



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 607 of 2005

CHARLES K KANG'ETHE.....PLAINTIFF/APPLICANT

=VERSUS=

GEORGE G MWANGI.....DEFENDANT/RESPONDENTS

RULING.

The Applicant herein **Charles Kinyanjui Kangethe** has brought this Notice of Motion dated 10th April, 2013 *under Section 38,51, 1A,1B and 3A of the Civil Procedure Act, Order 22 Rule 28 (1) and 5 29(1) and 3, Order 51 Rules 1 and 3 of the Civil Procedure rules,2010* and all other enabling provisions of Law for Orders that:-

a) The Court do Order the Defendant, his agents, servants and/ or anyone claiming authority from the Defendant be removed and / or evicted from Land Parcel **No. Limuru/Kamirithu/T 212** in enforcement of the Decree of this Court.

1. That such removal and/ or eviction be executed by Decree holder and/ or the Court Bailiff with the supervision and assistance of the Officer Commanding, Tigoni Police Station.

2. An Order that the Decree Holder and/ or the Court Bailiff be at liberty to remove, open any lock or bolt , break open any door or do any other act necessary for putting the decree holder in possession of Land Parcel **No. Limuru/Kamirithu/T 212** .

4. That the Court do order the Defendant be arrested and detained in prison for Six months in enforcement of the Decree herein and such arrest be executed by Officer Commanding, Tigoni Police Station.

5. Any other directions

6. Costs of the application.

The application is supported by the grounds on the face of the application and by the supporting affidavits of **Charles Kinyanjui Kangethe** and **Joseph Munyaka**. The Applicant averred that on 30/5/2012 this court entered judgement against the Defendant. The said decree of the Court was served upon the Defendant on 26/8/2012 and the defendant has failed to honour it.

The applicant prayed to Court to issue the Orders sought for the interest of Justice and to give effect to the overriding objectives of the Civil Procedure Act which is to ensure a just, expeditious, proportionate and affordable resolution of civil disputes.

I have noted that the Defendant herein did not file his Replying Affidavit though the application was served to his advocate as per the Affidavit of Service sworn on 29/4/2013 by **Simon Kamanguya**.

I have considered the instant application and the prayers sought. Indeed a judgement was entered against the Defendant on 30/5/2012 by Judge Mwilu. A Decree was later extracted on 13/8/2012 and served upon the defendant on 26/8/2012 as per the Affidavit of Service sworn by **Simon Kamanguya**. The Judgement of the court has not been appealed against, set aside or vacated and so it is still valid.

It is the contention of the Applicant that the Defendant has failed to obey the said Decree of the Court. That Applicant cannot enjoy the fruits of his Judgement and thus this Application. The Defendant did not oppose the application and thus Applicant's allegations are not controverted. The Applicant has come to court for execution of the Decree. The court has power to enforce execution as provided by **Section 38 of the Civil Procedure Act**.

Section 1A of the Civil Procedure Act also stipulates out the overriding objectives of the Act. Some of these objectives are **just** and **expeditious** resolutions of Civil Dispute. The duty of the court is also spelt out in Section 1B of the Act and one of such duty is just determination of the proceedings. The applicant herein has a Decree in his favour. He cannot enjoy the fruits of that Decree due to the action of the Defendant. The applicant is justified to come back to Court and seek the Court's assistance in enforcement of its Decree.

I have noted that in the Judgement issued on 30/5/2012, the Defendant was ordered to pay punitive damages to the tune of **Ksh.100,000/=**. He has not done so and defendant is therefore a **Judgement debtor**. The applicant sought for defendant to be arrested and detained in prison for six months. As was held in the case of **Fatehali Ali Jessa Shaban Kapera & others 1969(THCD 72**. "*Upon default in payment of the Judgement debt, the defendant should be served with a **notice to show cause** why a Decree should not be executed by committal to Civil Prison before warrant of arrest is issued*".

I have not seen a notice to **Show Cause** issued by the applicants to the Defendant. The court therefore cannot issue a warrant of arrest. However, the applicant is justified in seeking for the other prayers.

Consequently, the Court allows the applicants Notice of Motion dated 10/4/2013 in terms of prayers No.1, 2, 3 , and 6.

· Applicant is entitled to costs.

Dated, signed and delivered this 24th May,2013

L. N. GACHERU
JUDGE

In the Presence of:-

.....For the Plaintiffs
.....For the Defendants
.....Court Clerk

L. N. GACHERU
JUDGE