



**Mbondo & another ((Suing on behalf of the Estate of ELIJAH Mbondo Ntheketha))  
v County Government of Machakos; Musyoki (Interested Party) (Environment &  
Land Case 181 of 2014) [2022] KEELC 15304 (KLR) (5 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15304 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 181 OF 2014  
CA OCHIENG, J  
DECEMBER 5, 2022**

**BETWEEN**

**SERAH MUTHIO MBONDO ..... 1<sup>ST</sup> PLAINTIFF**

**RICHARD MUEMA MBONDO ..... 2<sup>ND</sup> PLAINTIFF**

**(SUING ON BEHALF OF THE ESTATE OF ELIJAH MBONDO NTHEKETHA)**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS ..... DEFENDANT**

**AND**

**ROSE MUENI MUSYOKI ..... INTERESTED PARTY**

**RULING**

- 1 What is before court for determination is the plaintiffs' notice of motion application dated the March 25, 2022 where they seek the following orders:
1. Spent.
  2. That this honourable court do grant leave to the firm of Nzei & Company Advocates to come on record as representing the plaintiffs/applicants herein after delivery of the judgment and the notice of change of advocates filed herewith be deemed to be properly on record.
  3. Spent.
  4. That this honourable court be pleased to issue an order directing the respondent (County Government of Machakos), its agents, servants, employees, assigns or any other person/entity claiming authority from the respondent (County Government of Machakos) herein to vacate



all that property known as LR No 11800/93 measuring 3.472 Ha pending payment in full and/or satisfaction of the judgement dated September 18, 2020.

5. That in the alternative to prayer 4 hereinabove, this honourable court be pleased to grant forceful eviction orders against the respondent (County Government of Machakos) removing it, its agents, servants, employees, assigns or any other person/entity claiming authority and/or license from the respondent (County Government of Machakos) from all that property known as LR No 11800/93 measuring 3.472 Ha until payment in full and/or satisfaction of the judgement dated September 18, 2020 and the OCS Tala Police Station, The Office of the Machakos County Commander do ensure compliance.
  6. Spent
  7. That this honourable court do issue an order restraining the defendant/respondent (County Government of Machakos) either by itself, its agents, employees, servants, assigns or any other person/entity claiming authority from the defendant/respondent (County Government of Machakos) from further trespassing, using, interfering, developing, charging, carrying out business or in any way interfering with all that property known as LR No 11800/93 measuring 3.472 Ha.
  8. That the OCS Tala Police Station, Office of the Machakos County Commander do ensure compliance.
  9. That costs of this application be borne by the defendant.
- 2 The application is premised on the grounds on the face of it and the supporting affidavit of Serah Muthio Mbondo who confirms together with Richard Muema Mbondo, they are administrators of the estate of Elijah Mbondo Ntheketha. She deposes that land parcel No 11800/93 hereinafter referred to as the 'suit land', formed part of the estate of Elijah Mbondo Ntheketha. She avers that the defendant has been in occupation of the suit land from 1983. She explains that this court issued a judgment in their favour on September 19, 2020 and highlights the terms of the said judgment. She contends that the suit land is still being utilized by the defendant despite the judgment where it was restrained from utilizing it. Further, that the deceased estate continues to waste away.
- 3 The defendant in opposing the plaintiffs' application filed a notice of preliminary objection where it avers that the instant application has been filed by an advocate who has no audience of the court. Further, that the application offends the provisions of order 9 rule 9 of the Civil Procedure Rules, is defective and ought to be struck out.
- 4 The plaintiffs filed a further affidavit reiterating their averments and insist that they have withdrawn instructions from the firm of Messrs Mutisya & Company Advocates. They aver that the erstwhile advocates have not objected to their obtaining a different representation. They contend that the notice of preliminary objection has been filed to deny them the right to enjoy the fruits of their Judgment.
- 5 The plaintiffs current lawyers Messrs Muttisya & Company Advocates filed a replying affidavit sworn by Martin Mutisya Muthengi Advocate where he confirms they rendered services for the plaintiffs and judgment was delivered on September 18, 2020. He contends that they incurred costs in the services they rendered to the plaintiffs. He explains that the plaintiffs only paid a deposit of Kshs 334,000.
- 6 The plaintiffs filed a supplementary affidavit confirming that their erstwhile advocates filed their bill of costs. They insist that the firm of Messrs Nyamu & Nyamu Advocates have no locus to file a notice of preliminary objection since they are not properly on record for the defendant.
- 7 The application was canvassed by way of written submissions.



## Analysis and Determination

- 8 Upon consideration of the instant notice of motion application including the respective affidavits, notice of preliminary objection as well as the rivalling submissions, the following are the issues for determination: Whether the firm of Messrs Nzei & Co Advocates should come on record for the plaintiffs herein, after judgment. Whether an order of injunction should issue restraining the defendant or its agents from interfering with the suit land. Whether the defendant should vacate suit land or be evicted therefrom.
- 9 As to whether the firm of Messrs Nzei & Co Advocates should come on record for the plaintiffs herein, after judgment.
- 10 I note the aforementioned firm seeks to come on record for the plaintiffs after the entry of judgment and issuance of a decree. The plaintiffs current counsels have vehemently opposed the prayer for leave for the firm of Messrs Nzei & Co Advocates to come on record for the plaintiffs. I note the firm of Messrs Muttisya & Company Advocates already filed their advocate/client bill of costs on January 12, 2022 but there is no indication whether the same was taxed. Order 9 rule 9 of the [Civil Procedure Rules](#) stipulates that:
- "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- a. upon an application with notice to all the parties; or
  - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."
- 11 While order 9, rule 10 of the [Civil Procedure Rules](#) provides that:-
- "An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first."
- 12 In this instance it emerged that the plaintiffs' current advocates already filed an advocate client bill of costs. The plaintiffs have sought to change representation after judgment and issuance of a decree but have not explained how they intend to settle their erstwhile lawyers' fees.
- 13 In the case of [SK Tarwadi vs Veronica Muehlmann](#) [2019] eKLR the judge observed as follows:
- "In my view, the essence of the order 9 rule 9 of the Civil Procedure Rules was to protect advocates from the mischievous clients who will wait until a Judgment is delivered and then sack the advocate and either replace him...."
- 14 See also the decision of [Suraya Property Group Ltd & another v W & K Estates Ltd & 2 others](#) [2019] eKLR
- 15 Since the firm of Messrs Muttisya & Company Advocates have already filed their advocate client bill of costs, I am of the view that they should await for its taxation and proceed to execute the order emanating therefrom. In the circumstances while relying on the provisions of order 9 of the [Civil Procedure Rules](#) and associating myself with the decisions cited above, I find that the erstwhile counsels will suffer no prejudice if I allow the firm of Messrs Nzei & Company Advocates to come on record for the plaintiffs and will hence proceed to do so.



- 16 As to whether an order of injunction should issue restraining the defendant or its agents from interfering with suit land. I note this suit was already determined when judgment was delivered on September 18, 2020 where an order of a permanent injunction was issued restraining the defendant or its agents from interfering with the suit land. It is trite that an order of temporary injunction can only issue in a suit, as envisaged under order 40 rule 1 of the *Civil Procedure Rules*. However in the current circumstances, judgment was already delivered and a decree issued hence there is no suit. In the foregoing, I will decline to grant the order as sought.
- 17 As to whether the defendant should vacate the suit land or be evicted therefrom. As I have already noted above, that the court in its judgment issued orders of a permanent injunction restraining the defendant from interfering with the suit land and to pay the plaintiffs mesne profits. The plaintiffs contend that the defendant is yet to settle the decretal sum and move from the suit land. Since there is a judgment of the court which has not been appealed against nor set aside, I find that the defendant is supposed to proceed in accordance with the provisions of order 22 of the *Civil Procedure Rules* and adhere to the process set out therein by applying for execution of the decree.
- 18 In the circumstances, I find the plaintiffs notice of motion application dated the March 25, 2022 partially successful and I will only allow prayer No 2.
- 19 The costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5<sup>TH</sup> DAY OF DECEMBER, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

