



**Eldoret Express Company Limited v Tawai Limited; National
Land Commission (Interested Party) (Environment & Land Case
87 of 2015) [2022] KEELC 14792 (KLR) (15 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 87 OF 2015
SM KIBUNJA, J
NOVEMBER 15, 2022**

BETWEEN

ELDORET EXPRESS COMPANY LIMITED PLAINTIFF

AND

TAWAI LIMITED DEFENDANT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

[Notice of Motion dated the 21st October 2021]

1. Before the court is the notice of motion dated October 21, 2021 filed by the judgement debtor, pursuant to sections 1A, 1B, 1C, 3A & 63 of the [Civil Procedure Act](#), and Order 22 of the [Civil Procedure Rules](#), seeking for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to settle terms of the decree issued herein.
 - d. That his honourable court be pleased to give guidelines on how the decree is to be executed.
 - e. That the respondent does produce before the court title deed as well as deed plan to suit land.
 - f. That the Director of survey to file a report in court on the deed plans to the applicant's land parcel number 5707/R as well as the Respondent parcel of land number 5707/6.



The application is based on the six grounds on its face and supported by the affidavit sworn by George Mubichakani Malanga, a director to the judgement debtor, who *inter alia* deposed that Tawai Limited owns parcel 5707/R, now registered as Kiminini/Kiminini Block 7, in Trans Nzoia County, and that is where he and other members reside. That they were served with a court order dated the June 23, 2021 which purports to evict them from the land, while the order does not mention the land. that no notice of eviction has been given as required by the law and the intended eviction will cause them damages to their land and properties. The application is also supported by Mathew Juma Khisa, a director, through his affidavit sworn on the April 20, 2022 in which he deposes inter alia that its members reside on parcel LR NO. 5707/R, which is distinct from LR. NO. 5707/6, while the judgement debtors' members reside on LR. NO.5707/R, IR. NO.18551. That the eviction order was issued in respect of LR. NO. 5707/6 and not LR. NO. 5707/R. That to avoid the judgement debtor's members being unlawfully evicted, and violence the boundaries of the two parcels should be established through a surveyor.

2. The application is opposed by the judgement creditor through the Notice of preliminary objection and replying affidavit sworn by Joseph Nganga Thungu, a director, on the February 14, 2022 deposing to the following among others, that the application is frivolous, vexatious, res judicata and abuse of court process; the respondent was on November 28, 2019 declared the lawfully registered owner of parcel 5707/6, IR NO. 43019/184 by the Court of Appeal in Eldoret CACA NO.118 of 2017; that eviction order was issued on November 19, 2020, and applicant filed an application seeking its stay on March 2, 2021, which raised similar issues to those in the instant application; that the application of March 2, 2021 was heard on merit and ruling delivered on June 23, 2021 and no appeal has been preferred; that the issues raised in the application concerning LR NO. 5707/6 have been determined with finality by the various courts as particularized therein and the application should be dismissed with costs.
3. The learned counsel for the judgement debtor, judgement creditor, and the interested party filed the submissions dated the April 20, 2022, May 20, 2022 and April 11, 2022 respectively, which the court has considered.
4. The issues for determinations by the court are as follows;
 - a. Whether the judgement debtor has made a reasonable case upon which orders sought on terms of the decree, guidelines on how the decree is to be executed, production by the respondent of title deed and deed plan for the suit land, and report by the director of survey on deed plans for LR. NO. 5707/R and LR.NO. 5707/6 should issue.
 - b. Whether the issues raised in the application have already been determined, and therefore res judicata.
 - c. Whether the court is functus officio.
 - d. Who pays the costs.
5. The court has carefully considered the grounds on the application and notice of preliminary objection, affidavit evidence, written submissions, superior courts decisions cited, the record and come to the following findings;
 - a. The Court of Appeal in its decision of November 28, 2019 in Civil Appeal No. 118 of 2017 that was between the same parties and subject matter now before the court, had this to say;

“...a sickening swamp of lies, half-truths, selective amnesia and outright impunity that has clouded and obfuscated reality to the point where falsehood passes for truth



and truth lies desecrated in a highly contentious fight for some prime land in Trans-Nzoia County...”

This court has since that decision by the Court of Appeal dealt with other applications by the parties as particularized by the judgement debtor in its replying affidavit and submissions. Indeed, it takes an eye for detail and deep discernment to figure out which party is telling the truth in any proceedings, but more so in this case. The parties herein have battled against each other in matters to do with this suit, from this court all the way to the highest court in the land, the Supreme Court of Kenya. The battle has strangely, found its way back to this court yet again. This time, as it had been the case before, the bone of contention is land parcel No. 5707/R. The judgement debtor contends that while a decree was issued on parcel number LR NO. 5707/6, the decree holder intends to execute it on a parcel described as L.R 5707/R, which is now renamed Kiminini/Kiminini Block 7. The judgement creditor has disputed the allegation, insisting that the execution is intended to be on parcel LR. NO. 5707/6.

- b. That it is strange that parcel LR. NO. 5707/R has been brought out as an issue for determination before this court. It is strange because both the Court of Appeal and the Supreme Court of Kenya have had a chance to deal with the place of parcel 5707/R in this proceeding. Interestingly, the judgement debtor, through its counsel on record in *Eldoret Express Limited v Tawai Limited; National Land Commission (Interested Party)* [2019] eKLR – Civil Appeal No. 118/2017 had submitted as follows on the parcel;

“Tawai’s response to the suit was by way of a statement of defence dated March 12, 2008 filed on its behalf by Zablon Mokua & Company Advocates. This pleading was later amended to include a counterclaim and it was to the following effect;

That even though Express “would have been” (sic) the registered owner of the suit property which was denied, the registration could not hold as the whole of LR No. 5707 registered in its name had been charged to and not discharged by Brooke Bond;

That its members did not trespass but had been in lawful occupation of the suit land since 1984;

That it was “the registered owner of the entire LR 5707 which includes land parcels 5707/01 up to and including the purported 6 which is rightfully LR No. 5707/R.”

It is important to note that the above submissions were made in the Court of Appeal by Counsel then appearing on behalf of the judgement debtor herein. The Court of Appeal did not agree with the judgement debtor and went ahead to make a ruling in favour of the present respondent who was then the appellant.

- c. That the nature of the prayers being sought through the instant application will by their very nature, if they were to be granted, have a ripple effect on, and eventually have the potential to vary the decision of February 28, 2019 by the Court of Appeal. This, I believe is apparent to the counsel on record for the judgement debtor, who must obviously know that the law would surely frown upon that kind of an occurrence which is capable of resulting to judicial and procedural chaos. The forum to challenge or seek review of the said Court of Appeal decision is definitely not this court.



- d. The jurisdiction that this court exercises is well known to all people, as it is set by the Constitution and the statutes. For avoidance of doubt, section 13 of the Environment and Land Court Act, 2011 provides that:

“The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land”.

The said article 162(2) (b) of the Constitution, 2010 provides that:

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to - the environment and the use and occupation of, and title to, land.

Looking at the previous rulings made by this court on issues related to those in the instant application, and the determinations on the same issues by the Court of Appeal and Supreme Court of Kenya, there is in my view, nothing new in the instant application, that the said superior courts have not been addressed on and determined.

- e. That in view of the foregoing, this court lacks jurisdiction to hear and determine matters that have already been heard and determined by this court and the Appellate Courts. In that regard, the court must down its tools as was held in Mombasa Civil Appeal No. 50 of 1989 *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR that;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In the upshot, I hold that this court is functus officio and lacks jurisdiction to hear and determine the instant application, and it is hereby struck out.

- f. That having come to the finding that the application should be struck out, it is only fair that the judgement debtor pays the judgement creditor’s costs in the application in accordance with section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya.

6. Flowing from the above conclusions, the court finds and directs as follows;

- a. That the judgement debtor’s/ defendant’s application dated the October 21, 2021 is hereby struck out.
- b. The judgement creditor/plaintiff is awarded costs of the application.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 15th DAY OF NOVEMBER 2022.

S.M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PLAINTIFF

DEFENDANT



INTERESTED PARTY

COUNSEL

.....

WILSON .. COURT ASSISTANT.

S.M. Kibunja, J.

ELC MOMBASA.

