



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 11 OF 2008**

**ALBERT CHAUREMBO MUMBA ..... PLAINTIFF**

**VERSUS**

**DAMA THOYA KITI**

**KARISA THOYA**

**KAINGU THOYA ..... DEFENDANTS**

**RULING**

This ruling is in respect of a Notice of Motion dated 26<sup>th</sup> August 2020 by the plaintiff/applicant seeking for the following orders:

- a) That the Honourable Court fix a day for investigating the 1<sup>st</sup> judgment debtor Dama Thoya, Jumaa Karisa Menza, Karisa Thoya Kiti and Paul Jamaa Karisa and any other person who has resisted and obstructed the judgment creditor/applicant to obtain possession of Plot No. Kilifi/Mtondia/404 (Original No. Kilifi/Mtondia/110).***
- b) That the Honourable Court do order that the judgment creditor/applicant be put in possession of the suit property.***
- c) That the Honourable Court do order the 1<sup>st</sup> Judgment debtor Dama Thoya, Jumaa Menza, Karisa Thoya Kiti and Paul and any other person who has restricted and obstructed the judgment creditor/applicant to obtain possession be obtained in prison for a period not exceeding 30 days.***
- d) That the 1<sup>st</sup> Judgment debtor Dama Thoya, Paul Jumaa Karisa Menza, Karisa Thoya Kiti and Paul be condemned to pay costs of this application.***

Counsel agreed to canvas the application by way of written submissions which were duly filed.

**PLAINTIFF'S SUBMISSIONS**

Counsel relied on the grounds on the face of the application and the supporting affidavit dated 26<sup>th</sup> August 2020 whereby the plaintiff deponed that on 13<sup>th</sup> February 2015, judgment was delivered in his favour and against the Defendants (judgment debtors) in this suit. Later on 7<sup>th</sup> October 2015, a warrant to the court bailiff was given so as to give vacant possession. Subsequently, the court bailiff directed the Plaintiff to pay a sum of Kshs. 180,000/- to enable execution of the warrant.

The Plaintiff further deponed that he was not in a position to raise the said monies and the judgment debtors have continued to obstruct the implementation of the judgment to give vacant possession of Plot No. Kilifi/Mtondia/404 (Original No. Kilifi/Mtondia/110) (the suit property).

Counsel submitted that the Respondents save Dama Thoya were not Defendants in the case and that they have not denied that they are still in occupation of the suit land. It was counsel's further submission that all the other issues raised by the Respondents in their replying affidavit were considered by the Court during the trial and that the Defendants did not appeal against the Judgment of the Court and therefore estopped from raising the same issues.

Mr. Odhiambo submitted that Order 22 Rule 82 gives this Court powers to investigate a case where the holder of a decree for the possession

of immovable property is resisted or obstructed by any person in obtaining possession of the property.

## **DEFENDANTS' RESPONSE**

The Defendants, Dama Thoya, Karisa Thoya Kiti and one Jumaa Karisa Menza filed a joint Replying Affidavit on 13<sup>th</sup> September 2021 whereby they deponed that they only had knowledge of the said judgment on 3<sup>rd</sup> September 2021 when they were served with the present application. They added that the Plaintiff obtained the orders fraudulently since he did not serve them as early as 2015 when he obtained the same and that the suit property belonged to their late father.

## **ANALYSIS AND DETERMINATION**

I notice that this is a 2008 matter which was finalized in 2015 and what is remaining is execution in terms of the judgment.

Order 22 Rules 82 and 83 provides as follows:

### ***Resistance or obstruction to possession of immovable property [Order 22, rule 82.***

***(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.***

***(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.***

### ***83. Resistance or obstruction by judgment-debtor [Order 22, rule 83.]***

***Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor, or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and, where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in prison for a period not exceeding thirty days.***

Order 22 rule 82 allows for an application where a party has resisted or obstructed the possession of immovable property where the court has issued a decree. It is on record that the court pronounced itself vide a judgment dated 13<sup>th</sup> February 2015 where the defendant was to give vacant possession which the defendants have not complied with.

It is further on record that warrants were issued to the court Bailiff to assist with the execution of the decree but the same has not been done due to the costs of execution. The defendants admit that they are aware of the judgment but complain that they only came to know about it on 13<sup>th</sup> September 2021.

Now that the Defendants are aware of the Judgment and that they did not file any Appeal against the said Judgment, it follows that they are under a duty to obey the decree by giving vacant possession. They did not give any explanation as to why they have not given vacant possession. The action by the Defendants in resisting to vacate the suit land is without any lawful cause. I therefore find that the application has merit in terms of fixing a day for investigating the Judgment debtors who have resisted and or obstructed to give vacant possession. Respondents to pay costs of the application.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF JANUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***