



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC SUIT NO. 94 OF 2017**

**JAMES MATHUVA MAKEWA ..... PLAINTIFF/APPLICANT**

**VERSUS**

**NZAVI NGULUI .....DEFENDANT/RESPONDENT**

**RULING**

1. What is before this court for ruling is the Plaintiff/Applicant's Notice of Motion application dated 29<sup>th</sup> January, 2020 and filed in court on 16<sup>th</sup> June, 2020 for orders: -

1) *Spent.*

2) *That the Honourable court be pleased to grant orders of eviction against the Respondent herein Nzavi Ngului from the applicant's suit premises known as LR No. Makueni/Nguu/1283 formerly Plot No. 464/1283 Nguu Settlement Scheme.*

3) *That the Honourable court do grant orders to Mr. Mutune of M/s Faith Auctioneers to conduct the eviction exercise and in satisfaction of the orders granted herein.*

4) *That the officer commanding Emali police station (OCS) be and is hereby ordered to offer security to the auctioneers in carrying out the exercise and to maintain law and order.*

5) *That costs of this application be awarded to the Plaintiff.*

2. The application is predicated on the grounds on its face and is supported by the Supporting and Supplementary Affidavits of James Mathuva Mukewa, the Plaintiff/Applicant herein, sworn at Nairobi on 10<sup>th</sup> February, 2020 and September, 2020 respectively.

3. The application is expressed to be brought under Sections 1A, 1B, 3A, 152 E and G of the Land Act No. 6 of 2012 (Revised 2016) Laws of Kenya.

4. The Defendant/Respondent has opposed the application vide his undated grounds of objection filed in court on 20<sup>th</sup> July, 2020.

5. The Defendant/Respondent contends that: -

1) *This application is res judicata of another application which was heard by this court on the same subject matter and whose record is in this court file and therefore this court has no jurisdiction to hear it.*

2) *Without prejudice to the foregoing this application is defective. No notice was served upon the Respondent personally. The application is not addressed to either the Respondent personally or to his lawyer. The lawyer received a copy of the same on the impression that it was addressed to be served upon only to discover that it was addressed to another lawyer, M/s Mulandi Kasabit & Associates Advocates.*

3) *Notice of eviction should be served upon the person to be evicted personally. The notice must contain a description of the land from which the person to be evicted.*

4) *The piece of land subject to dispute should be identified in this case there are structures which were there owned by the applicant legally and which are still there. During hearing of the suit, the court declined the same to be owned by the Respondent. They are still there they are not part of the land awarded to the Applicant. The trial judge did not make a ruling on the same. These structures should have been indicated in the notice of eviction.*

5) *The land having been registered as parcel No. LR 464/1283 and indicated in the Sadat Map of the survey of Kenya for the area where the land is located should have been part of the notice of eviction and be attached to the application. The entire application is bad in law and pray the same to be dismissed.*

6) *A report is being awaited from the committee appointed to investigate allotment of plots within Nguu settlement scheme after which the Respondent intends to petition to court under the constitution for being deprived of his land. This issue was raised at the hearing of the main suit. It was not heard. It was left un heard.*

7) *The Applicant has no development in this land and therefore no damages being suffered by the Applicant.*

8) *Thus the notice of objection should have clearly specified in terms of size, location, structures during hearing the then presiding judge made an order of status quo on the then development.*

9) *The application is duplication of the previous report and same should be dismissed with costs. At any rate is defective and bad in law.*

6. The application was canvassed by way of written submissions. Even though the counsel for the Defendant/Respondent told the court on 21<sup>st</sup> October, 2020 that he had filed his submissions, by the time of writing this ruling, there was no evidence of his submissions in the file.

7. The Plaintiff/Applicant has deposed in paragraphs 3, 4, 7, 8, 10, 12, 15, 16, and 17 of his supporting affidavit that, he is currently the registered owner of the title LR No. Makueni/Nguu/1283 formerly Plot No. 464/1283, Nguu Settlement Scheme with the title being attached and marked "JMM 1", that on diverse dates in the year 2002 the Defendant encroached into his land laid claim of the same (sic) which caused the Applicant to move to court to ventilate his rights over the property in this matter, that on or about the 19<sup>th</sup> February 2018 the Honourable court in the presence of the parties pronounced itself in his favour issuing an injunction restraining the Respondent from occupying dealing with the said suit property but the latter is still occupying the land in contempt of the express orders of the court with the decree being attached and marked "JMM 2", that the Respondent has vowed not to move out of the property unless he is moved out by the due process of the law and he has information that the Respondent is in the process of putting up more structures on the land contemptuously, that the Respondent has forced him to undertake this process which is costly and he should therefore bear the costs of the exercise unless he moves out voluntarily, that the notice of ninety (90) days was from 18<sup>th</sup> June 2019 when the Respondent received the notice meaning that it is now about 150 days yet the Respondent has refused or failed to move out necessitating this process of eviction with the notice being attached and marked "JMM 3", that the Plaintiff has fulfilled the conditions given under Section 152E and G of the Land Act No. 3 of 2012 that notice must be served before eviction which the Respondent has not objected to as provided for, that the Plaintiff/Applicant had been advised from (sic) his advocates on record which he verily believes to be correct that the Respondent having failed to respond or file an objection or move out of the premises, the only option is to evict him forcefully from the premises through an order of the honourable court and that the Respondent filed an application in court on the 29<sup>th</sup> April 2019 praying to be given three (3) months to move out and that the application was heard and ruling delivered on the 13<sup>th</sup> November 2019 dismissing the application for lacking merit with the application and judgment being attached and marked "JMM4".

8. And in response to the Defendant's/Respondent's grounds of objection, the Applicant deposed in paragraphs 3, 4, 5, and 6 of his supplementary affidavit that he had information from his advocate on record Mr. Moriasi which information he believes to be correct that the notice of eviction was served on the 18<sup>th</sup> June 2019 upon the Defendant/Respondent, that further the process server one Mr. Michael Njonjo's affidavit of service was omitted from the attachments to the affidavit in support of the application and the process server's affidavit is attached and marked "JMM 6", that the failure to attach it to the application was an error on the party of his advocates which is regrettable and its inclusion is very crucial to his application as it shows how the Defendant/Respondent was served with the notice, that further the inclusion of the affidavit of service belatedly will not prejudice the Respondent in any way since the Plaintiff/Applicant is only trying to put the record straight regarding the service which was admitted in one of Respondent's advocates letter to his advocate.

9. In his submissions, the counsel for the Plaintiff/Applicant raised four issues for determination namely: -

1) *Is the property lawfully owned by the Applicant under LR. No. Makueni/Nguu Ranch/1283 formerly plot No. 464/1283 Nguu settlement scheme?*

2) *Does the Respondent have a right or interest of holding unto the land in dispute?*

3) *Was the Respondent served with the eviction notice and/or was he aware of the intended eviction?*

4) *Is the application herein Res Judicata?*

10. The counsel submitted on issue number 1 and 2 together. The submissions were that the Plaintiff/Applicant is the registered owner of land title LR No. Makueni/Nguu Ranch/1283 formerly plot No. 464/1283 Nguu Settlement Scheme measuring 4.01 hectares. That he was awarded judgment in his favour and thereafter a decree was issued on 19<sup>th</sup> February, 2018 declaring the Plaintiff/Applicant as the lawful owner of the suit property. The counsel went on to submit that the Defendant/Respondent in his objection has not disputed ownership of the suit property nor has he laid claim on it.

11. It was further submitted that in the application dated 29<sup>th</sup> April, 2019 and attached to paragraph 17 of the Supporting Affidavit as JMM4, the Defendant/Respondent had at paragraph 26 of his Supporting Affidavit acknowledged that the suit property belongs to the Plaintiff/Applicant. The counsel went on to submit that the Respondent further applied for stay of execution for three (3) months to enable him to look for alternative land or verification by the National Land Commission and that by the time of making the instant application, it was one (1) year and six (6) months and the Respondent had not moved out or made any efforts to move out voluntarily and hence this

application. The counsel pointed out that instead, the Respondent started putting up more permanent structures on the property.

12. On whether the Respondent was served with eviction notice and/or was aware of the intended eviction process, the counsel submitted that the Plaintiff's/Applicant's application dated 16<sup>th</sup> August, 2018 seeking to execute the orders of the court by way of eviction was declined as there was no decree for eviction in the main suit and hence the Applicant was forced to commence the process of eviction as provided for under Section 152E and 152G of the Land Acts No. 6 of 2012.

13. It was further submitted that the Eviction Notice marked as JMM3 was served upon the Respondent by a process server known as Michael Njonjo and that the latter did so on the instructions of M/s Ombachi Moriasi & Co. Advocates upon which the process server filed an affidavit of service marked as JMM6. It was also submitted that although the Respondent received the Eviction Notice, he declined to sign the attached copies on the grounds he had to consult his advocates on record. The counsel pointed out that the Respondent's advocate on record, M/s Paul Kisongoa & Co. Advocates in his letter dated 9<sup>th</sup> July, 2019 addressed to M/s Ombachi Moriasi & Co Advocates for the Plaintiff/Applicant had confirmed the receipt of the latter's letter and further sought suspension of the intended eviction which request the Applicant declined.

14. The counsel went on to submit that the purpose of the amendment to the Land Act No. 6 of 2012 where Section 150E and G were added was to avoid eviction by way of ambush.

15. On whether the instant application is *res judicata*, the counsel submitted that the Plaintiff's/Applicant's application which the Respondent has alluded to was declined because the procedure of eviction was not provided for by way of execution and there was no decree for eviction granted in the final judgement.

16. The counsel went on to submit that the instant miscellaneous application is pursuant to Sections 152E and 152G of the Land Act No. 6 of 2012 thus it is distinguishable from the previous application. The counsel termed the objection by the Respondent as one that is baseless and ought to be declined. In support of his submissions, the counsel relied on the case of **Margaret Karwirwa Mwongera –Vs- Francis Kofi [2019] eKLR.**

17. Having considered the application and the grounds of objections as well as the submissions filed by the counsel for the Plaintiff/Applicant, there is no doubt that the issue of the Plaintiff's/Applicant's ownership of land parcel known as LR Makueni/Nguu Ranch/1283 formerly Plot No. 464/1283 Nguu Ranch Settlement Scheme is not in dispute. The Plaintiff's/Applicant's claim of ownership is buttressed by the title deed marked as JMM-1 as well as the judgment that was delivered by this court on 19<sup>th</sup> February, 2018. The judgement has not been set aside and it remains in force. As was correctly submitted by the counsel for the Plaintiff/Applicant, the Defendant/Respondent herein in his application dated 29<sup>th</sup> April 2019 (JMM4) acknowledged ownership of the suit property by the applicant. That application which was for stay of execution of the order dated 25<sup>th</sup> February, 2019 for a period of three (3) months to enable the Respondent to look for alternative land/or verification of the allotments by the National Land Commission and/or pending appeal dated 25<sup>th</sup> February, 2019 was dismissed by this court on 12<sup>th</sup> November, 2019 vide its ruling of the same date. In my view therefore, the Defendant/Respondent is simply procrastinating so as to deny the Plaintiff/Applicant from enjoying the fruits of his judgement.

18. The Respondent has not proffered any reasons on why he has not moved out voluntarily out of the Plaintiff's/Applicant's suit property. Further the Respondent is silent on what became of his appeal.

19. I have looked at the Eviction Notice dated 6<sup>th</sup> June, 2020 and marked as JMM-3. It clearly shows that it was addressed to Nzavi Ngului c/o Kindu Hotel. The affidavit of service sworn by Michael Kamau Njonjo at Nairobi on 16<sup>th</sup> January, 2020 and marked as JMM6 clearly shows the Respondent herein was served on 18<sup>th</sup> June, 2019 at Kindu Hotel. The Respondent herein has not in any way shown that the Nzavi Ngului who was served on the material date is not the Respondent herein. In the circumstances, it is my finding that the Respondent cannot deny the issue of service and grounds 2 and 3 of grounds of objection cannot hold.

20. On whether or not the instant application is *res judicata*, Section 152E of the Land Act No. 6 of 2012 provides as follows: -

***S. 152 E (1) "if, with respect to private land the owner or the person in charge is of the opinion that the person in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of intended eviction.***

***(2) The notice under subsection (1) shall: -***

***a) be in writing and in a national and official language.***

***b) .....***

***c) specify any terms and conditions to as the removal of buildings, the reaping of growing crops and any other matters of the case may require; and***

***d) be served upon on the Deputy Commissioner in charge of the area as well as the officer commanding the police position of the area."***

21. Having perused the Eviction Notice (JMM3), it is clear that the same was copied to OCPD Makueni, the Sub County Commissioner Motumba Makueni as well as the Chief Nguu Ranch. The same complies with the law even though the Applicant went out of his way to serve the chief which action was not necessary. I would, therefore, agree that the instant application is distinguishable from the

Plaintiff's/Applicant's application dated 16<sup>th</sup> August, 2018 that was dismissed on the 25<sup>th</sup> February, 2019 in that the latter was intended to implement an order that was not awarded in the judgment delivered on 19<sup>th</sup> February, 2018.

22. Faced with a similar application for eviction, Munyao Sila, Judge in the authority referred to me by the Plaintiff's/Applicant's counsel had this say;

***"I have no reason to decline this application. I allow it. I order the Respondent to be evicted from the land parcel Naivasha/OI Jorai Phase 11/876. The Applicant is at liberty to appoint a court bailiff or auctioneer to evict the Respondent. I further order the OCS, Elementaita to provide security during the eviction exercise."***

23. In the amended plaint dated 16<sup>th</sup> July, 2007, there was no prayer for an order of eviction and therefore the Plaintiff/Applicant could not purport to execute that which he was not awarded in the judgement dated 19<sup>th</sup> February, 2018. That is the reason why this court declined to allow the previous application by the Plaintiff/Applicant dated 16<sup>th</sup> August, 2018.

24. In a nutshell, the instant application is not *res judicata* and in my view, the Respondent is procrastinating with a view to remain in the suit premises. I have no reason to decline this application.

25. I would associate myself with the holding of Munyao Sila J. in the aforementioned authority and find that this application has merits.

26. In the circumstances, I hereby proceed to allow the application as follows: -

***1) That orders of eviction is granted against the Respondent herein Nzavi Ngului from the applicant's suit premises known as LR No. Makueni/Nguu/1283 formerly Plot No. 464/1283 Nguu Settlement Scheme.***

***2) That orders are granted to Mr. Mutune of M/s Faith Auctioneers to conduct the eviction exercise and in satisfaction of the orders granted herein.***

***3) That the officer commanding Emali police station (OCS) be and is hereby ordered to offer security to the auctioneers in carrying out the exercise and to maintain law and order.***

Signed, dated and delivered via email at Makueni this 22<sup>nd</sup> day of January, 2021.

.....

**MBOGO C.G.**

**JUDGE**

**Court Assistant:** Mr. G. Kwemboi.