



M'Mikua v Muchiri & another; Muthaura (Applicant) (Environment & Land Case 50 of 2008) [2022] KEELC 2907 (KLR) (11 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2907 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 50 OF 2008**

CK NZILI, J

MAY 11, 2022

BETWEEN

M'MUTHAURA M'MIKUA PLAINTIFF

AND

EUSTACE MUCHIRI 1ST DEFENDANT

NAHASHON MWAI GATERE 2ND DEFENDANT

AND

NAFTALY GUANTAI MUTHAURA APPLICANT

RULING

1. Before the court is an application dated 20.1.2022 seeking for an order of eviction of the plaintiff, his agents, children, assignees or anyone acting on his behalf from the suit land and the OCS Timau police station to provide security during the exercise.
2. The application is supported by an affidavit sworn on 10.11.2021 by Eustace R. Muchiri. The reasons given are that the applicant is the registered owner of the suit land in which she had been sued by the plaintiff for adverse possession but the suit was dismissed by the court. After the suit was dismissed the children and agents of the plaintiff in occupation have refused her access to the land and keep on trespassing on to the same hence denying her enjoyment of the benefits of her judgment.
3. The application was opposed through a replying affidavit sworn by Naftaly Guantai Muthaura, a legal representative of the estate of the plaintiff enjoined to the suit pursuant by the leave granted of court on 23.3.2022. It was averred that the plaintiff passed on 20.5.2020 whereas the judgment was delivered on 28.9.2017 after which an appeal was filed as Nyeri Court of Appeal no. 164 of 2017. That the parties had appeared for case management before the Deputy Registrar on 14.3.2018 and 19.3.2018 and were directed to file written submissions. That on 2.12.2021, the respondent filed an application seeking to



be enjoined in the pending appeal as a legal representative of the appellant's estate which application is opposed. That on 15.12.2021 the Deputy Registrar directed parties to put in written submissions which has been done and the courts directions on the ruling date

4. The applicant averred given the foregoing, it would be against the interest of justice to grant the orders of eviction since the ;- (i) the application was filed before any substitution of the deceased (ii) delay in processing the appeal was beyond the control of the respondent (iii) a similar application was filed on 10.11.2021; there was no order from the Court of Appeal to show that the appeal has abated; there has been non-disclosure of material facts since the applicant knew the issues and pending directions and steps alluded above before the Court of Appeal; the children and the wife of the plaintiff were still in occupation; it was only just and fair the application be dismissed otherwise if allowed the wife and children of the deceased would suffer loss as they shall be condemned unheard.

Determination

5. There is no dispute that the suit herein was dismissed on 28.9.2017 on the basis that there was in existence a sale agreement for Kshs.90,000. The 1st respondent had admitted a joint venture was in force hence he was a licensee as opposed to an adverse possessor.
6. Further the court made a definite finding that the plaintiff was not a squatter or a trespasser to the land but was in occupation with consent of the 1st defendant.
7. Following the judgment, a notice of appeal dated 4.10.2017 was filed and received by the Deputy Registrar on 6.10.2017. It appears the applicant took no action from 6.10.2017 until he filed an application dated 10.11.2021 which came up for inter-parties on 17.1.2022 was dismissed it for non-prosecution.
8. The applicant has filed the current application which in essence is all aspects similar to the one previously dismissed for non-prosecution.
9. The court is asked to order for an eviction of undefined persons. There was no counterclaim against the plaintiff's suit. The decree has nothing as regards eviction in favour of the applicant. There is also no indication if the defendant has given any statutory eviction notice or notice to execute a decree which was more than one year old as per the Civil Procedure Act.
10. There is decree in favour of the defendant. In the circumstances, I see no merits to this application. The same is dismissed with costs.
11. Concerning the replying affidavit, the defendants have not moved this court under Order 42 Rule 6 [Civil Procedure Rules](#). This court finds it has no jurisdiction based on a mere replying affidavit to grant any substantive orders. File closed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 11TH DAY OF MAY, 2022

In presence of:

No appearance

HON. C.K. NZILI

ELC JUDGE

