



Lagat & another (Suing as the legal representatives of the Estate of the Late Joel Kiprono Kipkoti) v Komen (Environment & Land Case 384 of 2015) [2023] KEELC 19206 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19206 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 384 OF 2015**

JM ONYANGO, J

JULY 27, 2023

BETWEEN

KIPKOSGEI SIRMA BUIGUT 1ST PLAINTIFF

JOAN LAGAT 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
JOEL KIPRONO KIPKOTI**

AND

CHARLES KIBET KOMEN DEFENDANT

RULING

1. What is before me is the Defendant/Applicant's application dated 16th December, 2022 seeking the following orders:-
 - a. That the Honourable court be pleased to make an eviction order against the Defendants herein from land parcel number Mosop/Kapchorua /799.
 - b. The OCS Kaptagat Police Station in Keiyo South Sub-County be directed to effect compliance with the order of eviction.
2. The application is based on the grounds that judgment was delivered on 7th December, 2022 and the plaintiff's suit was dismissed. Judgment was then entered for the Applicant in respect of the Counterclaim declaring him the owner of the suit land. The Respondents have refused to cede possession of the suit land to the Applicant prompting him to seek an eviction order to enable him access and use the suit land.



3. The application is anchored on the Applicant's supporting affidavit dated 13th January 2023 in which he depones that judgment was entered in his favour on 7th December 2022 declaring that he had lawfully obtained registration in respect of land parcel number Mosop/Kapchorua/799.
4. The plaintiffs opposed the application by filing a Replying affidavit sworn by Joan Lagat in which she averred that the prayer of eviction was incapable of being granted in the instant suit. She explained that eviction orders are substantive in nature and must be anchored in a suit and not through an application.
5. She averred that the Applicant never sought an eviction order in the Counterclaim nor does the decree relied upon by the Applicant state that an eviction was one of the reliefs granted and the prayer was therefore unfounded.
6. The application was disposed of by way of written submissions. The Applicant filed his submissions dated 19th April 2023 while the Respondents filed their submissions dated 11th April 2023.

Applicant's Submissions

7. The Applicant submitted that after the court dismissed the plaintiff's case and declared that the Applicant was the lawful owner of land parcel number Mosop/Kapchorua/799, the Respondents had refused to cede possession of the suit land to him. He submitted that the plaintiff had failed to prove his case on a balance of probabilities and he should not be allowed to circumvent justice. He urged the court to grant the orders sought as the plaintiff would not suffer any prejudice.

Respondent's Submissions

8. On his part, learned counsel for the Respondent submitted that the application was incurably defective, bad in law and an abuse of the court process. It was his contention that the application had been filed under the wrong provisions of the law which did not support the prayers sought.
9. He took issue with the supporting affidavit which was not commissioned by a Commissioner for Oaths and stated that the same was defective and ought to be struck out with costs.. He relied on the case of *Mary Gathoni & Another v Frida Ariri Otolu & Another* (2020) eKLR where justice Musyoka cited the case of *Regina Munyiva Ndunge v Kenya Commercial Bank Ltd* (2005) eKLR where the court held as follows:

“..that affidavit is therefore fatally defective as it was not sworn in the presence of a commissioner for oaths .. This court should have no alternative but strike out the replying affidavit as it is not properly commissioned”

10. On whether the eviction orders can be granted, counsel submitted that eviction orders are substantive orders in nature and must be anchored in a suit and cannot be issued through an application. He relied on the case of *Tatecob Housing & Cooperative SACCO Ltd v Qwetu SACCO Ltd* (2021) eKLR where Justice Munyao held as follows:

“The applicant cannot seek the orders sought in its miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought in the motion are orders of eviction. One will ordinarily only obtain an order of eviction after full hearing of a case. What the applicant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon hearing of such suit and if successful, that an order of eviction would issue”



11. Counsel urged the court to find that the application was incompetent and proceed to strike it out. He added that the Applicant never sought an eviction order in his Counterclaim to warrant the same being granted. He maintained that the Applicant having failed to seek an eviction order was estopped from seeking the same through an application.

Analysis And Determination

12. The singular issue for determination is whether the Applicant is entitled to an eviction order.
13. The courts have previously held that an eviction order can only be granted within a substantive suit and not by way of an application. See the case of *Tatecob Housing & Cooperative SACCO Ltd v Qwetu SACCO Ltd* (2021) eKLR and *Norah Ndunge Hnry & Another v Abednego Mutisya & Another* (2022) eKLR.
14. In the instant suit, the Applicant did not seek eviction orders in his Counterclaim nor did he lead any evidence on eviction. It is also clear that the judgment and decree in this suit do not mention any eviction order. There is therefore no basis for seeking an eviction through this application. Before the court can issue an eviction order, it must be satisfied that person seeking such order has tendered sufficient evidence to persuade the court that he is deserving of the said order. This can only be achieved through a substantive suit. In the absence of such a suit the application for eviction cannot succeed.
15. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF JULY 2023.

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J.M ONYANGO

JUDGE

