



**Mokoh v Oginga (Environment & Land Case 192 of 2017)  
[2023] KEELC 22653 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 22653 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 192 OF 2017**

**MN KULLOW, J  
JUNE 15, 2023**

**BETWEEN**

**TITUS KAHUNYORO MOKOH ..... PLAINTIFF**

**AND**

**RISPER AKEYO OGINGA ..... DEFENDANT**

**RULING**

1. Vide a Notice of Motion dated 25<sup>th</sup> July, 2019, the Plaintiff/ Applicant sought the following orders: -
  - a. Spent.
  - b. The Honourable Court be pleased to direct that the Eviction Order issued herein pursuant to the Judgment and Decree of this Honourable Court made on the 12<sup>th</sup> day of April 2018 be executed and/or implemented by M/S Odongo Investment Auctioneer.
  - c. The Honourable Court be pleased to order and/or direct the OCS Kamagambo Police Station to provide reasonable security to facilitate the execution, enforcement and/or implementation of the Eviction Order in line with the Decree of this Honourable Court issued on the 12<sup>th</sup> day of April, 2018.
  - d. Costs of this Application be borne by the Defendant/ Respondent.
  - e. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is premised on the 15 grounds thereof and on the Applicant's Supporting Affidavit sworn on even date. He contends that he instituted the instant suit against the defendant sometimes on 19/4/2016; the same was heard and judgment render on 12/04/2018, whose effect was to order and/ or direct the eviction of the defendant from the suit property.



3. It is his claim that despite the judgment and decree issued on the 12/4/2018; the respondent has remained in occupation of the suit land without any lawful basis and in total disregard of the court orders, which have neither been set aside nor varied. He further stated that the Application seeking stay of execution of the judgment and decree was dismissed on the 09/07/2019.
4. That as a result of the omission by the respondent, he has been unable to take possession of the suit property despite the lawful decree in his favor which has remained ineffectual over the years. Further, the failure to execute the said decree has occasioned him undue prejudice. He therefore urged the court to allow the Application and maintained that the respondent would not suffer any prejudice whatsoever if the same is allowed.
5. The Application was opposed; the Respondent filed a Further Replying Affidavit sworn on 07/02/2023. It is her contention that she lodged an Appeal at the Court of Appeal challenging the judgment and decree issued by Hon Justice G. M. Ong'ondo. The said appeal was dismissed for non-attendance and they have since filed an Application dated 03/03/2021 seeking the reinstatement of the Appeal, which Application is still pending for hearing and determination.
6. By consent, the parties herein agreed to have the Application canvassed by way of written submissions. Both the Applicant and the Respondent filed their rival submissions which I have read and taken into account in arriving at my decision as hereunder.

#### **Issues for Determination**

7. I have taken into account the entire application, Affidavit in support, Replying Affidavit and annexures thereto and the rival submissions. Consequently, it is my considered view that the sole issue arising for determination therefrom is;
  - a. Whether the Application dated 25.07.2019 is merited.

#### **Analysis and Disposition**

8. Section 38 of the [Civil Procedure Act](#) provides for powers of the court to enforce execution. It provides as follows:

“Subject to such conditions and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree–

....

(f) in such other manner as the nature of relief granted may require.
9. Order 22 Rule 28 (5) of the Civil Procedure Rules further provides as follows: -

“Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder, or some other person appointed by the court, at the cost of the Judgment debtor and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.”
10. The Applicant's grievance is that the decree has remained unexecuted and he has continued to suffer despite the court giving its verdict in his favor. There is no existing appeal pending in any court nor stay orders for whatever reason in respect to the said order.



11. The Applicant further contends that the judgment debtors/ Respondents have had more than enough time to vacate the subject land. Though the Respondent's advocate was duly served with the application, they have not filed any response to date. The Application thus stands unopposed.
12. A brief background to bring the matter into perspective is that; the Plaintiff herein filed the suit against the defendant/ respondent vide a plaint dated 13/4/2016. The matter was defended vide a statement of defense and counter-claim dated 3<sup>rd</sup> June, 2016. The matter was heard and judgment delivered on the 12/04/2018 by Hon. G. M. Ong'ondo J. whose effect was to declare the sale agreement between the parties void and consequently declare the plaintiff as the absolute indefeasible owner of the suit parcel and the Defendant as a trespasser. He issued the following orders: -
  - a. For the plaintiff against the defendant in terms of orders (a), (b), (c) and general damages of Kshs. 10,000/=
  - b. for the defendant against the plaintiff for Kshs. 70,000/= together with interest at Court rates
  - c. Costs of the suit and the Counter-claim be borne by the plaintiff and the defendant respectively".
13. The import of the said orders was for the Defendant/ Respondent to vacate the suit property while the Plaintiff was required to refund a sum of Kshs. 70,000/- to the Defendant. The Applicant contends that despite the clear and valid orders by the court, which have neither been set aside, reviewed, varied nor stayed, the Respondent has refused and neglected to comply and continues to be in occupation of the said land.
14. The Respondent avers that she lodged an Appeal against the said Judgment and Decree vide Civil Appeal No. 33 of 2019. I have looked at the annexures adduced by both parties and it is not in dispute that the said Civil Appeal No. 33 of 2019 was dismissed with costs on 23/02/2021 for non-attendance pursuant to Rule 102(1) of the Court of Appeal Rules. I have also perused the Application dated 03/03/2021 by the Respondent herein seeking to have the said Appeal reinstated.
15. With regards to the pending application dated 03/03/2021 before the court of appeal; seeking the reinstatement of the dismissed Appeal, it is important to point out that the Respondent herein has not shown/ demonstrated any steps taken to have the said application filed in the year 2021 heard interpartes and determined; either in the form of letters to the registry requesting for date or inviting the other advocate to appear for the said purposes. In my opinion, it is not enough to merely state that there is a pending application at the court of appeal but the onus is on the applicant to demonstrate the positive steps taken to bring litigation to an end. This court takes note that the matter herein was filed in the year 2016, judgment was delivered in the year 2018, it is now 7 years since the same was filed.
16. It is my considered opinion that the effect of the dismissal of the Appeal vide the order issued on the 23/02/2021 by the Court of Appeal was to vacate all the consequential and incidental orders issued thereto including the orders of stay of execution issued on 03/09/2019. Therefore, there is nothing stopping the execution of the judgment and decree of this court issued by my predecessor on 12/04/2018.
17. In view of the foregoing, this court finds that the judgement and decree dated 12<sup>th</sup> April 2018 was a final adjudication of the rights of the parties within the meaning of the *Civil Procedure Act*. Therefore, in the absence of any other order staying the execution of the said Judgment and Decree of this court



and/or setting aside the same, it is my finding that nothing stops the eviction of the respondent from the suit property as directed by the Hon. Ong'ondo J. in his judgement.

18. Costs generally follow event and in this case, this court finds no good reason why the successful litigant in this matter should be deprived of costs. See *Hussein Jan Mohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

### **Conclusion**

19. In the upshot, I accordingly find that the Application dated 29<sup>th</sup> July, 2019 is merited and I proceed to allow the same on the following terms;

- a. An Order of Eviction be and is hereby issued pursuant to the Judgment and Decree of this Honourable Court made on the 12th day of April 2018 and the same be executed and/or implemented by M/S Odongo Investment Auctioneer. The said eviction must strictly adhere to the statutory provisions on eviction as per section 152B and E of the *Land Act*.
- b. The OCS Kamagambo Police Station is hereby ordered and/or directed to provide reasonable security to facilitate the execution, enforcement and/or implementation of the Eviction Order in line with the Decree of this Honourable Court issued on the 12th day of April, 2018.
- c. Costs of this Application be borne by the Defendant/ Respondent.

It is so Ordered.

**DATED, SIGNED and DELIVERED Virtually in MIGORI on 15<sup>TH</sup> day of JUNE, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

.....**for the Applicant**

.....**for the Respondents**

**Court Assistant - Tom Maurice/ Victor**

