



**Njuguna v Gitau & another (Environment & Land Case
83 of 2013) [2024] KEELC 582 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 83 OF 2013
A OMBWAYO, J
FEBRUARY 9, 2024**

BETWEEN

DOMINIC MBURU NJUGUNA PLAINTIFF

AND

PETER NJUGUNA GITAU 1ST DEFENDANT

GATIMU KARIITHI 2ND DEFENDANT

RULING

1. The application before court is dated November 10, 2023 wherein the applicant seeks orders that warrants of attachment and eviction be issued in favor of Wanderi Auctioneers and that the Officer Commanding Station Nakuru Central Police Station be ordered 'to provide security during the eviction of the Plaintiff from the parcel of land known as Nakuru Municipality Block 16/634. The application is based on grounds that Judgment in this case was delivered by Justice Munyao Sila on March 6, 2019 in inter alia the following terms that the Second Defendant's prayer for vacant possession of the Suit Property is hereby allowed and the Plaintiff is hereby ordered to give vacant possession to the 2nd Defendant within 14 days of the Judgment, and in default, the Plaintiff be evicted from the Suit land.
2. Despite the timeline having lapsed and notices issued to the Plaintiff to vacate the Property, the Plaintiff has, in wanton disregard of the notice and Orders of this honorable court continued to trespass on the Property to the detriment of the 2nd Defendant's fight to Property.
3. Unless the eviction orders prayed for in this application are granted, the plaintiff will continue with his unlawful trespass of the Property. In the circumstances, it is in the interest of justice that this honorable court intervenes and grants the orders prayed. The supporting affidavit of Joseph Githinji Kariithi reiterates the grounds.



4. The respondent filed grounds of opposition contending that the application is bad in law, fatally incompetent, unsustainable, premature, an abuse of court process, and does not lie. The court has not been competently moved.
5. There is pending before this court a notice to show cause dated September 14, 2021 issued by the Deputy Registrar on the application by the same 2nd Defendant, still seeking Execution of the Decree herein. The NTSC is still pending for determination.
6. Application for execution of decree and issuance of warrants or orders thereon is the exclusive mandate/jurisdiction of the deputy registrar of the court in the first instance. The Judge only becomes seized of the matter upon "Appeal" or "Reference" from the decision of the deputy registrar.
7. According to the respondent, the requisite statutory Notices prior to any eviction have not been issued, contrary to the mandatory provisions of section 152B & 152E of the *Land Act*, 2012. The respondent argues that an application for Execution must be in the prescribed form:
8. Order 22 rule 6 of the *Civil Procedure Rules* makes it mandatory for any application for Execution to be in the prescribed form, and the application is ordinarily handled by the Deputy Registrar, who is the officer who issues Warrants/Orders in Execution.
9. The respondent submits that the present application before court is premature and an overreach on the part of the Applicant, as no Objection has been taken to any prior execution proceedings. He cites the case of *George Neil Baird & another v Fredrick Jose Kinpua & another* (2004) eKLR, where the High Court restated the foregoing position, and rendered itself thus;

“The procedure for application for execution is provided for in Order XXI Rule 6 which requires that a person seeking to execute a decree should apply to the court and such application shall be made in accordance with Form No 5 gf, Appendix D d the Civil Procedure Rules. Order MI Rule 18 (1) (a) is to be invoked where such application is made, inter alia, in respect era decree which is over one year old. The Notice to show cause why execution should not issue is issued by the court also in the form prescribed under the Rules, specifically Form No 6 0/Appendix D. Under Order XLVIII Rule 5 (b) (x) the proper person to deal with application of this nature is the Registrar of the High Court. I allow the preliminary objection and hold that this application is improperly before me and is in fact an abuse of the process of the court. In the circumstances it is not necessary for me to deal with the third objection. The application is hereby dismissed with costs to the Respondents.

10. He claims that the instant application is similarly premature, and an abuse of court process. That the Notice To Show Cause (NTSC) must issue before Execution of a Decree more than a year old. He cites Order 22 Rule 18 of the *Civil Procedure Rules* makes it mandatory for notice to show cause to issue before Execution of a Decree which is more than one year old. The said Rule 18(1) provides as follows;

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- (I) " Where an application for execution is made
 - (a) more than one year after the date of the decree;
 - (b)
 - (c)the court executing the decree shall issue u notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:"



11. The Judgment and Decree herein is dated 6th March 2019, almost five (5) years ago. Notice To show Cause is mandatory before execution of the same. And indeed, the court in the [George Neil Baird Case](#), *supra*, reiterated as much.

12. He relies on the case of [Moses Kipkurui Bor v John Chirchir](#) {2019} eKLR (parag(parag. 10 & 11), the court held that;

"The application dated 18 March 1997 is a direct application for execution, but there first needed to have been filed, and served, a notice to show cause, which the plaintiff does not pretend to have done. On that basis, the application dated 18 March 1997, would in any event, be incompetent..."

13. He argues that it is abuse of court process for the Applicant herein to institute two simultaneous court processes towards the same cause — one (Notice of Motion) before the Judge and the other (NTSC) before the Deputy Registrar. This amounts to forum-shopping and/or gambling. The Applicant is chancing to strike it lucky in either of the two fora.

That the instant application by the Defendant/Applicant is for Eviction of the Plaintiff/Respondent from the suit land. He cites Section 152B of the [Land Act](#) and contends that there is no leeway for anyone to conduct any eviction without following the process laid down in the Act, whether or not the Eviction arises from a prior Decree of the court. No exemption has been made in the Act for Evictions arising from court Decrees. Such Evictions must still follow the additional processes laid down in the Act.

14. He further cites Section 152 E of the [Land Act](#) and argues that no such eviction Notice has been served herein. No terms and conditions for the removal of the buildings on the suit land have been specified, and No Notice of the Eviction has been served upon either the Plaintiff/JD, or upon the Deputy County Commissioner, nor upon the OCPD all as mandatorily required by law. The Applicant herein does not even pretend to have complied with this requirement. In the premises, the intended Eviction is bad in law, incompetent and premature. In sum, he urges the court to dismiss the application dated 10th November 2023, with costs.

Analysis And Determination

15. This court has considered rival contention and with due respect to the counsel for the applicant, she has miscomprehended the provisions of sections 15A, 15B, 15C 15D, 15E, and 15F of The [Land Act](#). The sections do not apply to a situation where a decree has been issued but apply to where the owner of the land has not approached the court but is of the opinion that a person or a group is occupying his land unlawfully. A careful reading of sections 152 G and 152F shows that the court's jurisdiction is invoked where notice has already been given by the alleged land owner and the alleged invader has refused to vacate. It will be absurd to subject a decree to the process envisaged under the provisions of sections 152 A to 152F of the [Land act](#).

16. Section 152 E provides for eviction in respect to private land thus:-

152E. Eviction Notice to unlawful occupiers of private land.

- (1) If, with respect to private land the owner or the person in charge is of the opinion that a person is 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 the intended eviction.



- (2) The notice under subsection (1) shall—
 - (a) be in writing and in a national and official language;
 - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

17. This section does not envisage a court order as the starting point of the process but an opinion of the person who is in charge of the land and that is why section 152F provides for a recourse to court after issuance of notice and precisely provides as follows:-

152F. Application to Court for relief.

- (1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.
- (2) The Court, after considering the matters set out in sections 152C, 152D and 152E may-
 - (a) confirm the notice and order the person to vacate;
 - (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - (c) suspend the operation of the notice for any period which the court shall determine; or
 - (d) Order for compensation.

18. I have considered the application grounds of opposition and submissions on record and do find that the respondent is hiding in procedure to avoid compliance with the courts decree dated 6th March 2019.

19. The applicant is entitled to the orders sought. Litigation must come to an end and the decree Holder must enjoy the fruits of the judgment.

20. I do order that warrants of eviction be issued in favor of Wanderi Auctioneers and that the Officer Commanding Station Nakuru Central Police Station is ordered 'to provide security during the eviction of the Plaintiff from the parcel of land known as Nakuru Municipality Block 16/634.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9TH DAY OF FEBRUARY 2024.

A.O. OMBWAYO

JUDGE

