



Theuri v Njeri & 3 others; Ndegwa & 29 others (Interested Parties) (Environment & Land Case 2484 of 1994) [2022] KEELC 3636 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3636 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2484 OF 1994**

**OA ANGOTE, J
JULY 21, 2022**

BETWEEN

FRANCIS WAKAHU THEURI PLAINTIFF

AND

MONICA NJERI 1ST DEFENDANT

ESTHER WANGUI 2ND DEFENDANT

CATHERINE MUTHONI 3RD DEFENDANT

**FRANCIS NJURU NGUGI ALL T/A WAWAGE INVESTMENT
COMPANY 4TH DEFENDANT**

AND

JOSEPH GITUMA NDEGWA & 29 OTHERS INTERESTED PARTY

RULING

1. In the Notice of Motion dated October 28, 2013, the plaintiff has sought for the following orders:
 - a. That the defendants, their agents, services and any persons claiming through them be hereby evicted and forcefully remove the structures thereon from the parcel of land known as Ruiru/ Ruiru Block 1 (Witeithie/125) pursuant to judgement of Honourable Justice P. Nyamweya delivered on December 14, 2012 and subsequent ruling delivered on September 25, 2013.
 - b. That the County Commissioner of Kiambu County and the Officer Commanding Ruiru Police Station do ensure compliance of the respondents with the orders above.
 - c. That the costs and incidentals to this application be borne by the respondents.



2. This application is based on the grounds on the face of it and the supporting affidavit sworn by the plaintiff, Francis Wakahiu Theuri. The Plaintiff deponed that he is the registered owner of land known as Ruiru/ Ruiru Block 1 (Witeithie/125) situated along the Ruiru-Kiambu road (the suit property).
3. According to the plaintiff, pursuant to a suit between himself and the Respondents, Hon. Justice P. Nyamweya vide a Judgement of December 14, 2012, ordered the respondents to vacate the suit property and to remove the structures built on it and that dissatisfied with this decision, the respondents filed for review of the judgement which the court dismissed.
4. The plaintiff deponed that the defendants have however continued to put up new structures on the land and some of them are selling the parcels they occupy to defeat the cause of justice and that the respondents have also failed to deposit Kenya Shillings Eighty Million (Kshs. 80,000,000) as security as ordered on September 25, 2013.
5. The 1st interested party, Joseph Gituma Ndegwa, opposed the application and deponed that he is the Chairman of the BTL Membley Association; that the application was pre-mature and that the orders sought could not be granted at this stage. It was deponed that the Interested Parties filed Civil Appeal No. 272 of 2013 which is pending hearing before the Court of Appeal in Nairobi.
6. It was deponed by the 1st interested party that the normal course of justice should be allowed as an order of eviction would have devastating effects and that the appeal that they have filed raises substantial issues of law and fact. Further, it was deponed, should the appeal succeed after eviction is carried out, the plaintiff would not be in a position to compensate the applicants for the losses sustained.
7. The 1st interested party argued that an eviction cannot issue against the interested parties because they are lawfully in occupation of the land known as Ruiru/ Ruiru Block 1/ Witeithie/ 126 while the judgement sought to be enforced gave orders relating to a different parcel, Ruiru/ Ruiru1/ Witeithie/125.
8. It was deponed that the applicant realised the error and filed an application to amend the Judgement on July 25, 2014; that the application was however dismissed on February 24, 2017 and that the applicant appealed against the said Ruling through a Notice of Appeal dated March 1, 2017, which appeal is pending determination before the Court of Appeal.
9. The plaintiff filed a further affidavit in which he deponed that he was the registered owner of Ruiru/ Ruiru 1/ Witeithie/ 126, and that the said land was the same as Ruiru/ Ruiru1/ Witeithie/ 125, which is occupied by the interested parties.
10. He argued that there was no error on the record because when he filed this suit in 1994, he used the number allocated by the Surveyor in the proposed subdivision, which was Ruiru/ Ruiru Block 1/ Witeithie/ 125; that the surveyor submitted the same and an official map was issued with the same land indicated as Ruiru/ Ruiru Block 1/ Witeithie/ 126 and that the Certificate of Lease was issued as Ruiru/ Ruiru 1/ Witeithie/ 126 pursuant to the map.
11. The defendants filed Grounds of Opposition in which they averred that the application was misconceived, unsustainable and bad in law because the indicated parcel of land was not the subject matter of this suit.
12. The defendants also posited that no decree has been extracted in this suit; that the Applicant was introducing new evidence by annexing the map for subdivision to his application and that this was an attempt by the Plaintiff to rectify the 2013 judgement, which matter was decided by Gacheru J. and is thus res judicata. The parties filed written submissions which I have considered.



Analysis and Determination

13. The issues for determination before this court is whether the court should grant the orders of eviction, in execution of the judgement by Nyamweya J. delivered on December 14, 2012, as sought by the Applicant.
14. Section 38 of the *Civil Procedure Act* provides for powers of the court to enforce execution. It provides as follows:

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

 - (a) by delivery of any property specifically decreed;
 - (b) by attachment and sale, or by sale without attachment, of any property;
 - (c) by attachment of debts;
 - (d) by arrest and detention in prison of any person;
 - (e) by appointing a receiver; or
 - (f) in such other manner as the nature of the relief granted may require.”
15. The process for execution of a decree is set out in Order 22 Rule 7 of the *Civil Procedure Rules*. Subrule 2 provides the details that should be contained in an application for execution of a decree that is not a money decree. Under subrule 3, an applicant may be required to produce a certified copy of the decree.
16. Upon receiving an application under Rule 7(2), Order 22 Rule 13 requires the court to ascertain whether the requirements of rule 7 to 9, are applicable to the case, and, if they have not been complied with, the court may reject the application, or may allow the defect to be remedied there and then or within a time to be fixed by it.
17. The brief facts of this suit are that the parties litigated this dispute before Nyamweya J, who delivered judgement on 14th December 2014 in favour of the Plaintiff herein. In the Judgment, the court ordered the Defendants give to the Plaintiff vacant possession of the suit property within ninety (90) days, which land was described as Ruiru/ Ruiru 1/Witeithie/ 125.
18. The Plaintiff has however not presented any proof to show that he extracted a decree with respect to the judgement which he seeks to enforce, especially considering that the issue of the description of the suit property is in issue, and is pending in the Court of Appeal.
19. In fact, the current Notice of Motion has identified the suit land as no. 125 yet the Supporting Affidavit sworn by the Applicant indicates that he is the owner of LR no. 126 (former Witeithie/125). Whether Witeithie No. 125 and Witeithie No. 126 refer to the same property is not for this Court to determine, the issue having being dealt with by Gacheru J on an application for review of the Judgment.
20. This court should therefore dismiss this application as granting the orders as sought would be in vain. This is because the applicant has failed to extract a decree with respect to the Judgement dated December 14, 2012 and is seeking for orders over a parcel of land known as Ruiru/ Ruiru Block 1/ Witeithie/ 125 yet the Respondents and Interested Parties are said to be occupying Ruiru/ Ruiru Block 1/ Witeithie/ 126. Until that issue is determined, the orders of eviction cannot issue.



21. For those reasons, the application dated October 28, 2013 is dismissed with costs. This file is marked as closed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF JULY, 2022

O. A. Angote

Judge

In the presence of;

Ms. Muthoni for Kihara for Plaintiff

Ms. Nelima for Defendants

No appearance for Interested Party

Court Assistant - June

