

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 855 of 1997

ISAAC MUTUA
MATHEKA.....PLAINTIFF/APPLICANT

-VERSUS-

ELIUD W.
KAVAVU.....DEFENDANT/RESPONDENT

R U L I N G

In the Notice of Motion dated the 29th July 2004, Isaac Matheka Mutua (to whom I shall hereinafter refer to as “the Plaintiff”) seeks an order of eviction against Eliud W. Kavavu (to whom I shall hereinafter refer to as “the Defendant”) and delivery of vacant possession of the piece or parcel of land known as Plot No. 91 Misakwani, Machakos (to which I shall hereinafter refer to as “Plot No. 91”). He also seeks an order directing the Deputy Registrar of this Court to execute transfer documents in his favour.

The application is supported by the Plaintiff’s affidavit made on the 29th July 2004 and also by his subsequent affidavit sworn on the 9th November 2004. The grounds upon which the Plaintiff seeks these orders appear to be grounded on orders alleged to have been made in another suit between the same parties over the same subject matter being Nairobi High Court Civil Case No. 117 of 1986. That case was heard by Bosire, J. (as His Lordship then was) and Mwera J. and judgment was delivered on the 14th April 1992. Civil Case No. 117 of 1986 was actually an application made by the Defendant for an order of certiorari to quash the decision of the District Commissioner, Machakos, by which the District Commissioner had made an order on the 19th September 1986 that Plot No. 91 be retained by one Saulo Kababu Mutombi. The decision of the District Commissioner was made in the course of land adjudication in the area within which the suit land falls. In their judgment aforesaid, Bosire and Mwera, JJ. Confirmed the decision of the District Commissioner. However, the learned Judges did not make any order for the eviction of the Defendant from Plot No. 91. Accordingly, there is obviously no decree in that case which the Plaintiff can execute against the defendant to obtain vacant possession of Plot No. 91.

Exactly five years after the said judgment was delivered, the Plaintiff filed the present suit against the Defendant on the 9th April 1997 seeking an order for the eviction of the Defendant from Plot No. 91. The Defendant filed his Defence on the 8th July 1997 and denied the Plaintiff’s claim. As matters now stand, the Plaintiff has not obtained any judgment in the present suit which would entitle him to evict the Defendant and obtain vacant possession of Plot No. 91. From the record, it would appear that Plot No. 91 is still registered in the name of the aforementioned Saulo Kavavu Mutombi (now deceased) who was the Defendant’s father.

It is apparent that to give effect to the decision of the District Commissioner, a portion measuring three decimal five (3.5) acres was excised from Plot No. 91 and given to the Plaintiff with a new Plot No. 1658 in respect of which the Plaintiff appears to be the owner/proprietor.

As this suit has not been heard and determined, there is no judgment and decree granting the Plaintiff the orders he is seeking in the Notice of Motion now before me. In my judgment, the Plaintiff cannot rely on the decision of Bosire and Mwera, JJ. In Civil Case No. 117 of 1986 aforesaid to evict the Defendant from Plot No. 91 not only because the Defendant was not a party to that suit, but also, and in any event, because no decree was issued in that case granting the Plaintiff the right to evict the Defendant from Plot

No. 91.

For these reasons, there s clearly no merit in this application which in my event I consider to be totally misconceived. Accordingly, it is ordered that the Notice of Motion dated the 29th July 2004 be and is hereby dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 28th day of January 2005.

P. Kihara Kariuki

Judge