Serem & another v Francis (Sued as the administrator of the Estate of the Late Paulo Mulinya Mudunya) (Environment & Land Case 391 of 2015) [2023] KEELC 20006 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20006 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 391 OF 2015

JM ONYANGO, J

SEPTEMBER 25, 2023

BETWEEN

WILFRED SEREM ..... 1ST PLAINTIFF

EVERLYNE CHEBITOK CHELUGUI ..... 2ND PLAINTIFF

AND

ELMINA ALISONYA FRANCIS (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PAULO MULINYA MUDUNYA) ..... DEFENDANT

RULING

1. By a Notice of Motion dated October 21, 2022 the Applicant filed an application seeking the following orders:

    a. That the Honourable court be pleased to issue an order of eviction against the Plaintiff from the suit property known as Uasin Gishu/mile Thirteen Scheme/257 and the structures thereon be removed and/or demolished in execution of this honourable court's judgment/decree issued on April 28, 2021.

    b. The Honourable Court be pleased to issue orders directing the OCS Jua Kali Police Station to provide security during the eviction and demolition of structures on the suit property known as Uasin Gishu/mile Thirteen Scheme/257.

    c. The costs of this application be awarded to the plaintiff

2. The application is supported by the Defendant/Applicant's affidavit sworn on October 21, 2022. The essence of said affidavit is that since the Plaintiffs/Respondents' claim for adverse possession was dismissed on April 28, 2021, the Respondents have no reason to continue occupying and utilizing the suit property and they should therefore be evicted.

3. In opposing the application, the 2nd Respondent filed a Replying Affidavit sworn on December 1, 2022. In the said affidavit, she admitted that their suit for adverse possession was dismissed but there was no order of eviction. It was her contention that an eviction order can only be issued in a substantive suit and not vide an application in a concluded suit. She further contended that after delivering the judgment, the court was *functus officio*.

4. The application was disposed of by way of written submissions and both parties filed their submissions.

5. The main issue for determination is whether an eviction order ought to be issued against the plaintiffs.

6. In order to answer the above question it is necessary to give a background of this case. The plaintiffs filed suit against the defendant claiming that he was entitled to the suit property by virtue of adverse possession. They claimed that Noah Kipngeny Chelugui who was the 2nd plaintiff's late father and father-in-law to the 1st plaintiff bought the suit property from Paulo Mulinya, the defendant's late father on February 9, 1993. Although no consent of the Land Control Board was obtained in respect of the sale, Paulo Mulinya allowed Noah Kipngeny Chelugui to take possession of the land. Noah Kipngeny Chelugui in turn gifted the land to his daughter Everlyne Chebitok Chelugui who took possession thereof and has been living on the land with her husband since 1993. The last instalment of the purchase price was however paid on February 14, 2003.

7. After hearing the case the court held that the plaintiffs' possession of the suit land became adverse to the title of the registered owner after the last payment was made in 2003 and since the suit was filed in 2007, the period of 4 years was insufficient to extinguish the title of the registered owner. The court however ordered that the defendant refunds the plaintiffs the purchase price of Kshs.209,000 together with interest from the date of filing suit until payment in full.

8. It is against this background that the defendant filed the instant application seeking to evict the plaintiffs.

9. Learned counsel for the Applicant submitted that after the dismissal of the plaintiffs' claim, they ought to have vacated the suit property as they lack the legal justification to continue occupying the same. He is therefore of the view that the court ought to issue an eviction order pursuant to the provisions of section 34 of the *Civil Procedure Act*.

10. The said provision stipulates as follows:

    S.34(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"

11. In his submissions, learned counsel for the plaintiffs maintains that an eviction order cannot be issued in the absence of a substantive suit. He submitted that Order 3 rule 1 of the *Civil Procedure Rules* provides that :

    > Every suit shall be instituted by presenting a plaint to the court or in such manner as may be prescribed.

12. He submitted that the defendant did not file a counterclaim for eviction of the plaintiffs and he could seek an eviction order through an application. He relied on the case of *Tatecoh Housing and Cooperative*

Sacco Ltd v Qwetu Sacco Ltd (2021) eKLR where the court declined to grant an eviction order in a miscellaneous application and held that an eviction order could only be issued after a full hearing the case.

13. Similarly in the case of *Norah Ndunge Henry & Another v Abednego Mutisya & Another* (2022) eKLR the court declined to grant an eviction order in the absence of a substantive suit and observed as follows

> " It is therefore clear that the court can only grant such orders upon hearing the case on merit.. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating Summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be within a properly instituted suit..."

14. Counsel further submitted that the court was *functus officio* as it had pronounced itself in the judgment and it could not issue more orders than what it had issued in the judgment.

15. It is common ground that in the original suit, the defendant did not raise a counterclaim for eviction. It is also clear that the judgment and decree in this suit does not mention any eviction order. An eviction order that was not granted in the judgment is not one of the questions relating to execution contemplated under section 34 of the *Civil Procedure Act*.

16. 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.

17. In view of the foregoing, the application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER 2023.

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J.M ONYANGO

JUDGE