



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT THIKA**

**MISC. APP. NO. 8 OF 2021**

**PETER MUNGAI.....PLAINTIFF/APPLICANT**

**VS**

**JOSEPH NGABA KURIA.....1<sup>ST</sup> RESPONDENT/JUDGMENT DEBTOR**

**STEPHEN THUO GITAU.....2<sup>ND</sup> RESPONDENT/JUDGMENT DEBTOR**

**AND**

**LEAH NJERI NDICHU.....INTERESTED PARTY**

**RULING**

1. The Plaintiff/ Applicant filed the instant Application dated 22/2/2021 seeking Orders THAT;
  - a. Spent.
  - b. The Plaintiff be allowed to forcefully execute the decree delivered on the 28<sup>th</sup> June, 2018 against the Judgment debtors and its agents.
  - c. The Respondents/Judgment debtors and any interested parties borne by the Respondents be forcefully evicted from the property known as **LAND TITLE NO. RUIRU KIU BLOCK 2(GITHUNGURI)/3725** in the enforcement of the Judgment delivered on 28<sup>th</sup> June, 2018.
  - d. The County Commander, of the area to supervise in the enforcement of the orders of this Court and to maintain law and order.
  - e. Costs of the Application be provided for.
2. The Application is based on the grounds thereto and Supporting Affidavit of even date of **Peter Mungai Muraga**, the Applicant. He deponed that he filed the trial Court suit at Thika CMCC No. 1306 of 2010 and Judgment was entered in his favour on 12/6/2014 in the following terms;
  - ‘a. That the Plaintiff is the legitimate and legal owner of land parcel No Ruiru/Kiu/Block2 Githunguri/3725.
  - b. The District Registrar Thika Land Registrar do cancel all entries in the title in respect to land plot No Ruiru/Kiu/Block2 Githunguri/3725 and rectify the register and insert the name of Peter Mungai Muraga as the owner.
  - c. That the sale transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is unlawful null and void.
  - d. That an order of permanent injunction do issue against the Defendants, their servants agents or employees restraining them from alienating selling changing cultivating mortgaging wasting or in any manner from interfering with the possession and quiet enjoyment of the Plaintiff property Ruiru/Kiu/Block2 Githunguri/3725
  - e. That costs of the suit shall be borne by the 1<sup>st</sup> Defendant for he is the cause of all the mess to the other parties.’
3. That the Respondents were dissatisfied with the said Judgment and filed **ELCA No 22 of 2017 Joseph Ngaba Kuria & Stephen Thuo**

**Gitau Vs Peter Mungai Muraga, Paul Kamau Mwangi & Seven others t/a Eight United Enterprises.** That the appeal was dismissed as no effort was made to prosecute the same and it was therefore concluded in his favour pursuant to the Judgment delivered on the 28/6/2018. That despite the Judgment of the Court aforesaid, the Respondents have refused to vacate the premises in compliance with the Judgment of the Court and have continued with their illegal occupation of the suit land to date. Despite being directed by the Ruiru Police station to vacate vide the occurrence book (OB) dated the 5/10/2020, the squatter in situ has refused thus making it impossible for him to take full possession and develop his property. That it is now well over 11 years and he is yet to enjoy the fruits of his Judgment hence the Application before Court. He urged the Court to grant eviction orders against the Respondents and all interested parties on the land. He attached the Judgment of the Court in CMCC No 1306 of 2010 as well as the orders of the Court in **ELCA 22 of 2017 in Thika ELC** lifting the stay of execution orders issued in the lower Court and dismissing the appeal on account that no efforts had been made to prosecute the same.

4. Terming the Application as misconceived and incompetent, the 2<sup>nd</sup> Respondent raised a Preliminary Objection dated 5/5/2021 and urged that the 1<sup>st</sup> Respondent is deceased and thus cannot be sued. That the Applicant can only execute Judgment against the Administrators of the estate of the deceased.

5. Contemporaneously, the 2<sup>nd</sup> Respondent swore a Replying Affidavit dated 5/5/2021 and denied interfering with the possession and quiet enjoyment of the Plaintiff's property. He avowed that the Judgment in CMCC NO 1306 of 2010-Thika was against the 1<sup>st</sup> Respondent who was ordered to compensate the Applicant. He denied putting up any structures as alleged by the Applicant on the suit land and on that account stated that he has been wrongly enjoined to the suit by the Applicant who has not shown any cause of action against him.

6. Similarly, the Interested Party, **Leah Njeri Ndichu** swore a Replying Affidavit dated 17/6/2021. She denied ever being a party in CMCC No 1306 of 2010-Thika as evidenced by copies of pleadings annexed as **LNN1**. That the instant Application seeking to evict her is an abuse of Court process and breach of her right to fair trial. She averred that the Plaintiff should seek enforcement orders from the trial Court that issued the impugned Judgment. She contended that she has been in occupation of the suit land for many years and never been served with any Court documents. That she has never been an agent of any of the Respondents as alleged by the Applicant and that the Application is intended to unnecessarily vex her.

7. On the 20/9/2021 the Interested Party raised a Preliminary Objection in the following terms;

‘that the Application is hopelessly misconceived frivolous, totally devoid of merit and malafides for the reason interalia that the Applicant seeks to eviction order against the INTERESTED PARTY who was not a party to the proceedings in **Thika CMCC No 1306 of 2010** without giving her a chance to be heard which violates her right for fair hearing and that the INTERESTED PARTY has been in occupation of the suit property from the year 2014.’

8. The Preliminary Objection is grounded on the various pleadings, the record of proceedings and the Replying Affidavit dated the 17/6/2021.

9. The Interested Party also filed a Supplementary Affidavit dated 20/9/2021. She contended that she bought her parcel of land from a Mr. Mungai on 9/7/2014. That Mr. Mungai issued her a share certificate from Marstep Agencies and started construction a house thereon in 2020. That she was summoned to the Ruiru DCI office to explain her ownership of the land and she explained how she came into ownership. She maintained that Marstep Agencies never informed her of any pending suit in Court in respect of the suit land and it would be unfair to evict her without according her a fair hearing. That in any event she learnt that only one of the 4 partners of the said Marstep Agencies was sued in Thika Civil case no. 1306 of 2010 and annexed copy of the amended Plaint.

10. On 14/10/2021 directions were taken to canvass the Application dated the 22/2/2021, the 2<sup>nd</sup> Respondent's Preliminary Objection dated the 5/5/2021 and the Interested Party's Preliminary Objection dated the 20/9/2021 by way of written submissions.

11. The Applicant filed submissions dated 16/8/2021 and 18/11/2021 through the firm of **Abuya Kwamboka & Co. Advocates**. Citing the provisions of Article 40 of the Constitution, Applicant averred that the protection of his property rights are protected by the Constitution. That he has two Judgments in his favour and yet he is yet to enjoy the fruits of the said Judgments because the Respondents have refused to comply with the said Judgments.

12. Regarding the Preliminary Objection, the Applicant submitted that Order 24 rule 4(4) of the Civil Procedure Rules (CPR) is clear on what happens when a Defendant dies and the cause of action survives him/her. The Applicant admitted that he was not aware of the 1<sup>st</sup> Respondent's demise and only learnt about it upon being served with the Preliminary Objection.

13. With respect to the Interested Party, the Applicant submitted and claimed that she is the agent of the Respondents. That she unlawfully acquired the property from the Respondents and further that the Interested Party was cautioned and informed of the lower Court case but chose to ignore and continued construction of a house. That on the conclusion of the case she too was served with the orders of the trial Court which she decided to disobey. He implored upon the Court to make a finding that the response together with the Interested Party are in contempt of the Courts orders issued on the 28/6/18. Relying on the case of **MMG Vs JG aka JMG & Anor (2018) eKLR and Simon Parkoiyet Mokare Vs Peter Kokai & 3 Others (2020) eKLR**, the Applicant urged the Court to issue eviction orders against the Respondents and the Interested Party.

14. On the issue of the Interested Party not being aware of Court proceedings, the Applicant relied on the Interested Party's Supplementary Affidavit to demonstrate her knowledge. That she served the Interested Party with Court orders that were ignored and she proceeded to construct her house. He urged the Court to find the Respondents and Interested Party in contempt of Court orders issued on 28/6/2018 and 30/4/2008 and commit them to civil jail.

15. The 2<sup>nd</sup> Respondent through the firm of **Kimani Kahete & Co. Advocates** filed brief submissions dated 12/10/2021. Supporting the

Preliminary Objection, it was submitted that any suit against a deceased person is incurably defective. That while the Administrators of a deceased Defendant can be enjoined to defend the suit, a formal Application has to be made to that effect. That the claim herein is that of trespass which cannot survive the deceased 1<sup>st</sup> Respondent.

16. Opposing the prayer for eviction, the 2<sup>nd</sup> Respondent claimed that the Applicant has not proven that the 2<sup>nd</sup> Respondent is in occupation of the suit land nor his agents to warrant such orders. That the 2<sup>nd</sup> Respondent has not put up any structures as alleged and if at all there are squatters on the suit land, the practical remedy is to pursue them and not the 2<sup>nd</sup> Respondent.

17. Lastly, the firm of **Kaingati Kamonjo & Co. Advocates** filed submissions dated 26/10/2021 on behalf of the Interested Party. She submitted that her right to a fair hearing as contained in Article 50 of the Constitution was infringed as she was not a party to Thika CMCC case No. 1306 of 2010. That she bought her land from Marstep Agencies as a bona fide Purchaser without notice and cited the Court of Appeal case of **Samuel Kamere vs Land Registrar (2015) eKLR** in support of that proposition.

18. The main issue for determination is whether the Preliminary Objections and instant Application are merited. I will start by considering the Preliminary Objections.

19. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

20. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

21. The 2<sup>nd</sup> Respondent impugns the capacity of the 1<sup>st</sup> Respondent herein who is said to be deceased. The legal capacity of a party in any legal proceeding is critical point of law that goes to the root of any suit. A party must have capacity to sue and or be sued. It is trite that Court proceedings cannot be sustained against a deceased Defendant and in the event of his demise, an Application for substitution must be done; if the cause of action survives him/her.

22. As already been stated, one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party. While no proof of such death was tendered, the ground of objection would in itself call upon the Court to inquire into the date of the death and whether the suit was a nullity ab initio or whether the cause of action survived the deceased to warrant substitution to be validly done. All these require the Court to call in aid evidence to ascertain the same hence ousting the Preliminary Objection from being a pure point of law.

23. With regards to the Interested Party's Preliminary Objection dated the 20/9/2021, the ground is that the suit is devoid of merit on account that the Applicant is seeking to evict the Interested Party who was not a party to the suit in the trial Court without giving her a chance to be heard. That by so doing her right to a fair hearing will be violated as she has been in occupation of the property since 2014.

24. With the greatest of respect, this objection calls upon this Court to inquire of the pleadings to ascertain whether or not the Interested Party was a party or not in the trial Court. Equally the Court will have to inquire into evidence to find out if she has an accrued right capable of protection by the Court.

25. Regarding the two Preliminary Objections, it is the finding of the Court that the same are unmerited and they are for rejection.

26. I shall now determine the Applicant's Notice of Motion dated the 22/2/2021. The Applicant sought orders to evict the Respondents and the Interested Party. The 2<sup>nd</sup> Respondent contended that he is not in occupation of the property and that now that the Applicant is the registered owner of the land he is at liberty to evict whomever is in possession. He also contended that with the 1<sup>st</sup> Respondent having died, there is no claim for trespass available for the Applicant to pursue as the claim of trespass became extinguished upon the death of the 1<sup>st</sup> Respondent. On the other hand the Interested Party position is that her right to be heard will be violated if she is evicted without being accorded the right to be heard having resided on the land since 2014. It was her case that she was neither served with the claim in the trial Court nor with the Judgment. That she has a right in the property capable of protection of law and urged the Court to dismiss the Application.

27. The case of the Applicant is purely the enforcement of a decree of the trial Court in CMCC No 1306 of 2010. See the orders in para 2 of this Ruling.

28. The Applicant claims that this Court issued another Judgment in his favour. I have anxiously perused the record and cannot find any

Judgment from this Court save for an order issued on the 28/6/2018 in ELCA NO 22 of 2017 as follows;

- a. That an order be and is hereby issued directing that the orders of stay granted in CMCC No 1306 of 2010 be and are hereby stayed.
- b. That this appeal be and is hereby dismissed as no effort has been made to prosecute the appeal.
- c. That costs are provided for.”

29. It would appear that the appeal was not heard on its merit but was a dismissal. That being a negative order I find that there is nothing for this Court to found any issuance of orders of execution. In my considered opinion the Applicant should make this Application in the trial Court which is seized with the trial Court file.

30. Section 34 of the Civil Procedure Act states as follows;

“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.”

31. From the foregoing, it is clear that the Application herein is fatal because the law requires that any execution of a decree should be by the Court executing the decree and not to file a separate suit.

32. The Court finds that the Application is misdirected and the same is without merit. It is dismissed.

**33. Final orders and disposal;**

- a. The 2<sup>nd</sup> Respondent’s Preliminary Objection dated 5/5/2021 is unmerited. It is dismissed.
- b. The Interested Party’s Preliminary Objection dated 20/9/2021 is unmerited. It is dismissed.
- c. The Applicants Notice of Motion dated the 22/2/2021 is unmerited. It is dismissed.
- d. Each party to bear their costs.

34. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 21<sup>ST</sup> DAY OF APRIL 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Abuya for the Plaintiff/Applicant

1<sup>st</sup> Respondent: Absent

Ms. Thuo H/b for Kirori for 2<sup>nd</sup> Respondent

Kamonjo for Interested Party

Court Assistant: Phyllis