



**Mabwa v Angelei & 3 others (Environment & Land Case 118 & 87 of 2015
(Consolidated)) [2023] KEELC 18230 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 118 & 87 OF 2015 (CONSOLIDATED)
FO NYAGAKA, J
JUNE 21, 2023**

BETWEEN

SHEILA KABOLE MABWA JUDGMENT DEBTOR

AND

JOSHUA ANGELEI 1ST DECREE HOLDER

ROBERT LOBUR ANGELEI 2ND DECREE HOLDER

GEDION LOITALIM ANGELEI 3RD DECREE HOLDER

ALLAN ENGILAE ANGELEI 4TH DECREE HOLDER

RULING

Introduction

1. Before me is an Application filed by the Decree-Holders. It is dated September 26, 2022 and filed on October 24, 2022. That Application was hinged on Section 3A of the *Civil Procedure Act*, Order 51, Rule 1 of the *Civil Procedure Rules* and Section 14 of the *Environment and Land Court Act*. It prays for orders:
 1. That this Honorable Court be pleased to order the Plaintiff/Respondent and her agents, servants, or anybody claiming under her to forthwith move out of the land comprised in title No Trans Nzoia/Kaisagat/201 and failing which an eviction order be issued;
 2. That costs be provided for.
2. The Application was supported by the grounds on its body and further by the Affidavit of the 1st Decree-Holder, deposing the same on his behalf and on behalf of the other Decree-Holders.
3. In summary, the Applicants stated that the judgment entered on December 3, 2018 found that the subdivision of the suit land namely parcel number Trans Nzoia/Kaisagat/201 into parcel Nos. Trans



Nzoia/Kaisagat/247, 248, 249 and 250 was illegal, null and void. For purposes of this Application the Court will refer the land parcels in terms of their numerical digits. He deponed further that as a consequence, the titles issued were canceled and the registration of the suit land reverted to its original parcel No 201. The court further ordered that the Defendants be registered as the proprietors of that suit land. He annexed and marked as JA1 a copy of the decree of the Court.

4. In compliance with the orders, the Decree-Holders were registered as the proprietors on August 14, 2020 and a title issued subsequently. He annexed and marked as JA2 a copy of title deed. The Decree Holders lamented that since entry of judgment in 2018, the Judgment-Debtor and her agents, servants or anyone acting on her behest, have failed to move out of the Decree-Holders' suit land occasioning prejudice.
5. They pointed out that in terms of the ruling of this court delivered on March 11, 2019 which he annexed and marked as JA3, the Judgment-Debtor's Application seeking to stay enforcement of the judgment pending the hearing and determination of her intended Appeal was dismissed with costs.
6. The Decree-Holders justified the Application on the need to actualize the judgment of December 3, 2018 to evict the Judgment-Debtor and her assigns/agents and/or servants from the Decree-Holders' suit land.

The Response

7. The Judgment-Debtor opposed the Application. She deposed and filed a Replying Affidavit on January 18, 2023. She deponed that she moved into parcel No 247, a subdivision arising from land parcel No 201.
8. Following dissatisfaction with the outcome of the judgment delivered on December 3, 2018, the Respondent filed an Application for stay of executing dated February 8, 2019 which was dismissed notwithstanding that she filed an Appeal on February 28, 2019. She continued that on March 17, 2022, the said Appeal was issued with pre-directions as to case management. She annexed as marked as SKM1 copy of the deposit receipt and SKM2 the directions as well as SKM3 a return of service thereof.
9. The Respondent deposed that she filed an Application for stay during the outbreak of the Covid-19 pandemic. Following, her Application was overtaken by events noting that the Decree-Holders had moved with speed to register the suit land in their favor.
10. The Respondent informed the Court that the Decree-Holders are aware of the subsistence of the Appeal that is still active. That plot No 248 is owned and occupied by Richard Onyino Swimwa, parcel no 249 is owned and occupied by Peter Machora Onchwari who are not parties to the proceedings herein whilst she occupies and owns parcel no 247.
11. As a result, if eviction orders were issued, the people stood evicted yet titles were cancelled without their knowledge or consent. Be that as it may, an eviction order could not be actualized by way of an Application since 3rd parties in occupation stood to suffer without being heard.
12. For the above reasons, the Respondent urged this court to await the outcome of the Appeal before issuance of eviction orders praying that the Application be dismissed with costs.

Submissions

13. The court directed parties to file and exchange written submissions addressing both Applications. The Decree-Holders wrote and filed their submissions on February 20, 2023. They submitted that the Judgment-Debtor was undeserving of the orders of the court for the reasons that the Application



was inordinate and improper before this court since similar orders previously sought were dismissed by this court. Noting that the judgment is undisturbed, they prayed that an eviction order was best granted in the interest of justice. Additionally, the existence of an appeal to the Court of Appeal did not impede the Decree-Holders' right to enjoy the fruits of their judgment. They submitted that it was the Judgment-Debtor who introduced the 3rd parties to the suit land. For these reasons, they urged this court to allow their Application.

14. The Decree-Holder filed her submissions dated March 30, 2023 (sic) on March 13, 2023. She summarized both Applications to accuse the outbreak of the Covid-19 pandemic for her delay in filing the present Application as she experienced inaccessibility to the court's services. She cited the provisions of Article 40, 50 (1) and 65 of the Constitution as well as Section 75 of the Civil Procedure Act to submit that she was entitled to proprietorship of land within the Republic of Kenya. She added that since eviction orders were not pleaded in the main suit, they ought not to be granted at this stage. For those reasons, she urged this court to dismiss the prayer for eviction.

Analysis and Disposition

15. I have considered the Application and the rival parties' Affidavits. I have also scrutinized the submissions filed by rival parties as well as the relevant provisions of the law.
16. The Application seeks to evict the Judgement-Debtors from all that parcel of land namely Trans Nzoia/ Kaisagat/201. By judgment of this court delivered on December 3, 2018, the court issued the following orders:
 1. A declaration that the subdivision of parcel number 201 into parcel numbers 247, 248, 249 and 250 is illegal, null and void;
 2. An order be and is hereby issued cancelling all the titles to plot numbers 247, 248, 249 and 250 and reinstating plot number 201 as one undivided whole as was the case before subdivision;
 3. An order that the Plaintiff's title to all that parcel known as 201 has been extinguished and that the Defendants are the rightful owners of plot no 201;
 4. The Defendants should be registered as the owners of plot no 201;
 5. An order that the Plaintiff shall bear the costs of this suit and the Counterclaim.
17. Section 14 of the Environment and Land Court Act directs this court to enforce *inter alia*, a judgment or decree in the manner set out in the Civil Procedure Rules. Order 22, Rule 6 of the Civil Procedure Rules provides that a Decree-Holder shall apply for execution of a decree in the court that passed the decree. Thereafter, Order 22, Rule 29 of the Rules provides as follows:

“Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and if, necessary, by removing any person bound by the decree who refuses to vacate the property.”
18. What is apparent is that a successful party has the liberty to apply for execution of his or her decree after judgment has been delivered within the stipulated time period. Unless orders state otherwise, that application is undisturbed. Flowing from that, a party out of necessity, who has judgment on immovable property in his/her favor, is called upon to remove any person not honoring such pronouncement, in order for the Decree-Holder to successfully take possession of the suit premises.



19. I have looked at the Application and the decree in force. Indeed, as rightly pointed out by the Judgment-Debtor, there were no eviction orders intimated by the trial court. However, what is apparent is that the court found that the Decree-Holders were the lawful proprietors of the suit land. Having ordered that the property reverts to its original form pre-subdivision, the court directed that a title be issued in the name of the Decree-Holders. That took place on August 14, 2020.
20. While no orders for eviction were issued, I find that an inference can be drawn from the orders sought to the extent that the title registered in the name of the Decree-Holders ought to be transferred unencumbered. In other words, it ought not to have any battle for supremacy on possession over the suit land. Otherwise, to turn a blind eye on the issue of eviction where declaratory orders were issued would really render those declaratory orders an academic exercise. The fact that the Decree-Holders succeeded and have registered title is akin to a right to vacant possession of the suit premises. I find that one cannot stand without the other. In any event, it would be absurd for the Court to issue orders which cannot be effective, particularly in finding that the Decree-holders are the rightful owners of the parcel of land and let the adverse party continue to occupy it.
21. Withal, I also inject the oxygen principle which ensures that justice shall be facilitated expeditiously, proportionally and affordably. If the issue were to be left for determination by this court in a fresh suit, then it would defeat this very purpose of the oxygen principle.
22. Article 159 (2) (d) of the *Constitution* urges this court to administer justice without undue regard to procedural technicalities. The present case is a ripe candidate benefitting from those provisions. It is only in the interests of justice that an eviction order be issued in favor of the registered properties for its enforcement.
23. In *Aliaza v Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (June 24, 2022) (Judgment) the Court of Appeal considered an appeal from the judgment of the Environment and Land Court in relation to which a party had not pleaded for a constructive trust, and where the issue arose as to whether the owner of the suit parcels of land was registered as proprietor thereof in trust for a buyer who had not obtained a land control board consent within the required time. It held as follows:
- “Happily for us today, we have been empowered to render justice and fairness, and to rule in accordance with good conscience, by nothing less than the Supreme Law of the land, which renders any legislation inconsistent with the Constitution null and void.
- Contrary to the submission by the respondent, in the face of these constitutional provisions, the fact that the appellant had not pleaded a constructive trust in his counterclaim does not preclude this Court from inferring such a trust.
- I take the view, on the authority of the decisions in *Odd Jobs v Mubia* [1970] EA 476 and, among other decisions, *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR that though unpleaded, the issue of a constructive or implied trust was left for the determination of the trial court.”
24. In *Vyas Industries -vs- Diocese of Meru* [1982] KLR 114, the Court of Appeal rendered itself as follows:
- “The circumstances in which an unpleaded issue can become an issue in a suit is a question which was considered in *Odd Jobs -vs- Mubia* [1970] EA 476 in which it was held that:
- a) a court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue had been left to the court for decision.



- b) On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.”

25. In *Ann Wairimu Wanjokhi -v- James wambiru Mukabi* [2021] eKLR the Court of Appeal held as follows:-

“Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, *Odd Jobs vs Mubia* (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court.”

26. Guided by the decisions above, I am of the humble view that this court is enjoined, and also by relying on Section 3A of the *Civil Procedure Act*, to breathe life to the decree it issued. While the issue of eviction from land parcel No 201 was not pleaded, the Court having found that the decree holders were the rightful owners thereof, it goes without saying that he/she who is not the owner has no right to occupy and use the same save with the permission or licence of the owner. That other person must be evicted therefrom, particularly given that he/she was a party in the matter where the declaration has been made.

27. The upshot is that the Application dated September 26, 2022 succeeds and is hereby allowed as prayed. The Judgment-Debtor has been on the suit land for too long since judgment was entered against her. Staying longer thereon is a mockery of justice and the orders this Court. She is directed to move out of the land within the next fourteen (14) days in default of which she will be evicted. This order is to be served on the Area Chief and the Officer Commanding Station of the nearest police station to the subject suit land. The Applicants will have the costs thereof.

28. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 21ST DAY OF JUNE, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

