



REPUBLIC OF KENYA



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**Tapem v Ariworeng & 5 others (Environment & Land Case 100 of 2015)
[2023] KEELC 21834 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 100 OF 2015
FO NYAGAKA, J
NOVEMBER 29, 2023**

BETWEEN

MUSA TAPEM PLAINTIFF

AND

SAMSON ARIWORENG 1ST DEFENDANT

CHEPOSIRKOI ARIWORENG 2ND DEFENDANT

REUBEN ARIWORENG 3RD DEFENDANT

MUSA ARIWORENG 4TH DEFENDANT

CHEPOGHE ARIWORENG 5TH DEFENDANT

CHARLES ARIWORENG 6TH DEFENDANT

RULING

1. The Defendants brought the instant Application, dated 15/05/2023 against the Plaintiff. It was a post-judgment Application, judgment having been delivered on 24/01/2023. The Application was brought under Section 3 and 3A of the *Civil Procedure Act* and Order 40 Rules 1, 2 and 4(1) of the *Civil Procedure Rules*, 2010. They prayed in the Application for orders. Suit against the Defendants who are alleged to be brothers. The Plaintiff amended his Plaint on 06/12/2021. It was filed on even date. In it he sought the following reliefs:

- a. ...Spent
- b. That an eviction order be issued against the Plaintiff, his servants, employees or agents from land title number known as L.R. No. West Pokot/Chepareria/461 since they are trespassing in the said land.
- c. ...Spent



- d. That upon determination of Application this Honourable Court be pleased to issue a permanent injunctive order restraining the Plaintiff by himself, servants, employees, agents or any others persons acting under his instructions or his interests from entering, interfering with the Applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any manner interfering with all that parcel of land known as Land Title Number, West Pokot/Chepareria/461.
 - e. That this order be served on the OCS Chepareria Police Station to ensure compliance.
 - f. That the Plaintiff be ordered to pay cost (sic) of this application.
2. The Application was based on the grounds that the 1st Defendant is the registered owner of land parcel number West Pokot/Chepareria/461 hence entitled to exclusive possession thereof. That through the judgment delivered herein on 24/01/2023 the Court dismissed the Plaintiff's claim in the said land and upheld the 1st Defendant's title to the land. That when the matter was pending in Court the Plaintiff moved onto and built houses on the land and continues to reside on it. The Plaintiff prevented the 1st Defendant from taking possession of the land hence interfering with his proprietary rights. The Plaintiff is violent towards the Defendants hence the necessity of filing the instant application.
 3. The Application was based on the supporting Affidavit of Samson Ariworeng sworn on 15/05/2023. It basically reiterated the contents of the grounds in support of the Application by way of deposition save that he annexed to the Affidavit and marked SA1 copies of his identity card, title deed, certificate of official search and the decree of this Court. He deponed that it was in the interest of justice that the Application be granted.
 4. The Plaintiff filed a Relying Affidavit sworn on 17/06/2023 on 19/06/2023. He annexed to the Affidavit and marked as MT1 a copy of the decree of the Court. He deponed that he was the one who had sued for eviction of the Defendants from the suit land as well as cancellation of the title. He deponed further that on 31/03/2017 the Defendants denied his claim and contended that they were the ones in possession. That the Defendants did not file a counterclaim for his eviction and did not adduce any evidence of eviction. He deponed that the allegation of his entering the suit land during the pendency of the suit did not have any evidentiary support from the record. That parties are bound by their pleadings. That the court merely dismissed his claim and he filed a Notice of Appeal against it. Lastly, he deponed that there was no decree of eviction to execute by way of eviction and or permanent injunction and the Application was not founded on a judgment or decree of the Court.
 5. The Respondents then filed a Further Affidavit sworn by the 1st defendant on 24/06/2023. In it he deponed that prior to 2015 he and the co-defendants were in possession of the suit land which was his as of right. That in 2015 the Plaintiff filed the instant suit against them and obtained a judgment by which he arrested the 1st Defendant. He annexed to the Affidavit and marked SAR1 a copy of the judgment of the Court and eviction order issued pursuant to the judgment.
 6. He deponed further that *vide* a consent entered into by the Advocates on 17/03/2017, also part of annexure SAR1, the judgment was set aside. That by that time the Plaintiff had not built on their land hence they did not file a counterclaim since the Plaintiff had not taken possession of the suit land, which is registered in the 1st Defendant's name. That between 05/1/2022 and 15/01/2023 while the parties were waiting for judgment which was delivered on 24/01/2023 the Plaintiff entered the suit land and constructed houses on it in a bid to frustrate the judgment creditors now.
 7. He deponed that the filing of an appeal against the judgment was not a ground for the Plaintiff to frustrate the applicants from taking over their land. That after the dismissal of the Plaintiff's suit the



Defendants have been unable to enter their land and the Plaintiff is extremely violent towards the applicants. That it was proper for the court to order the execution of the decree in any manner as the nature of the reliefs sought may require. That courts do not issue orders in vain hence the Plaintiff should be ordered to vacate the land.

8. Following the filing of the Further Affidavit, the Plaintiff filed a Further Replying Affidavit sworn by him on 25/07/2023 in answer to the one filed by the Applicants. He deponed that it was untrue that he had not built houses on the land when the consent to set aside judgment was entered into or when the defence was filed and even that he built on the land between 05/1/2022 and 15/01/2023. Then he deponed that the suit land belonged to his late father and his family. He annexed and marked as MT1 a copy of a certificate of official search dated 20/07/2015. He deponed that the Applicant only got registered as owner of the suit land after the decision of the Minister after 2015. That when he filed the suit he was still in occupation of the land. He then deponed that judgment was not awaited for more than a year and that in any event the Defendants did not incorporate a counterclaim in their case.
9. The Application was disposed of by way of written submissions. The Applicants filed theirs dated 30/05/2023 on 06/06/2023 and Supplementary ones dated 24/06/2023 on 27/06/2023 while the Plaintiff filed his dated 25/07/2023 on 26/07/2023.
10. In their first set of submissions the Defendants submitted that the Plaintiff built his houses in the suit land and when the suit was pending and he had since declined to vacate it. That his actions had through violence prevented the applicants from taking possession of the land and there was no justification whatsoever for his actions hence it was necessary for the court to grant the orders.
11. In the Supplementary Submissions they argued that it was agreed that prior to the year 2015, the Defendants were in possession of the suit land and the plaintiff sought for, among others, their eviction and an order of permanent injunction restraining them, their agents and /or servants from trespassing upon/or committing any acts upon the said parcel of land. That earlier on the suit proceeded secretly and the Plaintiff got a judgment in his favour, extracted a decree and an eviction order and by it demolished the Defendants' houses in the suit land and caused the arrest of the 1st Defendant in execution of the decree of this court. That by the time the consent setting aside the judgment was entered into and defence filed the Plaintiff had not built his houses in the suit land hence there was no need to file a counter claim for eviction since by that time the Plaintiff was not in possession of the suit land. That it was between 5/1/2022 and 15/1/2023, when the matter was still pending for judgment that the Plaintiff entered into the suit land and constructed his houses therein and remained there in order to frustrate the Defendants because he sensed defeat.
12. That following the dismissal of the Plaintiff's suit, the Defendants have been unable to enter into the suit land since the Plaintiff became extremely violent towards them. That Section 38(f) of the Civil Procedure Act provides for execution of the decree in such other manner as the nature of the relief granted may require. That since courts do not issue orders in vain, the enforcement of the judgement delivered 24/1/2023 required an order for the Plaintiff to vacate the suit land and removal of any structures he put on it. They relied on the case of Simon Ngao Mbiti v Daniel K. Ngomo [2020] eKLR.
13. The Plaintiff submitted that the Court was not being called upon to enforce an execution by the application. That only costs could be executed against the Plaintiff but they had not been taxed. He submitted that the decision of Grace Maundu (*supra*) could not assist the Applicants as it was distinguishable.



Issue, Analysis and Determination

14. I have considered the Application, the circumstances thereof, the law and the submissions of the rival parties. I am of the view that only two issues lie for determination. One is whether the application is merited and who to bear the costs of the application.
15. On the first issue, it is worth noting that there are two main prayers in the Application. One is for the eviction of the Plaintiff from the suit land while the other is for injunction against him, his servants, agents, employees and or persons claiming through him.
16. Regarding the prayers, the question that this Court sets to consider first is, whether they can issue in a post-judgment process where there is no relief granted for their issuance. The Applicants relied on Section 38(f) of the *Civil Procedure Act* to argue that this court is empowered to order the execution of the decree in such other manner as the relief granted may require. The Respondent did not think so. He argued that there was no eviction order made in the judgment: only costs were ordered against him and that even then they were yet to be assessed. In my humble view the provision should be interpreted as a whole and not separately or reading disjunctively or isolated manner the sub-sections. Thus, the provision only applies to situations where the Court issues a decree to be executed and a party moves the court for execution of the same on the limbs thereof specifically. It does not relate to a case where the application by a party seeks to enforce a relief not granted by a Court in the decree.
17. This turns the Court to the reliefs that were granted herein. The relief was that the Plaintiff's suit was dismissed with costs to the Applicants. There was no positive relief granted to the Applicants which could be enforced against the Respondent other than costs of the suit. The Applicants relied on Order 40 Rules 1, 2 and 4(1) of the *Civil Procedure Rules*, 2010.
18. First, it is worth noting that Order 40 deals with "Temporary Injunctions and Interlocutory Orders." What is clear to me is that anyone moving the Court under the Order contemplates and only does so in situations where the Court is called upon to issue orders to preserve the subject matter pending final determination on the rights of the parties in the matter. Therefore, I need not elaborate the interpretation of each of the Rules cited for they all point to steps temporal in nature pending a final order of the Court. As soon as the Court has delivered a judgment in a matter, then it has no jurisdiction of any nature under Order 40 of the *Civil Procedure Rules*, 2010.
19. In the instant case the rights have been determined: The Plaintiff's claim was dismissed, leaving the 1st Defendant the duly registered owner of the suit land. Therefore, there is nothing temporary the Court is to act on: this court has no jurisdiction under the provisions cited. The applicants' reliance on the Order to move this Court in the instant situation is a misinterpretation of the law. Perhaps the Applicants should have invoked Section 3A of the *Civil Procedure Act* on the inherent power of the court to make appropriate orders for the necessary ends of justice to avoid abuse of its process.
20. What remains of this Court to clarify regarding whether the Defendants should have raised a counterclaim and prayed for eviction or not is what the facts herein demonstrate. In their Joint Statement of Defence dated 30/03/2017 and filed on 31/03/2017 at paragraph 6 the Defendants pleaded, "The Defendants further maintain that they have been in possession of the suit land and that the Plaintiff has never been in possession of the same." In his Reply to Defence dated 18/04/2017, the Plaintiff pleaded at paragraph 4 that "...the Defendants herein have never been in occupation or possession." This position differed with that of his Amended Plaint wherein at paragraph 5 he pleaded that the Defendants had "without any justifiable reason or colour if right encroached and/or trespassed onto the Plaintiff's parcel of land, constructed structures, cultivated the land and are grazing thereon..." Moreover, in his written statement dated 05/08/2015 which he adopted in evidence



in-chief on 04/02/2019 he had stated the same position. His oral testimony of that also indicated as much besides the demand letter dated 31/03/2015 produced as PExh 6 on that 04/02/2019 which had similar contents. Therefore, contrary to the depositions in his Further Affidavit about the Plaintiffs not residing and he not moving onto the suit land in the course of the suit is completely untrue. This Court agrees with the depositions of the Defendants that indeed the Plaintiff occupied the suit land before the delivery of judgment to frustrate them.

21. Regarding ownership of the suit land, in the further Affidavit of the Plaintiff, he swore that the suit land was still registered in his late father's name, one Danger Tabim. He annexed a copy of an official search marked as MT1. This position sharply contrasts with that of his pleadings, particularly in paragraph 5A of the Amended Plaint dated 06/12/2021 and filed on the same date. In it he averred that "The 1st Defendant has now unprocedurally and illegally registered the land parcel known as LR. No. West Pokot/Chepareria/461 in his name." Furthermore, at paragraph 7A he prayed for cancellation of the registration of the 1st Defendant's title over the suit land. Again, relief (bb) of the Amended Plaint was for cancellation of the subject title and the prayer for it to revert to Danger Tabim (deceased).
22. Additionally, it is also clear from the copy of the title marked as annexure DExh 2, the copy of certificate of official search produced as DExh 3 and the extract of title produced in evidence by the Plaintiff as PExh 9, the suit land is registered in the name of Samson Ariworeng Rwatanyang, the 1st Defendant herein. It does not matter when it was so registered.
23. The totality of the two issues above is that there could have been no possibility of the Defendants to pray for eviction of the Plaintiff by way of a counterclaim before judgment could be entered herein. Thus, the issue could not fall for trial before the court at the time all issues over the suit land as between the Plaintiff and Defendants were for determination. And since the suit is now concluded, the only question left for the Court in regard to the prayer for eviction and the objection raised thereto is, how do the Defendants lawfully have the Plaintiff move out of the land, if at all, if he has refused to vacate? The only way to do so is for them to bring another claim against him but only limited to issues that arose outside of those determined herein. As the facts stand, there was no relief for eviction or injunction prayed for by the applicants and granted.
24. Lest the Plaintiff be happy and turn the process of this Court to a mockery and make the ends of justice trivial, since he moved onto the suit land while the Court prepared judgment, that cannot go unnoticed and unacted on. Moreover, the doctrine of *lis pendens* prevents parties from doing any acts inconsistent with the preservation of the subject. The Plaintiff cannot be permitted to reap from an illegality just because the claim for eviction was not sought when he knows well that the then prevailing circumstances could not make it possible to do so.
25. For the reasons above and given that the Plaintiff has been untruthful in some respects herein, this court exercises its discretion under Section 3A of the [Civil Procedure Act](#) and hereby issues an injunction in terms of prayer (d) of the application conditional upon a period of two (2) months from the date of this order in order to enable the Defendant(s) to file a suit seeking appropriate reliefs against the Plaintiff except if he voluntarily vacates the suit land forthwith.
26. The upshot is that the application fails on the fundamental technicality and is hereby struck out. But for lack of candor the Respondent shall bear the costs of the instant application.
27. Order accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA EMAIL THIS 29TH NOVEMBER, 2023.

HON. DR.IUR FRED NYAGAKA



JUDGE

