



Nkirina & another v Nkatha & 3 others (Environment & Land Case 41 & 42 of 2020 (Consolidated)) [2023] KEELC 18125 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 41 & 42 OF 2020 (CONSOLIDATED)**

**CK YANO, J
JUNE 21, 2023**

BETWEEN

CELINA NKIRINA PLAINTIFF

AND

SUSAN NKATHA 1ST DEFENDANT

TERESIA KAINDA THIRINDI 2ND DEFENDANT

PATRICK KAMENCU ROBERT 3RD DEFENDANT

MARTHA WANJA GITONGA 4TH DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 42 OF 2020**

BETWEEN

DANIEL KIRIMI MUTUA PLAINTIFF

AND

PATRICK KAMENCU ROBERT 1ST DEFENDANT

SUSAN NKATHA 2ND DEFENDANT

TERESIA KAINDA THIRINDI 3RD DEFENDANT



JUDGMENT

1. Two plaintiffs filed separate suits which were consolidated by an order of court made on 15th November, 2020. Celina Nkirina hereinafter the 1st plaintiff filed case No. 41 of 2020 vide a plaint dated 10th September, 2020 seeking for the following orders-;
 - i. A declaration that the eviction of the plaintiff from her business premises of bar and restaurant on plot number 3 Laare Market is unlawful, malicious and callous.
 - ii. Immediate restitution by restoration of possession. Alternatively, a mandatory injunction do issue to re-instate the plaintiff in her business premises on plot 3 Laare market. In the interim, an injunction do issue to bar and prohibit the defendant by themselves or through their agents servants or proxies, from letting out the premises, and/or otherwise parting with possession, until the hearing and determination of an application for interim relief, to prevent a travesty of justice.
 - iii. Exemplary and punitive damages for wrongful eviction, loss and damage to be assessed by court
 - iv. Costs of this suit.
2. The 1st plaintiff averred that by an agreement of lease dated 1st September, 2018, the 4th defendant (Martha Wanja Gitonga) let out part of plot No. 3 Laare Market for a bar and restaurant business for a period of 4 years on terms and conditions set out and the rent for the demised premises was paid up to December, 31st 2021. That on being awarded the said plot, the 1st and 2nd defendants initiated a wrongful process to evict the 1st plaintiff which was completed with the eviction of the 1st plaintiff on 2nd September, 2020.
3. The 1st plaintiff averred that the 3rd defendant had moved the court in a succession cause by an application dated 2nd December 2019 seeking to prevent or bar the defendants from evicting the tenants put in possession of demised premises by the family of M’Imirongo M’Uthaka (deceased) without due process as they had been lawfully put in possession thereof by the same family.
4. The 1st plaintiff enumerated particulars of wrongful eviction, trespass and restitution and averred that her eviction from and closure of the suit premises was wrongful, an act of trespass and an abuse of the High court Order of 14th February, 2019. The 1st plaintiff gave particulars of malice and ill will on the part of the defendants and argued that as result of the defendant’s action, she suffered irreparable loss and damage and loss of business profit, the particulars of which she has enumerated. The 1st plaintiff claims an award in excess of Kshs. 30,000,000/=
5. Daniel Kirimi Mutua (hereinafter the 2nd plaintiff) filed case No. 42 of 2020 by a plaint dated 10th September, 2020 claiming a declaration that his eviction from the suit premises was illegal and amounted to trespass for which the defendants shall pay exemplary damages to him, reinstatement into the premises, permanent injunction, exemplary damages for eviction and trespass as well as costs of the suit.
6. He averred that by an agreement of lease made on 1st March 2017 between him and the 1st defendant, the 1st defendant let out a hotel, kitchen and store on plot 3A Laare market for rent upto 1st September, 2022 amounting to kshs. 1,040,000/= which was paid and acknowledged by the 1st defendant.



7. The 2nd plaintiff averred that by a decision of the High Court sitting at Meru made on 14th February, 2019, the High Court in Meru succession cause no. 308 of 2010 awarded the 3rd defendant, Teresia Kainda Thirindi, and her children the said premises.
8. The 2nd plaintiff further averred that on 2nd September, 2020, without a formal termination notice or an opportunity to be heard being afforded the plaintiff either in Meru High Court Succession Cause No. 308 of 2020 in the matter of M'Imirongo M'Uthaka (deceased) or in a reference upon issuance and service of a notice under Landlord and Tenant (shops Hotels and catering Establishments) Act, the 2nd plaintiff was wrongfully and maliciously evicted from the suit premises on plot 3A Laare Market and that he suffered loss and damage. The 2nd plaintiff has particularized the particulars of loss, damage and wrongfulness of the eviction and prayed for recompense and restitution by reinstatement into the premises. The 2nd plaintiff claims an award in excess of Kshs. 30,000,000/=.
9. At the hearing, the 1st plaintiff testified as P.w 1 and called two witnesses. They were cross-examined and re-examined. P.w 1 stated that she had rented the suit premises from one Robert Kaburwa M'Imirongo (deceased) who was father to Patrick Kamenchu in the year 2004, and operated a bar and butchery. The 1st plaintiff testified that the deceased put her in possession of the suit premises. That later, she was asked to be dealing with widow of the 3rd defendant and his wife, the 4th defendant who is now deceased. P.w 1 testified that she entered into several tenancy agreements with the 4th defendant, culminating with the agreement of 1st January, 2018 which was to lapse on 31st December, 2021.
10. 1 adopted the contents of her two affidavits sworn on 10th September, 2020 and 7th November, 2020 and produced the list of documents as P exhibit 1. She stated that she paid rent for the entire period of the lease with the knowledge of the family of M'Imirongo M'Uthaka (deceased). It is the evidence of P.w 1 that on 2nd September, 2020, she was maliciously evicted from the demised premises under the supervision of the O.C.S Laare Police Station who alleged that they were executing a court order. It is the 1st plaintiff's contention that she was never served with a notice to terminate the tenancy nor a court order. The 1st plaintiff testified that she suffered loss of more than Kshs. 2,000,000/= in stock that was in the premises and which she stated were destroyed besides loss of business.
11. Pw 1 testified that she was evicted yet she was not named in the High Court Succession Cause eviction order. In a nutshell, P.W 1 complained that there was no observance of due process and that her eviction was illegal and prayed for the remedies sought in her plaint. The 1st plaintiff prays for compensation of loss of business at the rate of Kshs. 25,000 per day from 2nd September, 2020 until reinstatement or until judgment, 4 goat carcasses valued at Kshs. 5,000/=, assorted beer crates worth Kshs. 600,000/=, bar tables and chairs worth Kshs. 70,000/=, two T.V sets valued at Kshs.100,000/= one radio valued at Kshs. 46,000/= and assorted business receipts and accountable documents.
12. Richard Kang'entu M'Njila testified as P.w 2 and adopted his witness statement and explained how he was accosted by persons under the oversight of the OCS Laare police station and ordered to leave the suit premises. He stated that the group had a court order in which they were executing by evicting the tenant from the premises. He confirmed that there were foodstuffs and beverages that were destroyed and or stolen.
13. Pw 3 was Isaac Michubu who said he was employed by P.w 1 and witnessed the eviction on 2nd September, 2020. That the OCS told him that they were executing a court order and gave them 30 minutes to vacate from the premises. He stated that in the cause of the said eviction, some property were damaged, eaten and or taken away.



14. Daniel Kirimi Mutua who is the plaintiff in case No. 42 of 2020 testified as Pw 4. He stated that he was a tenant in the suit premises and that he had a lease agreement with the 1st defendant which he had paid rent from 2017 upto August, 2022. He produced the lease agreements, licenses and other documents as exhibits. Pw 4 testified that during the eviction he was not given a chance to take anything away. He stated that he identified the 2nd defendant as one of those present during the eviction which was done under police supervision. He stated that he has sued the 1st and 3rd defendants because they were the administrators of the estate.
15. Pw 4 stated that he has never gone back to the suit premises since 2nd September, 2020, adding that he was evicted without notice or court order. He claims for the loss and damage suffered during the said eviction as particularized in his plaint and for an order for reinstatement.

Defendants' Case

16. The 1st and 2nd defendants entered appearance and filed their statement of defence on 7th February, 2020 wherein they denied the averments contained in the plaints and particulars of loss and damages pleaded therein. They averred that they were allocated the suit premises by the Court vide Meru High court succession cause No. 308 of 2010 and that the court granted them an order for vacant possession and put them into possession of the said premises.
17. Susan Nkatha testified as Dw 1 and adopted her witness statement filed on 23rd February, 2022 as her evidence-in-chief and also relied on the replying affidavit dated 4th November, 2020 and produced the documents dated 4th February 2022 and filed on 7th February, 2022 as exhibits 1, 2 and 3. She was cross-examined and re-examined. Her evidence was that the suit premises belonged to her deceased father, M'Imirongo M'Muthaka who died intestate and that during his lifetime, the plaintiffs were not in occupation of the said premises. That the plaintiff leased the premises from the 3rd and 4th defendants after the demise of the deceased, adding that the plaintiffs knew that the 3rd and 4th defendants were not the administrators of the estate of the deceased, therefore did not have capacity to enter into any kind of transaction on behalf of the estate.
18. Dw 1 stated that after the death of her father, her brothers fraudulently petitioned for letters of Administration in High Court Succession cause No. 308 of 2010 without her knowledge and that together with her mother the 2nd defendant herein, they objected after which the matter was heard and the estate was distributed on 14th February, 2019 to the beneficiaries. Dw 1 stated that the plaintiffs are neither the children of the deceased nor beneficiaries of the estate of the deceased. That on 5th November, 2019 they issued notices to all the tenants occupying the suit premises notifying them of the change of ownership and requested them to execute new lease agreements or vacate, but that the plaintiffs disregarded the notices necessitating filing of an application for eviction on 24th July, 2020 which was allowed. It is her evidence that the premises have been leased out to other tenants and advised the plaintiff to pursue the 3rd and 4th defendants for any refund they may have paid as rent.
19. Dw 2 was Patrick Kamenchu Robert who admitted that the suit plot belonged to his deceased father. That the same was subdivided and he was given a portion which he developed and rented out to the 2nd plaintiff. He further confirmed that there were succession proceedings which resulted in distribution of the estate of the deceased, including the suit premises, which resulted in the eviction of the plaintiffs. That they tried filing for review in the High Court but was not aware of the outcome. He was also cross-examined and re-examined.



20. Martha Wanja Gitonga testified as Dw 3 and was cross-examined and re-examined. She admitted receiving rent from the 1st plaintiff and wanted her reinstated into the suit premises to enable her get money for her children's upkeep.

Written Submissions

21. At the close of both cases, the parties through their advocates on record filed written submissions which I have read and I need not reproduce herein.

Analysis and Determination

22. The court has considered the pleadings, the evidence adduced and the submissions by the parties. The issues for determination are whether the plaintiffs have proved their cases on balance of probabilities and whether they are entitled to the orders sought.
23. From the material on record, it is not in dispute that originally, the suit property belonged to the late M'Imirongo M'Muthaka (deceased) who died intestate. After the demise of the deceased a succession cause No. 308 of 2010 was filed in the High Court. The probate court later on 14th February, 2019 distributed the estate of the deceased and the 1st and 2nd defendants were allocated plot No. 3 or 3A Laare Market. This is the suit property herein. Further, the probate court granted the 1st and 2nd defendants an order for vacant possession and the order was eventually executed and they were put in possession of the suit premises. The plaintiffs are now challenging their eviction from the suit premises and are asking for reinstatement besides payments of costs and damages suffered during the eviction exercise.
24. In my view, and as rightly submitted by counsel for the 1st and 2nd defendants, whether or not the eviction was proper could only be challenged in the succession cause No. 308 of 2010 or an appellate court. I am therefore not persuaded that the said eviction orders which were issued by the High Court can be challenged in separate suits as the ones now before this court. This is because this court and the High Court are courts of equal status. No doubt this court has no jurisdiction and cannot pretend to sit on appeal over orders that were issued by the High court in succession cause No. 308 of 2010.
25. Section 34 of the [Civil Procedure Act](#) provides as follows-;
- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
 - (2) The court may subject to any objection as to limitation or jurisdiction, treat a proceedings under this section as a suit, or a suit as a proceeding, and may, if necessary order payment of any additional court fees.
 - (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.
26. I have perused the ruling dated 14th February, 2019 which was produced as D exhibit 1. I note that the probate court ruled that plot No.3 Laare Market became the property of the 1st and 2nd defendants who are the deceased's surviving wife and her children. It is therefore clear that the eviction of the plaintiffs from the suit premises was through a court sanctioned process and this court cannot give orders whose end result would contradict the decision given by the High Court which has concurrent



and horizontal jurisdiction similar to this court. Thus, this court cannot in any way cloth itself with appellate jurisdiction in so far as the orders issued in the succession cause are concerned. The plaintiffs themselves do agree that their eviction was pursuant to orders issued by the High Court in the said succession cause.

27. Further, the plaintiffs testified that they leased the suit premises from the 3rd and 4th defendants after the demise of the registered owner M'Imirongo M'Muthaka (deceased). The 3rd and 4th defendants had not obtained letters of administration to enable them administer the estate of the deceased and therefore by dint of Section 82 of the *Law of Succession Act* did not have power to lease the deceased's property to the plaintiffs and could not enter into any binding contract with anybody over any asset that made up the estate of the deceased. No doubt the lease agreements in question contravened Sections 45 and 82 of the *Law of Succession Act*.
28. In the result, it is my finding that the plaintiffs have not proved their case to the required standard and are not entitled to the orders sought. Consequently the plaintiffs' suits as consolidated are hereby dismissed with costs.

DATED SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE 2023

IN THE PRESENCE OF

Court Assistant – V. Kiragu

MS Mbubuya for 1st and 2nd defendant

S.M Kimani for plaintiffs

No appearance for 3rd & 4th defendants

C.K YANO

JUDGE

