



REPUBLIC OF KENYA



KENYA LAW
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**Mukanda v Mutswenje (Environment & Land Case 507 of 2014)
[2022] KEELC 153 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 507 OF 2014
DO OHUNGO, J
JUNE 21, 2022**

BETWEEN

FRANCIS MAKUBA MUKANDA PLAINTIFF

AND

FELIX SAKWA MUTSWENJE DEFENDANT

RULING

1. Judgment was delivered in this matter on 28th February 2019. The plaintiff's suit was dismissed and judgment entered in favour of the defendant as follows:
 1. A declaration that the defendant is the owner of a portion measuring two (2) acres out of the parcel of land known as E/Wanga/malaha/1767 having lived on, occupied and used the said parcel of land from 1969 to-date and the defendant is hence entitled to the said parcel of land by virtue of adverse possession and the plaintiff is ordered to transfer title to the said parcel of land to the applicant.
 2. Each party to bear its own costs.
2. Subsequently, through ruling delivered on 24th March 2021, the court empowered the Deputy Registrar to execute relevant mutation forms and necessary documents on behalf of the plaintiff for purposes of having the portion measuring two (2) acres hived off from land parcel number E/Wanga/Malaha/1767 and transferred to the defendant.
3. The plaintiff later filed Notice of Motion dated 23rd November 2021, seeking the following orders:
 - a) [Spent]
 - b) That it pleases the Honourable court to temporarily stay eviction, destruction of crops and fencing of extra land not occupied by the decree holder.



- c) That it pleases the Honourable court to order the Deputy Registrar and County Surveyor to visit the site and establish the true acreage occupied by the decree holder.
 - d) That the Honourable court's judgment herein delivered on 28th February 2019 be reviewed on the acreage as per the survey report.
 - e) The decree on costs now being executed be vacated as no costs were awarded.
 - f) [Spent]
 - g) Costs herein to abide the outcome.
4. The application is supported by an affidavit sworn by the plaintiff. He deposed that the land occupied by the defendant is less than 2 acres and that in enforcement of the decree, his land has been fenced into an enclave, his crops damaged and his freedom lost. That if the defendant was sincere that he was occupying 2 acres then he did not need to forcefully survey the land and cause destruction.
 5. The defendant responded to the application through a replying affidavit in which he deposed that the judgment of the court stands executed following the survey process which has seen the 2 acres hived off and fenced to avert further disruptions from the plaintiff. That the plaintiff is a very violent person who has threatened both him and M/s Dimonde Auctioneers. That being dissatisfied with the judgment, the plaintiff filed Notice of Appeal dated 11th March 2019 against it and is therefore precluded from seeking review. He added that the survey having been carried out on 17th November 2021 by government surveyors from the office of the District Surveyor, there is no need to repeat it. He urged the court to dismiss the application.
 6. The plaintiff/applicant filed submissions in support of the application. The defendant on the other hand relied entirely on his replying affidavit.
 7. I have considered the application, the affidavits and the submissions. A perusal of the record herein shows that the plaintiff sought stay of execution of the judgment through Notice of Motion dated 12th November 2020 and that the application was heard and dismissed through ruling delivered on 24th March 2021. That being the case, prayer (b) of the present application is res judicata and is hereby struck out. The same applies to prayer (d) of the application which seeks to revisit the acreage occupied by the defendant. The prayer is res judicata since that the issues of possession and the extent thereof were resolved in the judgment and I have no jurisdiction to reopen that aspect of the case. Consequently, prayer (d) of the application is struck out.
 8. Regarding prayer (c) of the application, the defendant has deposed that survey was carried out on 17th November 2021 by government surveyors from the office of the District Surveyor. That much is confirmed by the plaintiff who is merely complaining about the manner in which the survey was done. The plaintiff has however not offered any evidence by a survey professional to warrant a repeat exercise. In any case, the invitation to revisit the acreage occupied by the defendant is res judicata since that issue was resolved in the judgment. If the plaintiff is dissatisfied with that aspect of the judgment, then he ought to have raised it through appeal. I find no merit in prayer (c) of the application and I therefore dismiss it.
 9. Now onto prayer (e) of the application. As noted at paragraph 1 of this ruling, the court ordered in its judgment that each party was to bear own costs of the suit. That aspect of the judgment has not been set aside. The record further shows that the plaintiff's Notices of Motion dated 12th November 2020 and 22nd February 2021 were dismissed with costs through ruling delivered on 24th March 2021. The defendant filed bill of costs dated 6th April 2021 in respect of the costs awarded in the said ruling. As



far as the record goes, the only costs which have been taxed and in respect of which any execution may take place, are in respect of the two applications. The plaintiff has not demonstrated that there have been any attempts to recover from him costs of the suit. I find no merit in prayer (e) of the application and I therefore dismiss it.

10. In view of the foregoing, Notice of Motion dated 23rd November 2021 has absolutely no leg to stand on and is hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF JUNE 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The plaintiff present

No appearance for the defendant

Court Assistant: E. Juma

