



**Ntinyari v Rauga (Environmental and Land Originating Summons
3 of 2019) [2023] KEELC 22470 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 3 OF 2019**

CK YANO, J

DECEMBER 20, 2023

BETWEEN

ELIZABETH NTINYARI PLAINTIFF

AND

JOYCE KABURO RAUGA DEFENDANT

RULING

Preliminaries

1. By way of an originating summons filed on 18th January, 2019 the plaintiff claimed to be entitled to land parcel No. Nyaki/Giaki/Kiburine/12 measuring 8.2 Ha by way of adverse possession. Initially, the defendant did not enter appearance, hence the case proceeded as a formal proof and judgment was entered in favour of the plaintiff on 21st April 2021. Subsequently, the land was registered in the name of the plaintiff who sub-divided/or transferred the land.
2. By an application dated 25th January, 2022, the defendant sought for orders, inter alia for the setting aside of the judgment delivered on 21st April, 2021 and for leave to file a replying affidavit in defence of the suit. The defendant also sought for cancellation of the title deed to the plaintiff regarding the suit land and any resultant sub-divisions. By a ruling delivered on 27th April 2022, the court set aside the judgment and all consequential orders. The court also granted an order of temporary injunction restraining the plaintiff from selling, transferring, disposing off or charging the suit property and all resultant subdivisions. The court also issued orders of inhibition and granted the defendant and any other interested parties leave to respond to the originating summons. The defendant filed a replying affidavit dated 27th June 2022 and thereafter the matter proceeded to hearing.
3. By a judgment delivered on 5th July, 2023, this court dismissed the plaintiff's suit with costs to the defendant.



Defendant's Application Dated 31st July, 2023

4. By a notice of motion application dated 31st July, 2023, the defendant prayed for orders that the Meru District Land Registrar to cancel all the subdivisions arising from LR No. Nyaki/Giaki/Kiburine/12 being LR. Numbers Nyaki/Giaki/Kiburine/1408 to 1416, an order directing the land Registrar to reinstate the title to LR No. Nyaki/Giaki/kiburine/12 back to its original owner, the late Joyce Kaburo Rauga, an order lifting the inhibition orders issued on 27th April, 2022, an order of eviction against the plaintiff as well as an order of permanent injunction. There is also a prayer for the OCS Giaki Police Station to provide security in the implementation of the court orders.
5. The application is opposed by the plaintiff vide a replying affidavit sworn on 12th September, 2023.
6. The application was canvassed by way of written submissions. The defendant filed her submissions dated 23rd October, 2023 through the firm of M/S Mutuma & Koskei Advocates while the plaintiff filed hers dated 31st October, 2023 through the firm of M/s Gatari Ringera & Company advocate.

Defendant's Submissions

7. The defendant submitted inter alia, that the plaintiff admits that her suit was dismissed and the only basis upon which she can remain on the suit land is having filed an application barring her eviction pending the hearing and determination of the intended appeal. That while it is true that no counterclaim was filed, the plaintiff has no basis to remain on the suit land since she is a trespasser and was expected to voluntarily vacate the suit parcel of land but has declined to do so, thus making this application necessary.
8. The defendant's counsel submitted that Order 37 Rule 7 provides that an application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons supported by an affidavit. That unlike an ordinary suit commenced by way of plaint, it is not possible to file a counterclaim in a suit commenced by an originating summons. The defendant's counsel relied in the Environment and Land Court at Kericho Civil suit No. 6 of 2003 *Cheruiyot Chepkwony alias Mapengo v Sarah Chesiele Barta & another* where the court considered an application for eviction after a claim for adverse possession failed and held that-;

“It is John Cheruiyot who continues to be in this case representing the estate of the deceased. I observe that the case of the deceased was one for a declaration of trust and in the alternative for adverse possession. The claim failed. I presume that the original deceased plaintiff could have been in possession of the suit land. If he was alive, then the applicant could have probably been entitled to seek his eviction through the avenue of this suit, given that he could have probably been entitled to seek his eviction through the avenue of this suit, given that he could have failed to justify his continued stay on the suit land.”

9. The defendant submitted that the plaintiff had proceeded ex-parte and obtained judgment, the basis of which she had subdivided the suit parcel of land into resultant subdivisions which are Nyaki/Giaki/Kiburine/12 to 1408 - 1416. That with the ex-parte judgment having been set aside and having lost the case, the plaintiff cannot hold onto the illegal subdivision and it is only fair that the same be cancelled and the title reverts back to the name of the late Joyce Kaburo Rauga. That the effect of setting aside the earlier judgment was that the title to the suit property was to be presumed to be the property of the late Joyce Kaburo Rauga. The defendant's counsel also relied in Environment and Land Court at Migori ELC case No. 346 of 2017 *Lucy Ghati v Alex Wambura John & another* where the court allowed an application for eviction.



10. Learned counsel for the defendant further submitted that the jurisdiction of this court emanates from the constitution as well as the Environment and Land Court Act no. 19 of 2011. That Section 13(7) of the ELC Act empowers the court to make any order and grant relief as the court deems fit and just including interim or permanent preservation orders including injunctions, prerogative orders, award of damages, compensation, specific performance, restitution, declaration or costs. That section 13 of the ELC Act is clear that the overriding objective of the Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act while Section 18 (3) is clear that among the principles guiding the court are the principles of judicial authority under Article 159 of the constitution and it is clear that justice should be administered without undue regard to procedural technicalities. That it is only fair that the orders sought by the defendant be granted with the Officer Commanding Giaki Police Station providing security to implement the orders of this court. That the defendant would also be entitled to costs of the application.

Plaintiff's Submissions

11. Learned counsel for the plaintiff submitted that by the Ruling delivered on 27th April 2022, the court granted the reliefs now sought as prayer numbers 2 and 3 of the motion dated 31st July, 2023. That the order granted was that the registration of the land be reinstated in the name of the previous registered proprietors, and that there was no order for registration of the land in the name of Joyce Kaburo Rauga only. That she was not the sole registered proprietor of the land and the same cannot be registered in her sole name. It is the plaintiff's submissions that the order made by the court ought to have been registered and this application was absolutely unnecessary. That the applicant should pursue registration of the order issued on 27th April 2022 to ensure reinstatement of entry numbers 6 and 7 of the register relating to the suit land. It is the plaintiff's submissions that the only order that can be issued by this court is the one sought in prayer 4 of the notice of motion. That the order of inhibition was issued by the court on 27th April 2022 and was expressed to remain in force pending the hearing and determination of the suit, and the suit having been determined, the court retains the jurisdiction to order for the lifting of the inhibition, and that such an order should have formed part of the court's judgment.
12. Learned counsel for the plaintiff submitted that the court is bereft of the jurisdiction to entertain prayers 5, 6 and 7 of the application as the same are substantive relief orders that ought to have been sought and canvassed in the main suit. That the applicant admits that she is the legal representative of the late Judith Kaburo Rauga and has always had the capacity to present her estate in these proceedings. That when the ex-parte judgment was set aside, she was granted leave to defend the plaintiff's claim against the defendant and was at liberty to set up a counter claim or cross- action against any trespasser. That indeed she was under a legal obligation to plead her claim for orders of eviction and injunction once she was given an opportunity to do so. The plaintiff's counsel referred the court to explanation of section 7 of the Civil Procedure Act. It was submitted that the issue whether the defendant was entitled to the twin prayers for eviction and injunction ought to have been raised and framed for determination following trial. The plaintiff's counsel submitted that it is too late in the day for the defendant to raise the issue after the trial was concluded and judgment delivered. That the jurisdiction of the court after delivery of judgment is limited to granting consequential orders like lifting the inhibition granted during the proceedings, making orders under the provisions of Section 99 of the Civil Procedure Act and entertaining applications for review. The plaintiff's counsel submitted that the court is now functus officio and cannot grant substantive reliefs that were neither sought nor canvassed. Further, that the defendant claims to have in her possession a court order issued in Meru CMCC No. 274 of 2014 in favour of her deceased mother and which order was produced in evidence by the defendant. That there is no explanation at all whether the order was ever executed. Learned counsel for the plaintiff



submitted that it would amount to an abuse of the court process for the defendant to seek similar orders in these proceedings. The plaintiff's counsel further submitted that as the issue of eviction of the plaintiff from the suit land was not the subject of the litigation herein, the defendant is fully required to comply with the provisions of Section 152E of the *Land Act* No. 6 of 2012 in seeking eviction of the plaintiff from the suit land. It is therefore submitted that the current application for orders of eviction and injunction is misconceived and ought to be dismissed with costs.

Analysis and Determination

13. I have considered the application, the response and the submissions filed. The issue for determination is whether the defendant has met the threshold for the grant of the orders sought in the application.
14. In the judgment delivered by the court on 5th July, 2023 the court found no merit in the plaintiff's case and dismissed the same with costs to the defendant. Before then, the matter had proceeded ex-parte and judgment was entered in favour of the plaintiff on 21st April 2021. The court (Mbugua J) found that the plaintiff was entitled to the suit land Parcel Nyaki/Giaki/Kiburine/12 by way of adverse possession. By an application dated 25th January, 2022, Judy Rauga Gichu the personal representative of the estate of the deceased sought orders to substitute the defendant, temporary injunction, and setting aside the judgment delivered on 21st April 2023, leave to file a response to the suit and lastly cancellation of the title deed issued to the plaintiff regarding the suit land and any resultant subdivisions. That application was opposed by the plaintiff. The court (Nzili J) allowed the said application, set aside the judgment delivered on 21st April 2021 and issued a temporary injunction barring the plaintiff from selling, transferring, disposing off or charging the suit property and all resultant sub-divisions. The court further granted orders of inhibition to be registered against the suit property and the resultant subdivisions to subsist for one year only, and leave to the defendant and any other interested parties to respond to the originating summons.
15. It is my view that once the ex-parte judgment dated 21st April 2021 was set aside, the same extended to all orders consequential thereto and the suit property ought to have reverted to its original status. Indeed that was what the court ordered on 27th April 2022. That means the status quo before the judgment of 21st April 2021 was restored. The plaintiff's claim was for adverse possession over title No. Nyaki/Giaki/Kiburine/12 registered in the name of Joyce Kaburo Rauga to hold in trust for Judy Rauga Gichu, Edward Mbaya Rauga, Ronald Muriithi Rauga and Nicholas Mutwiri Rauga. Therefore, even though the plaintiff had transferred the land into her name and subsequently subdivided the same pursuant to the *ex-parte* judgment, the said transfer and the subdivisions were eventually set aside by the court and the property reverted to its original status. With the ex-parte judgment having been set aside, and the plaintiff's suit having been dismissed, the plaintiff or anyone claiming through her, cannot hold the suit property and the resultant subdivisions. The same must be cancelled and the title to revert back to the name of Joyce Kaburo Rauga to hold in trust for the others named in the title. I therefore find merit in prayers 2 and 3 of the application and grant the same. I also find that the order of inhibition which was issued by the court is not opposed by the plaintiff and therefore the same is granted in terms of prayer 4 of the application herein.
16. The defendant also sought an order for eviction of the plaintiff as her claim for adverse possession was dismissed. However, it is clear that in this case, the defendant had not pleaded a counterclaim in the dismissed suit and therefore there is no basis upon which orders of eviction and injunction can be issued. The prayers for orders of eviction and injunction are not based on any proper claim, pleading or judgment and I decline to grant the same. Such orders have far reaching implications as it entails the removal forcefully, of the plaintiff from the suit land which she has been in occupation and possession of for some time. Even though the plaintiff's suit was dismissed the defendant must invoke the necessary



procedure and the law for such orders to issue since a court must be satisfied on merits upon hearing the parties. Whereas there is no dispute on ownership of the suit land, and the plaintiff's occupation is unlawful her suit having been dismissed, the provisions of section 152E of the Land Act are clear on the procedure one ought to invoke for necessary relief under Section 152F of the same Act.

17. I note that prayer 7 of the application is an order for provisions of security during the implementation of the orders of this court. I therefore think it is only fair that the same be granted.
18. Consequently, and for the foregoing reasons, the application dated 31st July, 2023 is partly successful as follows- ;
 1. The application is granted in terms of prayers 2,3,4 and 7.
 2. Prayers 5 and 6 of the application are dismissed.
 3. Considering that the plaintiff has necessitated the filing of the application, I award costs of the application to the defendant as against the plaintiff
19. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF DECEMBER, 2023

In the presence of;

Court Assistant – V. Kiragu/Lena M

Mutuma for defendant/applicant – present

Gatari for plaintiff/respondent – present

C.K YANO

ELC - JUDGE

