st defendant be cited for contempt for disobeying the decree of this honourable court dated June 21, 2007.
2. The applicant prayed for costs as well.
3. The application is based on the grounds on the face of the application and the sworn affidavit of Patrick Kiptanui sworn on the same date.
4. The said affidavit has raised clear and straight forward issues. The deceased had sued the respondent for among others orders that he be declared the sole owner of land parcel number Olenguruone / Kiptagich /184 and had sought his eviction upon the court finding in his favour. The decree attached to the affidavit issued on 21st June 2007 show as much and the respondent was permanently stopped from stepping on the suit parcel of land.



5. The applicant demonstrated that his father has since died as per the certificate of death and he has obtained limited letters of administration.
6. The applicant averred that his family has taken possession of the suit land and has done extensive developments including planting of tea and rearing of livestock. That the respondent without any colour of right has dumped building materials and is intending to trespass further contrary to the existing decree from this court.
7. The applicant went further to demonstrate that efforts to appeal against the said decree have been fruitless as the Court of Appeal struck out the Notice of Appeal.
8. In the premises, the applicant seeks the orders of this court to enforce the decree. That the only remaining issues was the changes in the land registry which he has been unable to undertake as there is a blanket order by the African Court dealing with Mau forest zone.
9. The respondent vide his replying affidavits sworn on September 22, 2022 and a further affidavit sworn on November 5, 2022 has opposed the application. He argued that the application is time barred and runs contrary to the provisions of section 4(4) of the *Limitation of Action Act*.
10. He went on to aver that he has been in constant occupation of the suit land despite the decree in favour of the applicants which according to him, they slept on it. He went on to attach the copies of tea accounts from Kiptagich tea factory which according to him it emanated from the suit parcel of land.
11. He prayed that the application was unmeritorious as nothing had prevented the applicants from executing the decree.
12. The court directed the parties to file written submissions which they have complied. The court need not produce them here as they are generally gravitating around the contents of their respective averments in the affidavits. Suffice to state that the court has also perused the cited authorities.
13. The first issue to determine is the validity of the decree herein and the ensuing appeal if any arising therefrom. This court as well as the parties have no hesitation in acknowledging the validity of the same.
14. Further it is evident that the Court of Appeal struck out the Notice of Appeal on March 14, 2016 and what this means is that there is no appeal pending at the moment.
15. Although it is true that a decree may not be executed after the lapse of 12 years as clearly spelt out under the provisions of Section 4(4) of the *Limitations of Action Act*, in this case I do not think the respondent should benefit from the same.
16. The applicant has demonstrated that he has been in occupation of the land vide the undisputed photographs in the supporting affidavits. There is clear homestead, tea and livestock which have not been denied by the respondent.
17. Secondly the respondent has not denied that the building materials which have been dumped next to the house does not belong to him as deponed by the applicants.
18. The fact that the respondent may be enjoying the tea from the parcel of land does not permit him to frustrate the decree of this court. As a matter of fact, from the tenor of his affidavit, all that the respondent is stating is that until the decree is executed he cannot obey the same. He is fully conversant with the fact that there was no stay of execution and in my view he is simply adamant and daring the law.



19. For the above reasons, the deceased family to the extent that the decree has never been overturned must enjoy the fruits of the judgement. They ought to use the land unhindered until the issue of the Mau forest complex is resolved by the government and to the extent that the decree permits.
20. This Court finds the application merited and hereby allows it in terms of prayers (a) and (b) thereof. The applicants shall have the costs of this application.

Dated signed and delivered via video link at Nakuru this 26th day of January 2023.

H. K. CHEMITEI

JUDGE

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