



REPUBLIC OF KENYA



KENYA LAW
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**Koinange v Guan (Environment & Land Case E002 of 2022)
[2022] KEELC 15442 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15442 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E002 OF 2022**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

PAUL MBATIA MBIYU KOINANGE PLAINTIFF

AND

CHEN GUAN DEFENDANT

RULING

1. The Applicant filed a Motion on the 11/1/2022 against the Respondent seeking the following orders;
 - a. Spent
 - b. Pending the hearing and determination of the suit the Defendant either by himself his servants and or agents give vacant possession to the Plaintiff to all that 4.5 acres of the property known as LR No 151/3 (Ehothia Farm) (the suit land/property).
 - c. That in the event that the Defendant fails to comply with the above order the Plaintiff be and is hereby permitted to evict the Defendant from the suit premises at the Defendant's costs and expenses.
 - d. The officer in charge Tigoni Police Station do provide security and ensure compliance of the orders granted by this court.
 - e. Costs of the Application.
2. The application is based on the grounds annexed thereto and the supporting affidavit of the applicant namely Eliza Mbatia who deponed that she holds a power of attorney from Paul Mbatia Mbiyu Koinange, her husband.
3. That without any color of right the Respondent has encroached on the suit land which property is the beneficial entitlement of the Applicant arising from the concluded long protracted succession of



the estate of his father. That the Respondent took advantage of the fact that the estate had not been distributed and assumed possession while carrying out crop and livestock farming. That upon the conclusion of the Succession Case on the 7/3/2020 wherein the Applicant became entitled to the suit land by way of distribution (See Judgement of the family Court in Succ. Cause No 527 of 1981), the Applicant notified vide the demand letter dated the 1/11/2021 the Respondent to vacate the suit land by the December 31, 2021. That despite the written notice the Respondent has refused to vacate the suit land and hand over vacant possession hence the filing of the suit.

4. Further the applicant deponed that he has leased the property to a tenant who has paid a deposit of Kshs 380,000/- but he is unable to access the property in the presence of the Respondent his workers and animals that are kept in deplorable state of animal husbandry thus lowering the aesthetic value of the property.
5. That the actions of the Respondent amount to an illegality unlawfulness and an affront to his right to the property as espoused in *the Constitution* and further the defence of adverse possession is not available to the Respondent given that he has not occupied the property for a period exceeding 12 years as the suit was a subject of succession proceedings.
6. The Application is opposed *vide* a replying affidavit dated the 20/3/2022 sworn by Chen Xiongguan, the Respondent herein. He stated that sometime in September 2022 one David Njunu the lessor and administrator of the estate of the late Mbiyu Koinange leased a portion of the suit land to him for a period of two years for which he signed a lease agreement. That he uses the land for agricultural activities and his quiet possession was interrupted by a demand notice from the Applicant. He contended that the administrator of the suit land had capacity to lease the land and that he has been informed by the administrator that the distribution of the estate is yet to take place and as such the Applicant has not been given the property.
7. The position of the Respondent is further supported by the Replying Affidavit of David Njunu Mbiyu sworn on the 21/3/2022 who deponed that he is the eldest son and one of the administrators of the estate of the late Mbiyu. He admitted that he and his co-administrator leased the suit land to the Respondent. Whilst contending that the estate was fully distributed *vide* the Judgement rendered on the 7/3/2022, he clarified that distribution is yet to take place as the administrators and the beneficiaries are yet to agree on the Sections of the suit property that each will be allocated and as such the Applicant is incorrect in holding that the property is his. He was emphatic that distribution having not been done, the Applicant has no capacity to lay a claim on the suit land. In addition, that there is an impending appeal against the Judgement aforesaid with regards to the mode of distribution of the estate and in the event that it succeeds the mode of distribution is likely to change rendering the current suit futile.
8. On the 28/3/2022 parties elected to canvass the Application *vide* written submissions which submissions I have considered.
9. The firm of Rosemary Monyangi & Co Advocates filed written submissions on behalf of the Applicant while that of the Respondent were filed by the law firm of Nyingi Wanjiru & Co. Advocates.
10. The applicant submitted and traced the genesis of the suit to the succession of the estate of his late father which has been protracted for the last 3 decades leading to a Judgement in 2020 in which the suit land devolved to him as a beneficiary. He relied on the Judgement rendered on the 7/3/2020 to proof ownership of the suit land. That adverse possession is not available to the Respondent for two reasons; the Respondent has not had possession to the extent of 12 years and secondly the occupation of the property was during the pendency of the succession proceedings hence terming the Respondent an intermeddler at best.



11. That in the absence of the Respondent's rebuttal to the Application, he urged the Court to allow it and grant him his orders. He cited the decision in the case of *Margaret Karwira Mwongera vs Francis Kofi* (2019) eKLR in which the prayers for eviction were granted as a result of the Respondent's failure to challenge the Application. In addition, he also cited the case of *Mariko Ndwiga vs Edith Muthanje* (2020) eKLR in which an Application for eviction was allowed on merit where the Respondent proved his ownership of the suit land.
12. Further the Applicant argued that litigation having come to an end it was time that he is allowed to enjoy the fruits of his Judgement and occupy his property as he has suffered extreme dementia because of the fights over the suit land.
13. As to whether the application should be granted the Respondent relied on the definition of trespass and cited in Sections 2 and 3(1) of the *Trespass Act* as follows;

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
14. Citing the above provisions of the law and the decision of the Court in *Republic vs James Maina Gachie* (2005) eKLR the Respondent argued that the Applicant is not an occupier of the suit land hence has no capacity to file the suit and that neither has he adduced a proper title to evidence ownership of the suit land. Conversely, he argued that he has a lease interest on the suit land pursuant to a lease he entered into with the administrators of the estate of the late Koinange and that he is entitled to the protection of the law. He cited the provisions of Section 2 of the *Land Registration Act*, Section 5(2) of the *Land Act* and Article 40 of *the Constitution* in urging the point.
15. In addition, the Respondent recognized the allocation of 60 acres to the Applicant in the aforesaid Judgement of 7/3/2020 but states that the same does not state in specificity the portion of the land in Ehothia Farm which belongs to the applicant as the 60 acres has not been delineated and could fall anywhere in the 645 estate and as such cannot claim the portion occupied and leased by the respondent belongs to him. That unless and until the portion is delineated the applicant cannot allocate himself the portion of the suit land let alone purport to evict its possessors/lessors.
16. As to costs the Respondent submitted that costs are at the discretion of the Court going by Section 27 of the *Civil Procedure Act* and that in this case he urged the Court to condemn the Applicant to costs for filing frivolous, spurious and superfluous Application/suit.
17. Having considered the Application, the rival affidavits, the submissions of the parties and all the material placed before me I find the question for the determination of the Court is whether the Application is merited. Secondly who meets the costs of the Application.
18. It is not in dispute that the suit land is part of the vast estate of the late Mbiyu Koinange which has suffered a protracted and long drawn out succession battle that has raged in Court for a long time. Finally, the Court rendered itself on the 7/3/2020 with respect to the mode of distribution of the estate amongst the beneficiaries one of which is the Applicant in this case.
19. It is the Applicant's case that the succession proceedings having been concluded, he is entitled to the suit land vide the Judgement dated the 7/3/2020 in Succ. Cause no 527 of 1981. Although the Applicant has not attached a certificate of confirmation of grant. It is clearly borne of the Judgment that the Applicant is a beneficial owner of a 60 acre portion out of the large Ehothia Farm.



20. The Respondent on the other hand has opposed the Application on the basis that the estate is yet to be distributed; it is uncertain if the 4.5 acre is within the 60 acres allocated to the Applicant and even the ground position of the 60 acres is unknown as at now; further the succession storm is yet to quieten given the impending appeal against the aforestated Judgment regarding the mode of distribution.
21. I have perused the Plaint filed by the applicant and find that the prayers sought therein are similar to the prayers sought in the Application. The main cause of action of the Plaintiff against the Defendant is that of trespass. He sought the following orders;
- a. An order of eviction of the Defendant his agents' servants from the suit land known as L R No 151/3 (Ehothia Farm).
 - b. A declaration that the suit property is legally owned by the Plaintiff
 - c. General damages for trespass of the Defendant.
 - d. Costs and interests of the suit.
22. Order 13 Rule 2 of the [Civil Procedure Rules](#) which deals with Judgment on admission provides as follows:
- “Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such Judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such Application make such order, or give such Judgment, as the Court may think just.”
23. In the case of [Choitram -vs- Nazari](#) [1984] KLR 327 where Madan, JA expresses the view that:
- “For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in Judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”
24. In the same case, Chesoni Ag. JA, observed that:
- “Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words “otherwise” which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions It is settled that a Judgment on admission is in the discretion of the Court and not a matter of right that discretion must be exercised judicially.”
25. In my considered view there is no admission in this case that calls for summary Judgment in favour of the applicant plaintiff. The Court is unable to grant the prayers of eviction on application as the same is a substantive prayer sought in the Plaint for which the plaintiff ought to lead evidence and proof the same. Granting the same at the interlocutory stage will be jumping the gun given that if granted it will determine the suit in a summary manner. There are questions that require proof by way of evidence and the same cannot be glossed over as doing so will violate the rights of the parties to be heard.



26. In the end I find the application is unmerited and I proceed to dismiss it with costs in favour of the Respondent.

27. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 20TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Monyangi for Plaintiff/Applicant

Githinji for Defendant

Court Assistant – Phyllis / Kevin

