



**Gitui v Kihuto (Environment & Land Case 10 of 2018)
[2022] KEELC 15322 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 10 OF 2018**

CK NZILI, J

DECEMBER 7, 2022

BETWEEN

JOSEPH KIHARA GITUI PLAINTIFF

AND

CHARLES KINYUA KIHUTO DEFENDANT

(The applicant has averred that by a judgment delivered on May 18, 2022, the defendant's counterclaim was dismissed; that a decree was extracted and served upon the defendant who has failed to vacate the suit premises despite a certificate of lease in favour of the applicant.)

RULING

1. Before the court is the plaintiff's notice of motion dated July 22, 2022, seeking for a declaration that the continued occupation by the respondent on LR No 11969/123/Marsabit Township is unlawful, an order for his eviction and for payment of mesne profits with effect from July 30, 2012 equivalent to the monthly rent changeable.
2. The application is based on the grounds on the face of the application and a supporting affidavit sworn by Joseph Kihara Gitui on July 26, 2022. The applicant has averred that by a judgment delivered on May 18, 2022, the defendant's counterclaim was dismissed; that a decree was extracted and served upon the defendant who has failed to vacate the suit premises despite a certificate of lease in favour of the applicant.
3. The application was opposed through a replying affidavit sworn on September 26, 2022. The grounds are that a notice of appeal was filed and served on August 28, 2022. That the alleged service of the decree was false and misleading. That the alleged certificate of lease was invalidated on March 11, 2016, by an order issued on June 5, 2013 as per copies of the provisional certificate of title and an order marked as annexures CKK "6" and "7" respectively. That the applicant lacks capacity to bring the suit due



to a bankruptcy/receiving order as per the ruling and order in Nyeri ELC No 667 of 2014 marked as annexures CKK “8” & “9” respectively.

4. The court has gone through the entire file, the application herein and the response thereto. The two main prayers by the applicant are for eviction and payment of mesne profits. These prayers did not form part of the applicant’s reply to defense and defense to the counterclaim.
5. The applicant withdrew his claim against the defendant following which the counterclaim was prosecuted. In the defence to the counterclaim the plaintiff/applicant did not raise the issues of vacant possession, eviction or payment of mesne profits.
6. In *Mombasa Bricks and Tiles & 5 others v Arvind Shah & 7 others* [2018] eKLR the court cited with approval *Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR, where it was stated that *res judicata* was only a bar upon a merit based decisional engagement.
7. In *Serve in Love Africa (Sila) Trust v Abraham Kiptarus Kiptoo & 2 others* [2021] eKLR, the court held that the *functus officio* doctrine is one of the mechanisms by which the law gives expression to the principle of finality.
8. In *Republic v City Council of Nairobi & 2 others* [2014] eKLR, the court cited with approval *Gurbachan Singh Kalsi v Yowani Ekori* Civil Appeal No 62 of 1958 EA 450 where the court said that where a given matter becomes the subject of litigation before a court, all parties are required to bring forward their full case and will not, except under exceptional circumstances permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward out of negligence, inadvertence, or accident. The court held that the plea of *res judicata* applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but also to every point which properly belonged to the subject of litigation and which the parties while exercising reasonable diligence, might have brought forward at the time.
9. Applying the above guiding principles, the judgment by the court did not allude to the orders of eviction and or mesne profits. The applicant did not raise those issues yet it was within his knowledge that the respondent was in occupation of the suit premises.
10. The two prayers herein are seeking a merit-based decision. They therefore require evidence to be tendered. Section 34 (1) of the *Civil Procedure Act* provides that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge, or satisfaction of the decree shall be determined by the court executing the decree and not by way of a separate suit.
11. In *Abdi Mohamed Noor v County Government of Turkana & another* [2020] eKLR, the court upheld a preliminary objection raised to an application seeking for compensation after the judgment had been pronounced declining a claim for mesne profits. The court held the application was bad on account of *res judicata* and on the doctrine of *functus officio*.
12. In *Samuel Juma Keya v Luke Omulo Omollo* [2015] eKLR, the court held that the issues raised in the subsequent suit had not been determined conclusively and to finality namely a prayer for permanent injunction and eviction hence constituted a direct and separate cause of action.
13. In *Joseph Kotonya Aketch v NSSF Board of Trustees & another* [2014] eKLR, what was before the court was a formal application to enable an auctioneer to gain access to the property and a joinder to the suit by an interested party. The suit had been dismissed. All what remained were eviction proceedings



which were said to be incidental to the execution and or satisfaction of the decree. The court took the view that section 34 of the *Civil Procedure Act* did not envisage the reopening of litigation or questions seeking to interfere with the findings of the court. The court found the application for eviction merited.

14. In this suit, the respondent's claim was based on adverse possession. The same was found unmeritorious. The respondent has not produced before this court any stay orders from the Court of Appeal. Instead of specifically responding to the prayers sought, he has raised extraneous issues which are unrelated to this application. Consequently, I find the prayer for eviction incidental to the execution process unlike the prayer for mesne profits.
15. In line with section 152 A, B, C, D E & F, of the *Land Act*, the applicant shall serve an eviction notice to the respondent within 7 days from the date hereof for the respondents to deliver up vacate possession of the suit premises and in default, execution to issue with attendant costs and expenses to be met by the respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 7TH DAY OF DECEMBER, 2022.

In presence of:

C/A: Kananu

Ashaba for applicant/defendant

Defendant in person

HON CK NZILI

ELC JUDGE

