



REPUBLIC OF KENYA



Ngeta & 3 others v Mutuku & 4 others (Environment and Land Miscellaneous Application E003 of 2020) [2023] KEELC 17845 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2020
A NYUKURI, J
MAY 29, 2023**

BETWEEN

**ONESMUS NDOLO NGETA 1ST APPLICANT
JOHN KIBAI KIKOLE 2ND APPLICANT
STANLEY MUNYAO 3RD APPLICANT
BENARD ARUBANOS NDUBA MUTUA 4TH APPLICANT**

AND

**GABRIEL MUTUKU 1ST RESPONDENT
FRANCIS MAKAU MUASYA 2ND RESPONDENT
MONICA MUENI MUTUA 3RD RESPONDENT
ALPHONSE MULI MBUVI 4TH RESPONDENT
MBATHA MBITHI KIATINE 5TH RESPONDENT**

RULING

1. This suit was instituted by the applicants by way of Notice of Motion dated October 1, 2020 seeking the following orders;
 - a. That this honourable court be pleased to issue an order of eviction against the respondents herein from the suit land known as Kangundo/kitwii/1313.
 - b. That the officer in charge Kangundo Police Station do provide security during the eviction to maintain law and order.
 - c. That costs of eviction and demolition be borne by the respondents.



- d. That costs of the application be borne by the respondents.
2. The application was supported by the affidavit sworn by Onesmus Ndolo Ngeta the 1st applicant. The applicants' case is that the applicants are joint registered owners of land parcel Kangundo/Kitwii/1313 (suit property) which they inherited from their father the late Elijah Kikole Ndolo, pursuant to succession proceedings. They stated that the respondents were among fifteen persons who filed Machakos ELC Case No. 4 of 2014 claiming to have acquired the suit property by adverse possession but that the suit was dismissed vide the court's judgment dated 13th April 2018.
 3. It was the applicants' averment that the respondents had refused to vacate the suit property despite numerous demands made by the applicants and that therefore the applicants served the respondents with a Notice to vacate dated June 16, 2020; which notice was also served on the area chief of Kitwii, Deputy County Commissioner, Kangundo and the Officer Commanding Police Division Kangundo, as required under the law. That despite service, the respondents remain adamant thereby denying the applicants access and quiet possession of their land. They attached a copy of title of the suit property, confirmation of grant, judgment and affidavit of service.
 4. The application is opposed. Gabriel Mutuku the 1st respondent filed a replying affidavit dated March 1, 2021. It was the respondents' case that they intend to challenge the judgment delivered in ELC NO. 4 of 2014 as they were granted leave to appeal out of time on November 20, 2020 by the Court of Appeal vide Civil Application Number 95 of 2019. They also stated that they had sought for stay of execution of the judgment in ELC No. 4 of 2014 vide Civil Application No. 94 of 2019 at the Court of Appeal which was coming up for hearing on March 16, 2021. They averred that if the application herein is allowed, it will render the appeal and application for stay nugatory. They stated that allowing the application will cause them to suffer irreparable harm as they will be evicted from land which is the only home they know. Further that their appeal had high chances of success.
 5. In a rejoinder, the 1st applicant filed a further affidavit sworn on July 12, 2021. He stated that the applicants had not obtained orders of stay as an application for stay and an appeal does not amount to a stay of execution. Further that the applicants' occupation in the suit property was unlawful and that they had failed to demonstrate how they stood to suffer irreparable damage. On whether the appeal has chances of success, he stated that that is a matter for the Court of Appeal and not this court.
 6. The application was disposed by way of written submissions. On record are the applicant's submissions filed on July 13, 2021.

Submissions

7. Counsel for the applicant submitted that the applicants followed the proper procedure for eviction by issuing a Notice to vacate to the respondents as provided for in sections 152 B and 152E of the [Land Act](#); which provides for issuance of a notice of not less than three months. Counsel argued that the [Land Act](#) provides for sufficient notice to enable affected persons seek redress in court if they so desire. Counsel maintained that the applicants had demonstrated that they were the lawful owners of the suit property. Counsel further contended that once the court is satisfied that sufficient notice was served, the court has discretion to confirm the notice and order vacation, cancel, vary, alter or make additions to the notice, suspend the operation of the notice or order for compensation. Counsel therefore argued that the respondents had been indolent having slept on their rights and a response that there is a pending case is not sufficient as they ought to have filed a case which they failed to do. Reliance was placed on the case of [James Mathuva Makewa v Nzavi Nguluzi](#) [2021] eKLR for the proposition that once there is sufficient service as provided in law and the applicants demonstrate ownership of the land, then the court may order eviction.



Analysis and determination.

8. I have carefully considered the application, the response, the rejoinder and submissions. The sole issue that arise for determination is whether the applicants have met the conditions to warrant grant of an eviction orders against the respondents.
9. Section 152 A of the [Land Act](#) No 6 of 2012 prohibits unlawful occupation of land whether it is private, public or community land. Section 152 B provides that eviction of an unlawful occupant of land must be in accordance with the [Land Act](#). That section also proceeds to provide for Eviction Notices to unlawful occupiers in the three land ownership systems. Most importantly, sections 152E and 152F of the [Land Act](#) provides for the process of service of eviction notice in respect to unlawful occupiers of private land and how a person served with an eviction notice may seek relief. The same provides as follows;

Section 152 E, Eviction Notice to unlawful occupiers of private land;

1. If with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
2. The notice under subsection (1) shall –
 - a. Be in writing and in a national and official language;
 - b. In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - c. Specify any terms and conditions as to removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - d. Be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

Section 152 F, Application to court for relief,

1. Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to court for relief against the notice.
 2. The court, after considering the matters set out in Sections 152C, 152D and 152E, may –
 - a. Confirm the notice and order the person to vacate;
 - b. Cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - c. Suspend the operation of the notice for any period which the court shall determine; or
 - d. Order for compensation.
10. Essentially therefore, where an owner of private land thinks that another person is unlawfully occupying their land without their consent, the owner ought to serve a notice to evict of not less than three months. The notice must be in writing and where the persons to be evicted are many, the notice ought to be published in at least two newspapers of nationwide circulation, and the owner of the land must ensure also that the Eviction Notice is placed in five strategic places on the subject land. The



Deputy County Commissioner as well as the OCPD of the jurisdiction where the land is situated must be made aware of the Eviction Notice.

11. Once the Eviction Notice has been served on the person who is in unlawful occupation of another's land, it is then upon the person served with the notice if they deem fit, to file suit in court challenging the notice, where they are aggrieved with such eviction notice. Where such a suit challenging an eviction notice is filed, the court's power is wide. It may uphold the notice or vary or suspend its operation or order compensation. Where a suit is not filed by the person against whom a notice to evict is served, then clearly the notice is deemed as having not been challenged and therefore upon proof of compliance with the requirements in section 152 E above, and the court being satisfied that the person seeking eviction is the owner or in charge of the land in question, may proceed to issue orders of eviction.
12. In the instant matter it is not in dispute that the suit property is registered in the Applicants' names. It is also not in dispute that there was Machakos ELC No. 4 of 2014 filed by the respondents against the applicants claiming to be entitled to the suit property by the doctrine of adverse possession which suit was dismissed on April 13, 2018. The respondents' main ground of opposing the application herein as stated in their replying affidavit sworn on March 1, 2021, is that they intend to challenge the judgment in ELC No. 4 of 2014, and to that end did obtain leave to file appeal out of time vide Civil Application No. 95 of 2019. According to the Respondents, if the orders of eviction are issued, their appeal will be rendered nugatory.
13. I have perused the ruling of the Court of Appeal in Civil Application No. 95 of 2019, and I note that the ruling was delivered on November 20, 2020. In that ruling the court granted the respondents herein leave to file appeal out of time and ordered the respondents to file the record of appeal in 30 days. It therefore follows that 30 days expired on December 20, 2020. As at the time the respondents swore their replying affidavit on March 1, 2020, the time for filing the appeal had already lapsed with an extra 46 days, considering that the dates between December 21, 2020 and January 13, 2021 are not tabulated as per the provisions of Order 50 Rule 4 of the *Civil Procedure Rules*. Having considered the replying affidavit, I note that there is no indication from the Respondents as to whether an appeal was filed or not. There is no evidence that when time to file appeal was extended, the Respondents filed the appeal as ordered. All that the Respondents are saying is that they had intentions of appealing against the judgment in ELC No. 4 of 2014. Definitely, an intention however good, without action is nothing but a mere wish, and cannot amount to anything. If the appeal had been filed as ordered by the Court of Appeal, then there was nothing that stopped the respondents from making such disclosure seeing that all they held on as the main pillar of their argument was that the judgment in ELC No. 4 of 2014, was challenged, and that if the orders of eviction are granted, their appeal shall be rendered nugatory. Indeed, if the respondents had shown to this court that there exists an appeal against ELC No. 4 of 2014, this court would be inclined to give the respondents opportunity to exercise their right of appeal by preserving the subject matter of the appeal, so as not to render the appeal nugatory. However, as things stand, there is no iota of evidence pointing to the existence of an appeal against the judgment in ELC No. 4 of 2014, and therefore the respondents' contention that allowing the application would render their appeal nugatory is baseless, imaginary, misleading and built on quick sand and therefore their argument is rejected by the court.
14. Besides, where an eviction notice is served on a person thought to be in unlawful occupation, it is upon such person to move the court to challenge the notice. I have considered the response to the application, and I note that service of the eviction notice is not contested. No claim has been filed by the respondents challenging the eviction notice or seeking its variance. While the respondents reserve the right to respond to an application like the one before court, besides filing the replying affidavit filed



herein, they ought to have instituted a suit challenging the eviction notice and not merely responded to a suit filed by the owner of the land seeking confirmation of the eviction notice.

15. The applicants produced a copy of a title deed issued on May 4, 2000, and a judgment in ELC 4 OF 2014 showing that the Respondents' claim to validate their occupation of the suit property was dismissed on April 13, 2018. Clearly, in the absence of an appeal challenging that decision or an application for review of the same, it is settled that the land belongs to the Applicants and they ought to be allowed to enjoy the same without any interference whatsoever from the Respondents. The Applicants attached an affidavit of service showing that the Respondents as well as the area OCPD and the Deputy County Commissioner were duly served on June 16, 2020, June 15, 2020 and June 18, 2020 respectively. This suit was filed on October 2, 2020, which is over three months from the date of service of the Eviction Notice. I am therefore satisfied that the Applicants complied with the requirements of section 152 E of the [Land Act](#).
16. Besides, the Respondents' averred that they will be rendered homeless if eviction orders are granted. That is an argument which cannot defeat the Applicants' right to enjoy their property as provided in article 40 of [the constitution](#) as read with the [Land Registration Act](#) No. 3 of 2012. Section 24 and 25 of the [Land Registration Act](#) delineate the interest conferred by registration and the rights of a registered proprietor as follows;
 24. Interest conferred by registration
Subject to this Act—
 - a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
 25. Rights of a proprietor
 1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and
 - b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.
 2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
17. It therefore follows that registration of land in a person's name confers on such persons the absolute ownership giving them the right to enjoy their property to the exclusion of all others except where the law states otherwise. As the applicants' registration and ownership of the suit property has not been challenged anywhere, the applicants' enjoyment thereof should not be interfered with. the applicants



have stated that the Respondents are on the suit property illegally and have failed to vacate despite service of the Eviction Notice as provided for in the *Land Act*.

18. In view of the above, it is the finding of this court that the respondents are in occupation of the applicants' land unlawfully and having failed to challenge the eviction notice which was served on them as provided in law, the applicants are entitled to eviction orders against the respondents. In the premises, I confirm the eviction notice issued by the Applicants and make the following orders;
- a. An order of eviction be and is hereby issued against the respondents herein from the suit land known as Kangundo/Kitwii/1313.
 - b. That the officer in charge Kangundo Police Station do provide security during the eviction to maintain law and order.
 - c. That costs of eviction and demolition shall be borne by the respondents.
 - d. That costs of the application shall be borne by the respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Munyao holding brief for Mr. Mutava for Respondent

Mr. Appearance for Applicants

Ms Josephine – Court Assistant

