



**Kalani v Muthusi (Environment & Land Case 149 of 2017)
[2022] KEELC 2625 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 149 OF 2017**

**A NYUKURI, J
JULY 14, 2022**

BETWEEN

DAVID KIMOYE KALANI PLAINTIFF

AND

MAILU MUTHUSI DEFENDANT

RULING

Introduction

1. Vide an application dated 25th August 2021, the Plaintiff/Applicant sought for the following orders;
 - a) Spent.
 - b) Spent.
 - c) That the Officer Commanding Station (O.C.S) Mwanga Police Station, Mitaboni do enforce the decree issued by this Honourable court on January 2021 by forcefully evicting the Defendant, his agents and any other person acting under him from parcel of land known as Mavoko Town Block 3/9282.
 - d) That the Defendant do pay the Plaintiff his costs of this application.
2. The application is anchored on the affidavit sworn by the Applicant on 25th August 2021. The Applicant's case is that on 4th October 2019, this court delivered a judgment and issued a decree in favour of the Plaintiff/Applicant wherein the defendant was restrained from trespassing on land parcel No. Mavoko Town Block 3/9282 (suit property) and an order of eviction issued against the defendant; that despite being aware of the decree herein, the defendant refused to vacate the suit property; that a specific order for provision of security is necessary to enforce the judgment to enable the Plaintiff reap the fruits of the judgment.



3. The application is opposed. The Defendant filed a replying affidavit on 28th January 2022 in opposition to the application. His case is that, having been dissatisfied with the judgment herein, he filed a Notice of Appeal on 1st October 2019 and that the appeal is still pending at the Court of Appeal as he is still waiting for directions from that court. He further averred that he has been in occupation of the suit property since 2002 where he has built permanent structures and engages in farming activities and that should the orders sought be granted, he will be rendered homeless and will have nowhere else to live with his family.
4. In a rejoinder, the Plaintiff/Applicant filed a supplementary affidavit on 23rd February 2022 in response to the Respondent's replying affidavit. He stated that no substantive appeal has been filed by the Defendant, since 16th October 2019, a period of about three years and therefore there can be no directions from the Court of Appeal as there is no appeal upon which directions may issue. He also averred that the judgment of this court remains valid as the same has not been set aside and therefore the orders sought ought to be granted to enable the applicant enjoy the fruits of the judgment.
5. The application was canvassed by written submissions. On record are the Plaintiff's submissions filed on 17th January 2022.

Submissions

6. Counsel for the Plaintiff submitted that Order 22 Rule 29 of the Civil Procedure Rules provides that where the court issues a decree for delivery of immovable property, such delivery shall be done by removing any person who refuses to vacate such property. Counsel argued that the judgment herein can only be effected by an order of eviction as sought in the application. Placing reliance on the cases of Simon Ngao Mbithi v Daniel K. Ngomo [2020] eKLR and Grace Maundu Kilungya v Matheka Makuthi & Another [2019] eKLR, counsel contended that where a judgment is for prohibition and mandatory injunction or eviction and the same is not stayed, appealed against or set aside, Order 22 Rule 29, empowers the court to order the removal of the person who refuses to vacate the immovable property.

Analysis and determination

7. I have considered the application, the response as well as the submissions. In my considered view, the sole issue for determination is whether the Defendant should be forcefully removed from the suit property as sought by the Plaintiff.
8. Order 22 Rule 29 (1) of the Civil Procedure Rules provides as follows;

Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.
9. It is therefore clear that Order 22 Rule 29 (1) of the Civil Procedure Rules empowers the court to order delivery of possession of immovable property, by removing a party who has been ordered evicted by a decree of the court, where such party refuses to vacate such immovable property.
10. In the case of Bruce Joseph Bockle v Coquero Limited (2017) eKLR, the Court of Appeal stated the following in regard to enforcement of eviction orders;

Looking at the orders issued in the judgment dated 14th March, 2013 and in particular the mandatory injunction, it is clear to us that they required the appellant to give vacant



possession of the suit property to the respondent. Enforcement of such an order could only be by way of eviction as stipulated under Order 22 Rule 29 of the Civil Procedure Rules. Therefore, we find that the judge correctly issued an order of eviction of the Respondent from the suit property.

11. In the instant suit, there is a decree in favour of the Plaintiff/Applicant, in which the court restrained the defendant from trespassing on the suit property and issued an eviction order against the defendant. The Plaintiff/Applicant has averred that the Defendant is unwilling to vacate the suit property. The Defendant states that he filed a Notice of Appeal on 16th October 2019 and is awaiting directions in the Court of Appeal and that if the orders sought are granted he will be homeless.
12. I note that no appeal has been filed since 16th October 2019. Rule 83 of the Court of Appeal Rules provides that where no appeal is filed within the prescribed period after filing a Notice of Appeal, then the appeal shall be deemed as withdrawn. Therefore, the Defendant's assertion that he is waiting for directions at the court of appeal, are baseless and not candid. There is no appeal pending in this matter, and the decree herein has not been reviewed, stayed or set aside, hence the same remains in force. In my view, the defendant's argument that if he is removed from the suit property he shall be rendered homeless is not a plausible reason not to grant the orders sought. There is already a decree for eviction against him and therefore his continued refusal to vacate the suit property does not only deny the Plaintiff of his right to enjoy fruits of his successful litigation, but also a contemptuous act. In the premises, there is no justification for the Defendant to continue in the refusal to vacate the suit property.
13. I therefore find and hold that the application dated 25th August 2021 is merited and I make the following orders;
 - a) The Officer Commanding Station (O.C.S) Mwanga Police Station, Mitaboni is hereby authorized to enforce the decree issued by this Honourable Court on January 2021, by forcefully evicting the Defendant, his agents and any person acting under him from parcel of land known as Mavoko Town Block 3/9282.
 - b) The costs of this application shall be borne by the Defendant.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 14TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

No appearance for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Ms Josephine Misigo – Court Assistant

