



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bundi v Kangethe & 17 others (Environment & Land Case  
411 of 2017) [2022] KEELC 2728 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2728 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 411 OF 2017**

**JG KEMEI, J**

**JUNE 23, 2022**

**BETWEEN**

**BARUTHI BUNDI ..... PLAINTIFF**

**AND**

**IBRAHIM KANGETHE ..... 1<sup>ST</sup> DEFENDANT**

**ISAACK KAMAU KABUE ..... 2<sup>ND</sup> DEFENDANT**

**PETER NJOROGE KABOGO ..... 3<sup>RD</sup> DEFENDANT**

**JOSHUA NJOROGE ..... 4<sup>TH</sup> DEFENDANT**

**PETER MWANGI ..... 5<sup>TH</sup> DEFENDANT**

**DANIEL WATUKU ..... 6<sup>TH</sup> DEFENDANT**

**JOEL KINUTHIA WANDUA ..... 7<sup>TH</sup> DEFENDANT**

**PETER MURIGI NJUGUNA ..... 8<sup>TH</sup> DEFENDANT**

**JOSEPHAT WANGEKA ..... 9<sup>TH</sup> DEFENDANT**

**MUCHIRI NDIRANGU ..... 10<sup>TH</sup> DEFENDANT**

**PETER KINUTHIA ..... 11<sup>TH</sup> DEFENDANT**

**SAMUEL WAWERU ..... 12<sup>TH</sup> DEFENDANT**

**GABRIEL KAMAU WAWERU ..... 13<sup>TH</sup> DEFENDANT**

**ZACHARIA MUCHIRI ..... 14<sup>TH</sup> DEFENDANT**

**MWANGI KAMAU ..... 15<sup>TH</sup> DEFENDANT**

**FRANCIS WAWERU ..... 16<sup>TH</sup> DEFENDANT**

**DAVID NDIRANGU ..... 17<sup>TH</sup> DEFENDANT**



**RULING**

1. Vide an amended Notice of Motion dated the 15/11/2021 the Applicant sought the following orders;
  - a. Spent
  - b. The Court grants leave to the Applicant to proceed with execution of decree before ascertaining costs.
  - c. The Respondent, their agents, servants, employees, representatives or any one acting under or claiming from them be evicted and any building therein be demolished pursuant to the judgement and decree in this suit from the suit premises Thika/mun/block11/863 by issuance of warrants of eviction to Aeliud Chai Wambu T/a Chador Auctioneers, THika Business Centre P.o Box 27304-00100 Thika.
  - d. That the OCPD and OCS Thika Police division and station do ensure compliance with the judgement and decree issued by this Honourable Court
  - e. That this Honourable Court make such other orders it may deem just and expedient under the circumstances.
2. The Application is based on the grounds annexed and on the Supporting Affidavit of the Applicant sworn on the 5/8/2021 in which the deponent stated as follows; despite the suit having been determined in his favour judgement the Respondents adamantly persist in occupying it; the 15<sup>th</sup> Defendant's attempt to set aside the said judgement was dismissed by the Court; that he was prevented by financial constraints from executing the decree and that unless the Court grants orders sought he will continue to be deprived of his right to the property.
3. The Application is opposed by the 15<sup>th</sup> Respondent vide his Replying Affidavit sworn on the 3/12/2021. He deponed that he is the Chairman of the Jua Kali Association and that the reasons why the Respondents did not oppose the suit is because some are deceased, and others including himself, have relocated from the area claimed by the Applicant. That they are now operating from a public open space/ road reserve and for that reason the Court should ascertain the extent of the Applicant's land in relation to the open spaces they are occupying before eviction is allowed. That they were relocated to the public open space by the County Government and that the Applicant is keen to use the orders of this Court to annex public land and in the process destroy small businesses.
4. In a further Supplementary Affidavit, the Applicant stated that the Respondents moved out of the land because they recognize that they were trespassers on his land. That the issue of a surveyor's report is a delaying tactic by the 15<sup>th</sup> Respondent and is a mere speculation which speculation should be ignored.
5. On the 15/3/2022 the parties elected to canvass the Application by way of written submissions. It is only the Applicant that filed written submissions on the 4/5/2022 which I have read and considered.
6. The issue before this Court for determination is whether the Application is merited.
7. It is not in dispute that there is a Judgment in favour of the Applicant where the Court adjudicated the rights of the parties to finality. The Court granted a permanent injunction against the Respondents as well as eviction orders. The issue of eviction is therefore already determined by the Court.



8. With respect to the prayer to proceed with execution of a decree before ascertaining costs against the Respondents, Section 94 of the *Civil Procedure Act* provides as follows;

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation’.

9. The rationale behind Section 94 of the *Civil Procedure Act* was elaborately discussed by Kuloba, J (as he then was) in the case of *Mercedes Sanchez Rau Tussel v. Samken Ltd & 2 Others* [2002]eKLR, as follows:

“The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a Taxing Officer. In order not to permit a Judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the Court may permit the execution of a decree except as to so much thereof as relates to unsettled costs.

...

Till such formal expression has been given to the Judgment of the Court, the decree is not executable, and in order to obviate the difficulty arising in a case where the taxation of the costs would take some time, section 94 permits the decree holder, as it were to execute a “decree” which strictly does not constitute the formal expression of an adjudication in as much as the provision with regard to costs has not been embodied in that decree, and it is perfectly true that an order from the Court for a decree to be executed is required if it is a “decree” not in the proper sense of the term as defined by section 2 of the Act. That is the rationale for section 94 making a specific order of the Court necessary in a case where a decree holder wants to execute a decree which does not contain the provision for costs, and that permission is necessary because a decree cannot be drawn up and the seal of the Court cannot be put upon the decree unless the provision with regard to costs is inserted in it, because it is in the Judgment of which the decree is only a formal expression.”

10. Whether to allow execution to proceed before costs are ascertained is a matter of the Court’s discretion. In the case of *Mercedes Sanchez Rau Tussel v. Samken*, supra, it was stated that:

“On the wording of the section the ordering of execution to be done forthwith is a matter in the sound discretion of the Court when the Court considers it necessary that in all the circumstances of the case the decree should be executed before awarded costs are ascertained by taxation.”

11. The Court notes that this matter was filed in 2011 and Judgment was delivered on the 6/12/2018, 5 years ago and the Applicant is yet to enjoy the fruits of his victory. I am alive to the averments of the 15<sup>th</sup> Respondent who has admitted to have relocated from the Applicants parcel of land to a nearby site. His quest to have the land be surveyed to ascertain the Applicants land vis a vis the spaces they are occupying in my view is inconsequential in the face of a valid judgement in favour of the Plaintiff and allowing this request will be tantamount to reopening the suit for retrial. The Applicant has a



valid Judgment and I think it is only fair that he is allowed to enjoy the fruits of his judgement. In my considered view this is an Application deserving of exercise of discretion of this Court. I so grant.

12. In the end the Application is granted as prayed.
13. Final orders and disposal;
  - a. Leave be and is hereby granted to the Applicant to proceed with execution of decree before ascertaining costs.
  - b. The Respondents, their agents, servants, employees, representatives or any one acting under or claiming from them be evicted and any building therein be demolished pursuant to the Judgment and decree in this suit from the suit premises Thika/mun/block11/863 by issuance of warrants of eviction to Aeliud Chai Wambu T/a Chador Auctioneers, Thika Business Centre P.o Box 27304-00100 Thika.
  - c. That the OCPD and OCS Thika Police division and station do ensure compliance with the judgement and decree issued by this Honourable Court
  - d. I make no orders for costs.
14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 23<sup>RD</sup> DAY OF JUNE 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Mugo holding brief for Karanja Kangiri for Plaintiff/Applicant

1<sup>st</sup> – 14<sup>th</sup> Defendant/Respondent – Absent

15<sup>th</sup> Defendant/Respondent – Jessee Kariuki

16<sup>th</sup>, 17<sup>th</sup> & 18<sup>th</sup> – Absent

Court Assistant – Phyllis Mwangi

