



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CASE NO. E078 OF 2021
MAUREEN AGOLLA ONG'ANYAPPELLANT/APPLICANT
VERSUS
TOM ODAGO OPIYO.....RESPONDENT
RULING

INTRODUCTION:

1. Vide Notice of Motion Application dated **17th November 2021**, the Appellant/ Applicant seeks the following Orders:
 - i.Spent.
 - ii. That the Appellant is seeking for an order of Restitution reinstating her to the Property, being Apartment Number **A901** on **LR 330/1375**.
 - iii. That this Court be pleased to issue an Order of Compensation of **Kshs. 300,000** arising out of Mesne Profits and Damages.
 - iv. That this Honourable court be pleased to issue an order directed to the OCS Muthangari Police Station to facilitate in the enforcement of the orders issued herein.
 - v. That the Costs of this Application be provided for.
2. The subject Application is anchored on the grounds contained and/or enumerated at the foot thereof and same is further supported by the Affidavit of Maurene Agola, who is the Appellant/Applicant sworn on the **17th November 2021**.
3. Upon being served with the subject Application, the Respondent herein filed a Replying Affidavit sworn on the **1st February 2022**, in respect of which the Respondent has made various averments, including but not limited to the fact that the suit premises is currently occupied by a tenant, who took possession over the suit premises after the appellant/Applicant herein had been evicted and/or removed from the suit property.

DepositionS by the parties:

appellant's/applicant's case:

4. Vide Supporting Affidavit sworn on the **17th November 2021**, the Appellant/Applicant has averred as hereunder;
5. The Respondent herein, procured and/or obtained orders of eviction from the Chief Magistrate's court vide **Milimani CMCC Misc. E870 of 2021**, and while armed with the said orders same proceeded to and evicted the Appellant/Applicant from the premises otherwise known as **Apartment No. A901** situate on **L.R No. 330/1375**, Nairobi.
6. However, even though the Appellant/Applicant was evicted and/or removed from the suit premises, same has remained unoccupied and thus it is on this basis that the Appellant/Applicant is seeking to be restituted in the suit premises.

7. Further, the deponent has averred that even though there was a judgment which was issued by the Chief Magistrate's Court, the vide **Milimani ELC 17 of 2020**, the said judgment has since been set aside and therefore the decision of the lower court has been reversed and varied.

8. Based on the fact that the judgment which was issued by the Lower court has since been set aside and/or varied, the deponent now avers that it is in the Interest of Justice that same be restored in the suit Property insofar as the eviction orders, upon which same was removed from the premises are no longer in existence.

9. On the other hand, the deponent has also averred that during the process of her eviction from the suit premises, same was subjected to anxiety and mental anguish and as a result, same incurred damages and Mesne Profits.

10. In this regard, the deponent has therefore sought for an order for compensation in the sum of **Kes.300, 000/=Only**.

11. Finally, the deponent has also implored the court to order and or direct the OCS Muthangari Police Station to facilitate the implementation and/or enforcement of the orders herein.

RESPONSE BY THE RESPONDENT:

12. Vide Replying Affidavit sworn on the **1st February 2022**, the Respondent has averred that the suit premises belong to and are registered in his name and to the extent that same is the registered owner thereto, same is entitled to exclusive possession and occupation.

13. Further, the Respondent has averred that the eviction order which was granted to or in his favor, remains alive and in existence, insofar as same have neither been set aside nor vacated.

14. Besides, the Respondent has further averred that upon the eviction of the Appellant/Applicant herein, same proceeded to and took possession of the suit property and in any event, the suit property has since been rented out to and in favor of a tenant.

15. Other than the foregoing, the Respondent admits and/or acknowledge that the judgment which was issued vide **Milimani ELC 17 of 2020**, has indeed been set aside vide judgment issued in **ELC A054 of 2020**, but that the said decision has not affected the proceedings vide **Milimani Misc. Civil Application No. E870 of 2021**, the latter being the proceedings which gave rise to the Eviction orders.

16. Based on the foregoing, the Respondent has thus averred that the subject Application is not legally tenable and cannot thus be granted, either as sought or at all.

17. Other than the foregoing, the Respondent has averred that even if the judgment issued vide **Milimani MC & ELC 17 of 2020**, was set aside and/or varied, the subject Application cannot be allowed because this is not the court of first instance, which is mandated to entertain and/or adjudicate upon an Application for restitution.

18. Finally, the Respondent has averred that the claim in respect of compensation in the sum of **Kshs 300, 000/= Only**, on account of Mesne Profits and Damages, are not tenable. In this regard, it has been averred that such a claim can only be ventilated and/or addressed during a plenary hearing but not in an interlocutory Application.

19. In a nutshell, the Respondent has therefore sought that the Application herein be dismissed with Costs.

SUBMISSIONS BY THE PARTIES:

20. The subject Application came up for hearing on the **8th February 2022**, on which date counsel for the Respondent sought to have the Application canvassed and/or disposed of by way of written submissions.

21. Nevertheless, and given the nature of issues arising at the foot of the Application herein, the court directed the Parties to prepare and to canvass the Application by way of oral submissions. In this regard, the subject Application was thereafter orally argued by the respective advocates.

22. On his part, counsel for the Appellant/Applicant submitted that to the extent that the judgment which was issued in **Milimani MC ELC 70 of 2020**, has been set aside or reversed on appeal, it was therefore necessary and/or appropriate to have the appellant restored into the suit premises.

23. It was further submitted that upon the setting aside of the decree and judgment of the lower court, this court therefore has the jurisdiction to order or decree restitution. In support of this contention, the Appellant's/Applicant's advocate has invoked and relied upon **Section 91 of the Civil Procedure Act, Chapter 21 Laws of Kenya**.

24. Finally, counsel submitted that following the eviction of the Appellant/Applicant from the suit premises, the Appellant/Applicant has suffered loss and damages and in this regard the Appellant/Applicant is entitled to compensation in the sum of **Kes.300, 000/= only**, on account of Mesne Profits.

25. On his part, counsel for the Respondent submitted that the Application by and/or at the instance of the Appellant/Applicant is misconceive and thus legally untenable. In this regard, counsel contended that even where the decree of the lower court has been varied or reversed, the Application for restitution can only be dealt with by the Court of First instance and not otherwise.

26. Secondly, counsel submitted that the Judgment and decree which has since been set aside and/or revised, was not a decree of this court and therefore this court is not the court of First instance.

27. Owing to the foregoing, counsel for the Respondent further submitted that on the basis of **Section 91 of the Civil Procedure Act**, this court therefore does not have the requisite jurisdiction to entertain and or adjudicate upon the subject matter.

28. Finally, counsel for the Respondent submitted that following the eviction of the Appellant/Applicant from the suit premises, the said premises were rented out and/or otherwise leased to a Third-Party, namely, tenant, who is now in occupation thereof.

29. In the premises, the Respondent has therefore contended that it is not possible to restore and/or reconstitute the Appellant/Applicant into the suit premises and such an Order, shall affect the Rights and Interests of a Third Party.

30. Based on the foregoing, the Respondent has therefore submitted that the Application ought to be dismissed.

ISSUES FOR DETERMINATION

31. Having reviewed and/or evaluated the Application dated the **17th November 2021**, the Supporting Affidavit thereto and the Replying Affidavit sworn in opposition thereto and having similarly considered the submissions made by the Parties, the following issues are germane for determination;

- i. Whether this Court is seized and or possessed Of the Requisite Jurisdiction to entertain the subject suit.
- ii. Whether the court can grant Compensation in the sum of **Kshs 300, 000/=** only, on account of Mesne Profit and Damages and based on an Interlocutory Application.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether this Court is seized and/ or possessed Of Jurisdiction to entertain the subject Application:

32. Before a court of law can take up and interrogate a subject dispute, the court must first and foremost be convinced that same is seized with the requisite jurisdiction to undertake the intended investigation.

33. Suffice it to point out, that the jurisdiction of the court is critical and essential and therefore from the onset, the court must determine the question of jurisdiction.

34. In any event, the jurisdiction of a court is provided for vide the constitution and/or an act of Parliament and where jurisdiction is not so provided, the court of law cannot interrogate unto itself jurisdiction on the basis of innovation and/or discernment of the path of the law or at all.

35. In support of the foregoing observation, it is imperative to take cognizance of the decision in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where the supreme court held as hereunder;

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

*This Court dealt with the question of jurisdiction extensively in, **In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011**. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

36. Other than the foregoing decision, the place and importance of jurisdiction was also underscored by the Supreme Court in the case of **Republic v Karisa Chengo & 2 others [2017] eKLR**, where the Court observed;

“Jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows: -

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or

commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

37. Having taken note of the centrality of the issue of jurisdiction, it is now important and/or appropriate to discern whether this court is seized of the jurisdiction to entertain an Application for restitution.

38. Before determining the foregoing question, it is imperative to take cognizance of the provisions of **Section 91 of the Civil Procedure Act, Chapter 21 Laws of Kenya**, which provides as hereunder;

91. Application for restitution:

(1) Where and in so far as a decree is varied or reversed, **the court of first instance shall**, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.’

39. From the provisions of **Section 91**, which I have quoted herein before, it is evident and/or apparent that where a decision and/or decree has been reversed on appeal, an application for restitution or better still restoration, is to be mounted and/or made to the court of first instance and not otherwise.

40. For the avoidance of doubt, the court of first instance is the court whose decree and/or judgment has been varied or set aside or better still the original court before whom the judgment and/or decree originated.

41. Based on the foregoing position, it is worthy to note that the decree that was varied and/or reversed was made by the Chief Magistrate’s court vide **MCELC 17 of 2020**, and upon the reversal of the said decree, it is therefore the said court, (read court of first instance) that is possessed of the jurisdiction to entertain the Application for restoration.

42. In my humble view, the Appellant/Applicant herein is at liberty to pursue the issue of restitution and/or restoration, but same must be lodged and/or mounted before the correct forum and not otherwise.

43. In support of the foregoing position, that is, that the Application for restoration ought to be made before the court of First instance, it is worthy to take cognizance of and reiterate the decision of the Court of Appeal in the case of **Cyrus Komo vs Hannah Nyambura Gikamu [2018]eKLR**, where it was held thus:

“...That provision is concerned with restoration to a party, on the variation or reversal of a decree, what has been lost to such party in consequence of such decree. The principle behind that provision is that on the reversal or variation of the decree, the law imposes an obligation on the party to the suit who received the benefit of the reversed decree to make restitution to the other party for what he has lost. [See **Mulla on the Code of Civil Procedure, 14th edition, volume 1 para 144 at page 731**].

17. By reason of the order of the Magistrate’s court given on 23rd December 1988 „dismissing? (read, striking out) the respondent’s defence and granting the order for the removal of the caution over the suit property, the respondent lost protection over the suit property. The subsequent order made on 17th February 1989 reversed the order of 23rd December 1988 and ordered reinstatement of the caution on the suit property thereby restoring the status quo ante the order of 23rd December 1988. The subsequent application dated 26th October 1989 made by the respondent under Section 91 sought to restore that status by, as it were, undoing what had been done on the basis of the reversed order. In those circumstances, we hold, as the learned Judge did, that the application dated 26th October 1989 under Section 91 should have been allowed...” (sic)

44. In a nutshell, I find and hold that this court is not seized of the requisite jurisdiction to entertain an Application for restitution and/or restoration and such an Application ought to have been mounted before the Chief Magistrate’s court.

ISSUE NUMBER 2

Whether the court can grant Compensation in the sum of Kshs.300, 000/= only, on account of Mesne Profit and Damages and based on an Interlocutory Application.

45. The Appellant/Applicant has also claimed that same is entitled to compensation in the sum of **Kes.300, 000/=** Only, on account of Mesne Profits and Damages and in this regard, same has therefore sought for an award to that effect.

46. Perhaps, it is important to note and/or observe that the court is dealing with its Interlocutory Application and not a substantive matter.

47. On the other hand, it is also important to note that a claim for Mesne Profit, which is akin to Special damages, is a claim that can only be pursued in a substantive manner, after same has been suitably pleaded and thereafter specifically proved.

48. To the extent that a claim for Mesne Profits is akin to Special Damages, a Party seeking same, must therefore particularly plead and specifically prove such a claim.

49. However, in respect of the subject matter, a claim for **Kes.300, 000/=** Only, on account of Mesne Profits and Damages has been thrown on the face of the Application and how same has arisen and/or been arrived at has not been stated, explained and/or provided for.

50. Based on the foregoing, it is difficult to understand how and on what basis the Appellant/Applicant would seek such compensation.

51. Nevertheless, it is also worthy to point out that despite the curious manner, in which the claim for Compensation has been sought, it is also worthy to note that no evidence, has been tendered to anchor and/or support the claim.

52. Suffice it to note, that a claim, for Mesne Profit, just like a claim for special damages, must strictly comply with the law and in this regard, I beg to adopt and reiterate the decision of the Court of Appeal in the case of **Idi Ayub Shabani V. City Council of Nairobi (1982-88) 1KAR 681** at page 684:

“Special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C. J. in Bonham Carter Vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damage it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages.’ They have to prove it’

53. Without belaboring the point, I wish to state and/or observe that a claim for Compensation on the basis of Mesne Profit and Damages, cannot be awarded on the basis of Interlocutory Application, in the manner sought for by the Appellant/Applicant.

54. Secondly, it is also important to note that where one is seeking compensation for Mesne Profits such a claimant, is obligated not only to specifically plead, but must also strictly prove the claim.

55. Finally, it must also be pointed out that a Claim for Mesne Profits, is only payable to and in respect of the proven Owner of the Suit Property, that is, the Landed Property in Question and such proof must await a Plenary hearing at the appropriate Forum.

56. In my humble view, the claim for compensation based on mesne profits and damages, which have been brought vide an interlocutory Application, is not only premature and misconceived, but same is clearly out of place.

FINAL DISPOSITION:

57. Whereas the Appellant/Applicant may have a valid shout for restitution, premised and/or predicated on the reversal of the decree upon which same was evicted, however, such a shout must be taken before the correct forum and not otherwise.

58. Having made the foregoing observation, I must say that the Notice of Motion Application dated the **17th November 2021**, is incompetent and same is hereby struck out.

59. The Parties herein, appear to have had a relationship, which seems to have hit the rocks and same are therefore estranged. In this regard, it may not be just to condemn the Appellant/Applicant with costs.

60. Consequently, and in the premises, Costs of the Application herein shall abide the Appeal.

61. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2022

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant.

Mr. Seth Ojienda for the Appellant/Applicant.

Miss Mwihaki H/b for Mr. Muriithi for the Respondent.