



REPUBLIC OF KENYA



**Kamau v Ngugi (Environment & Land Case 536 of 2017)
[2023] KEELC 17948 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17948 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 536 OF 2017**

AA OMOLLO, J

APRIL 20, 2023

BETWEEN

FREDRICK MUNGA KAMAU PLAINTIFF

AND

PATRICK KINYUA NGUGI DEFENDANT

RULING

1. The plaintiff file the application dated October 14, 2022 under the provisions of order 40 of the [Civil Procedure Rules](#) and section 3A and 63 of the [Civil Procedure Act](#). The Applicant sought for the following orders;
 - a. Spent
 - b. That this court does issue an order for eviction against the defendant and his agents, employees and servants from the property Plot D2-322 Kayole County of Nairobi
 - c. That an order be issued directed at the OCPD and OCS Kayole Police Station to facilitate in the enforcement of the orders
 - d. The costs of the application be provided for.
2. The application is supported by the grounds inter alia;
 - i. That judgement was entered by consent on August 5, 2018 and the Defendant has continued to occupy, utilize, rent and or interfere with the suit property.
 - ii. That a valuation report has already been conducted as agreed by the parties by consent and filed in Court.
3. The Applicant also swore an affidavit in support of the application which affidavit reiterated the facts stated on the face of the application.



4. The Defendant opposed the application by filing grounds and a replying affidavit. The grounds stated thus;
 - a. That the Respondent is not a trespasser on the suit property and has an unfettered right to stay upon the suit property as a bona fide joint owner thereof.
 - b. That the Plaintiff/Applicant has not approached the Court with clean hands as he obtained the valuation herein dated October 24, 2022 without consulting with the Respondent on the appointment of the Valuer and moreover, the valuation report was never brought to the Respondent's attention before the filing of the current application and accordingly, the Applicant has not sought the Respondent's acceptance of the value assigned to the property or otherwise or made any attempt to negotiate or agree with the Respondent on the amount that would be reimbursable to him being 50% of the Undeveloped value of the suit property.
 - c. That the Application for eviction is premature and can only be brought upon the Parties agreeing on the value of the Applicant's 50% share, reimbursement terms of the agreed value and if the Respondent default the fulfillment of the agreed terms and a buyer is identified jointly by the Parties.
 - d. That the Judgment by Consent Order signed by the Respondent and the Applicant's Lawyers on 5th August 2018 and filed in Court on August 6, 2018 and the Decree obtained pursuant thereto be varied OR set aside on account of fraudulent mis-representation and Parties be allowed to prosecute the suit and have the Court determine it on merit.
5. In his replying affidavit, the Defendant deposed that he is a co-owner of plot number D2-322-Kayole. He acknowledged there was a consent judgement but deposed he signed the consent on the understanding inter alia that the purpose was to stay the formal proceedings and give parties a chance to amicably settle the matter. Secondly, that the parties were to agree on a joint valuer to carry out the valuation of the suit property. That the valuation obtained by the Applicant herein dated October 24, 2022 was obtained the without consulting him on the appointment of the Valuer and it was never brought to his attention before the filing of the curent application.
6. He averred that the Applicant has not sought his acceptance of the value assigned to the property or otherwise or made any attempt to negotiate or agree on the amount that would be reimbursable to him as 50% of the Undeveloped value of the suit property. Accordingly, the Application for eviction is premature and can only be brought upon the Parties agreeing on the value of the Applicant's 50% share, reimbursement terms of the agreed value and if he defaults, the fulfillment of the agreed terms and a buyer is identified jointly by the Parties.
7. The parties filed their respective submissions which I have read and considered. The consent judgement at paragraph 3 read thus; "The Defendant who is in possession of the subject matter of this suit shall vacate the said premises within 90 days from today's date unless he chooses to purchase the Plaintiff's share"
8. The Defendant argues that this consent was obtained by fraudulent misrepresentation of facts and went on to inform this court that he had filed an application to review the said consent. That application was dismissed for non-attendance on March 14, 2022. Subsequent to the dismissal, the Defendant has not moved the court to set aside the impugned consent. The issues submitted on that the Defendant was never accorded an opportunity to seek independent legal advice on the proposed consent judgement is neither here nor there as the application before me is for execution and not setting aside of the consent decree.



9. The Defendant further submitted that the order of eviction sought cannot issue because as joint owners, none of them have superior right than the other in the jointly owned property. He cited the case of *Willington Njomo Gichanga v Lucy Wamaitba Kiarie and others* (2015) eKLR which quoted *Isabel Chelangat v Samuel Tiro Rotich and 5 others* (2012) eKLR on what constitutes joint ownership. There is no dispute that the suit property is jointly owned as captured in paragraph one of the decree thus; the suit property D2-322-Kayole is jointly owned by the plaintiff and the defendant.
10. The consent judgement was specific that the Defendant was required to vacate the subject matter within 90 days from July 25, 2018 unless he purchased the Plaintiff's share. The Defendant argues that evicting him will cause him irreparable loss as he developed the property single-handedly with minimal financial contribution from the Plaintiff and remains what he considers his home. First, this court has not been invited to review and so I cannot review the consent in terms of determining who contributed more or less to develop the suit property. Secondly, the consent granted the Defendant an option to stay on the property. All he is required to do is buy-off the Plaintiff's share. The Plaintiff deposed that he already filed a valuation report.
11. The Defendant also filed a valuation report prepared by Dantu Valuers which returned a value for the property without the developments at Kshs 1500000. The Defendant complained that the report filed by Plaintiff was undertaken without his consultation and because there was no consultation, the present application is premature. The Defendant however does not inform this court what steps he took in making an offer to the Plaintiff to buy off the 50%. Neither has he deposed to making any offer in the replying affidavit and grounds of opposition filed. The inference drawn is that despite the Defendant acknowledging the Plaintiff's share in the suit property, he still wants to continue enjoying the benefits alone. Otherwise, if indeed he did not understand the terms of the consent decree, nothing stopped him from taking steps to review and or set it aside.
12. In conclusion, I find that the application dated October 14, 2022 is not premature and it is merited. The same is granted as prayed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023

A. OMOLLO

JUDGE

