



**Chomba & 2 others v Githiga & 4 others; Wanyoike & 36 others (Proposed Interested Parties)
(Environment & Land Case 311 of 2001) [2023] KEELC 18262 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 311 OF 2001**

**A OMBWAYO, J
JUNE 15, 2023**

BETWEEN

**ERASTUS CHOMBA 1ST PLAINTIFF
MARY WANGARI CHOMBA 2ND PLAINTIFF
GRACE WANGARI CHOMBA 3RD PLAINTIFF**

AND

**DAVID KARIUKI GITHIGA 1ST DECREE HOLDER
JEREMIAH KINUTHIA MAHUGU 2ND DECREE HOLDER
MICHEAL KURIA 3RD DECREE HOLDER
THOMAS WANDERI 4TH DECREE HOLDER
W. OLWENY T/A OLWENY AND ASSOCIATES 5TH DECREE HOLDER**

AND

AMOS WANYOIKE & 36 OTHERS PROPOSED INTERESTED PARTY

RULING

1. The application before me is dated May 16, 2022 wherein the applicant seeks order that that the Honorable Court be pleased to enjoin the proposed interested parties in this suit as interested parties. That the honorable court be pleased to grant an eviction order against the respondents and the interested parties herein in execution of this honorable court's Decree issued on September 5, 2011 in HCCC NO. 311 of 2001 and HCCC No. 339 of 2001 respectively. That the honorable court be pleased to order the respondents and the interested parties herein, together with their agents and/or servants to give vacant possession of the respective Plots, to wit, Plots Nos. 523, 496, 497, 498, 504, 47, 524, 465, 463) 4671 495, 159, 297, 350, 351, 362, 407, 507j 448, 470, 520, 502, 262, 264, 443, 41 1, 4,



- 138, 53, 283) 298, 3329 321 , 322, 377, 328, 318, 10, 398, 130, 454, 433, 434, 303, 473) 287, 462, 340i 341, 349 and 390 respectively excised from L.R. No. Elburgon/Elburgon Block 10 (Ndimi Farm) in execution of this honorable court's Decree issued on September 5, 2011in HCCC No. 311 of 2001 and HCCC No. 399 of 2001 within sixty days from the date of the order being issued.
2. The application is based on grounds that in its judgment delivered on September 5, 2011in HCCC No. 311 of 2001 and HCCC No, 399 of 2001 respectively, the Honourable Court gave judgment in favour of Ndimo Farmers Cooperative Society Limited through its office bearers, the 1st to 4th defendants/ applicants and decreed that the suit property, being L.R. No. Elburgon/Elburgon Block 10 herein-after referred to as the suit property was rightfully and legally owned by the 596 members of the Ndimo Farmers Cooperative Society Limited. That pursuant to the said Judgment aforesaid, the Ndimo Farmers' Co-operative Society Ltd through its office-bearers has since sub-divided the suit property into several Plots to be shared amongst its genuine members and has already issued title deeds to its members,
 3. That the respondents and the interested parties herein, together with their servants and/or agents who are not members of Ndimo Farmers' Co-operative Society Ltd have illegally and unlawfully refused to give vacant possession of various Plots which have since been allocated to genuine members of Ndimo Farmers' Co-operative Society Ltd.
 4. That the issue of ownership of the suit property was substantially determined by this honorable court in its judgments delivered in HCCC No. 311 of 2001 and HCCC No. 399 of 2001 and the Respondents and the Interested Parties together with their agents therefore have no color of right to continue being in possession of portions of the suit property
 5. That this honorable court in its Ruling delivered on April 25, 2019discharged the interim orders of stay of execution issued on February 26, 2018in favour of the Plaintiffs/Judgment-debtors in both HCCC No. 311 of 2001 and HCCC No. 399 of 2001
 6. That the respondents and the interested parties together with their agents and/or servants are currently in illegal occupation of Plots Nos. 523, 496, 497, 498, 47, 504, 524) 4651 466, 467, 4951 159, 297, 350, 351, 362, 411, 407, 507, 448, 470T 520, 502, 262, 264, 443, 4, 138, 53, 283, 298, 332, 321, 322, 377, 328, 318, 10, 398, 130) 454, 433, 434 303, 473, 287, 462, 340, 341 349 and 390 respectively excised from the suit property and which Plots have since been allocated to genuine members of Ndimo Farmers Co-operative Society Limited and title documents have since been issued.
 7. That it is therefore imperative and in the interest of justice that the respondents and the Interested Parties be ordered to give vacant possession of the suit property and more so the Plots which they currently occupy unlawfully.
 8. That the OCS Elburgon Police Station ought to be directed to supervise the smooth eviction of the Respondents and the Interested Parties to ensure compliance of the orders issued by this honorable court.
 9. That members of Ndimo Farmers' Co-operative Society Limited most of whom are now in their twilight years have since the early 1980's waited to be allocated and subsequently be issued with their respective title-deeds for their respective Plots which has not been possible due to wrangles that has existed within the Society,
 10. That it is imperative that the instant application be heard and determined on priority.
 11. The respondents filed grounds of opposition whose import is that the application is incurably defective, filed by a party unknown in Nakuru H.C.C.C No 311 of 2001, moreover that the applicant and



Ndimu Farmers' Co-operative Society were not parties to the suit hence have no capacity. The respondent contends that there is no positive order capable of being enforced. Further that the court is functus officio and lacks jurisdiction in this matter.

12. I have carefully considered the rival submissions and do find that the matter into which the applicants seek to be enjoined was determined on September 5, 2012. The applicants seek to rely on a judgment in a matter thus Nakuru H.C.C.C No 311 of 2001 in which they were not parties. It is trite law that a person cannot seek to execute a judgment where he was not a party. Furthermore, there is no suit pending before this court in respect of this matter where the applicants can be enjoined.
13. Moreover the application seeks orders on behalf of Ndimu Farmers' Co-operative Society, a society that can sue and be sued in its own name. The Society is not a party in the proceedings, whereas Daniel Kangethe Wainaina has deponed the supporting affidavit, he is not an interested party and has no authority to file the suit on behalf of the society.
14. This court further finds that the applicants are attempting to execute non-existent orders. The court never issued any eviction order. The applicants are attempting to re-litigate the suit by way of application after judgment contrary to the principle of Res-judicata. The issue of eviction ought to have been raised by the defendants in this case by way of counter-claim but it was not done.
15. I do agree with the respondents that the court is functus officio. I do not agree with the applicants that section 34 of the [CPA](#) cap 21 Laws of Kenya supports their case. Section 34 of the [CPA](#) provides:-



34.

Questions to be determined by court executing decree

(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 proceeding 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. Explanation.—For the purposes of this section, a plaintiff



	whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.
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16. The section envisages a positive order of the court issued for or against a party or his representative. There is no evidence that the defendants were representatives of the applicants. Moreover, if the same was the case then their application would be res-judicata. The upshot of the above is that the application is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 15TH DAY OF JUNE 2023.

A. O. OMBWAYO

JUDGE

