



Lukorito & another v Kibwalei (Environment and Land Miscellaneous Application E002 of 2023) [2024] KEELC 3605 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023
LA OMOLLO, J
MAY 2, 2024**

BETWEEN

VERONICA TERIGI LUKORITO 1ST PLAINTIFF

REBECCA CHERONO ROTICH 2ND PLAINTIFF

AND

JOSPEH AYABEI KIBWALEI DEFENDANT

RULING

1. This ruling is in respect to the Applicants' Notice of Motion dated 10th July, 2023.
2. The application seeks the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. Spent.
 - v. Spent.
 - vi. That pending the hearing and determination of the summons, the Respondent be restrained, either by himself, his agents, family members, relatives and/or any other person acting under his instructions from evicting the Plaintiffs or denying them access to the suit property being Title Number RONGAI/LENGENET BLOCK 3/200.
 - vii. That pending the hearing and determination of the summons, the Respondent be restrained either by himself, his agents, family members, relatives and/or any other person acting under his instructions howsoever from transferring, alienating, disposing, selling, encumbering,



assigning or in any other like manner dealing with the suit property being Title Number RONGAI/LENGENET BLOCK 3/200.

- viii. That the Respondent be ordered to move out of the suit property pending the determination of the summons.
 - ix. That the Commanding Officer Kampi Ya Moto be directed to assist in the execution of the eviction orders.
 - x. That costs of this application be in the cause.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 10th July, 2023 by one Veronica Terigi Lukorito.

Applicant's Contention.

4. The Applicant contends that the Defendant/Respondent is their cousin whose father Kibwalei Chemjor (deceased) had filed case number Nakuru ELC No. 202 of 2015 against her father.
5. It is the Applicant's contention that the Respondent's father in the said suit was claiming ownership of the suit property where the court found that he had unlawfully occupied it and ordered him to issue vacant possession.
6. The Applicant further contends that the court also issued a permanent injunction barring the Respondent's father and/or his agents from trespassing onto the suit property.
7. She contends that they employed workers to cultivate the suit property with the objective of planting maize and other seasonal crops. She adds that the Respondent attacked the workers and drove them out of the suit property and planted his own crops.
8. She further contends that efforts to have him move from the suit property has bore no fruits even after being served with a demand letter.
9. The Applicant contends that the Respondent's action has led to immense losses including but not limited to funds used to employ the workers and failing to cultivate the land for economic gain.
10. She ends her deposition by stating that it would be in the interest of justice that the court grants them protection as they stand to suffer irreparable loss and damage.

Respondent's Response.

11. In response to the application, the Respondent filed a replying affidavit sworn on 10th August, 2023 by one Joseph Ayabei Kibwalei where he deposes that the application is an abuse of the court process.
12. He deposes that he has been in actual possession of the suit land for over 12 years undisturbed.
13. He further deposes that as advised by his advocate which information he believes to be true that the Applicants' suit against him is statutory time barred. He deposes that the Applicant has no locus standi to bring the suit against him.



14. The Respondent deposes that he has since developed the suit land with a semi-permanent house and has been tiling on the same for more than 12 years. He adds that the Applicants have never been in possession of the suit land.
15. He deposes that he acquired the suit land vide adverse possession with an absolute title to 4 acres of it. He further deposes that the Applicants have never visited the suit land and he denied any attack on the Applicants' workers.
16. The Respondent deposes that the Applicants' suit against him is an afterthought and should be dismissed.

Applicants' Response to the Replying Affidavit.

17. The Applicants' filed a further affidavit sworn by the 1st Plaintiff/Applicant on 30th August, 2023 in response to the Respondent's replying affidavit. She reiterated the contents of their application and supporting affidavit.
18. She deposes that the replying affidavit is not factual with the same aimed at misleading the court and denying them the fruits of their judgment and property rights.
19. The Applicant deposes that they possess the locus standi by virtue of being the legal and registered owners of the suit property. She denied that the suit is statutory barred as the matter has been in court since 2015 when the Respondent's father filed the case in Nakuru ELC No. 202 of 2015.
20. She deposes that the court issued a decree on 25th February, 2021 where the Respondent's father was found to have unlawfully occupied the suit property.
21. She further deposes that despite the Respondent's father and by extension his family being served with the decree they have disregarded and continue to trespass and even planted crops.
22. The 1st Applicant further deposes that permission to use the suit land had been granted then later withdrawn thus adverse possession cannot stand.
23. She denies that the Respondent has a title to the suit land or having ever made an application for adverse possession or a court order granting him the said rights.
24. In conclusion, she deposes that they have tried taking possession of the suit property pursuant to the decree of this court to no avail. She urges the court, in the interest of justice, to allow the application as it has been brought in good faith.

Issues for Determination.

25. The Applicants' filed their submissions on 20th November, 2023 and identified the following issues for determination:
 - a. Whether the Plaintiffs have locus standi.
 - b. Whether the Defendant is entitled to adverse possession.
 - c. Whether the Plaintiffs are entitled to the reliefs sought.



26. On the first issue, the Applicant submits that they have locus standi by virtue of being the legal owners of the suit property. They submit that the same is evidenced by the title deed which is in their name. They rely on the judicial decisions in *Law Society of Kenya V Commissioner of Lands & Others*, Nakuru High Court Civil Case No. 464 of 2000 and *Khelef Khalifa El-Busaidy V Commissioner of Lands & 2 Others* [2002] eKLR.
27. On the second issue, the Applicants submit that for a claim of adverse possession to succeed, the limitation period should have run for at least 12 years as provided under Section 7 of the *Limitation of Action Act*. They rely on the judicial authorities in Kisumu Civil Appeal No. 27 of 2013 *Samuel Kibamba V Mary Mbisi* [2015] eKLR, *Mtana Lewa V Khaindi Ngala Mwangandi* [2015] eKLR and *Samuel Miki Waweru V Jane Njeru Richu*, Civil Appeal No. 122 of 2021.
28. The Applicants submit that the Respondent failed to satisfy the key ingredients required to claim adverse possession. They argue that his stay in the suit property is forceful in contempt of court orders thus trespassing. They add that the Respondent's father grazed on the suit property having been given permission by the legal proprietors. The Applicants urge the court to dismiss the Respondent's claim of adverse possession.
29. They relied on Section 38 of the Limitation of Action Act and submit that the Respondent has not brought any application for adverse possession. The Applicants cited the judicial case in Nairobi Civil No. 283 of 1990 *Gabriel Mbuvi V Mukindia Maranya* [1993] eKLR and submit that the Respondent ought to prove the same. They also submit that the court is functus officio as it already pronounced itself to the question of ownership of the suit property vide its judgment dated 25th February, 2021. The Applicants rely on the judicial decision in *Jersey Evening Post Limited V A. Thani* [2002] JLR 542 and submit that the Respondent is in contempt of the court's order and has no right to make assertion before obeying the said orders.
30. On the third issue for determination, the Applicants rely on Article 40 of the *Constitution*, Section 3 (1) of the *Trespass Act* and Sections 24(a) and 25 of the *Land Registration Act*. They submit that they are entitled to the reliefs sought as they are the registered legal proprietors of the suit property pursuant to the judgment.
31. In conclusion the Applicants submit that the court grants them the prayers as sought in the application and further finds the Respondent in contempt.
32. The Respondent filed his submissions on 30th October, 2023. He submits that he has been in actual possession of the suit property with his family undisturbed for more than 12 years.
33. The Respondent further submits that he has never been a party in Nakuru ELC No. 202 of 2015 hence the suit against him is statute barred. He also submits that the Applicants have never been in possession of the suit property thus their allegation does not stand.
34. He submits that having been on the suit property undisturbed for more than 12 years, he has acquired the right to the suit property by virtue of adverse possession.
35. In conclusion, the Respondent urges the court to dismiss the Applicants' application with costs.



Analysis and Determination.

36. Upon perusal of the Application, Supporting Affidavit, Replying Affidavit, Annexures and Submissions filed in respect of this Application, it is my considered view that the following issues arise for determination:
- a. Whether the application 10th July, 2023 is merited.
 - b. Which party should bear the costs of this application.

A. Whether the application 10th July, 2023 is merited.

37. I must point out from the outset that parties have gone to great lengths to submit on the question of adverse possession. In my view, this is misplaced especially taking into consideration the prayers sought in the application. The application under consideration seeks eviction of the Respondent from the suit property.
38. In view of the above, this court shall not delve into the question of adverse possession. Whoever desires a determination of this question should file a suit.
39. The affidavit in support of the application has an annexure which is a judgment delivered on 25th February, 2021. The said judgment is delivered in the suit Nakuru ELC No. 202 of 2015. In the said suit, the applicants herein were the 2nd and 3rd Defendants while the Respondent herein was the Plaintiff.
40. The court found in favour of the Applicants herein and issued the following orders:
1. The Plaintiff issues vacant possession of the suit property to the 2nd and 3rd Defendants.
 2. A permanent injunction does issue barring the Plaintiff, his servants and/or agents from trespassing or in any other way interfering with the 1st, 2nd and 3rd Defendants ownership of the suit property.
 3. Costs of the suit is awarded to the 1st, 2nd and 3rd Defendants.”
41. It is evident that this court already pronounced itself on the question of ownership of the suit property. The orders that were issued in the said judgment intended that the Respondent herein to give vacant possession of the suit land to the to the Applicant.
42. I am constrained to state that by the court requiring the plaintiff to give vacant possession of the suit property to the Defendants, it meant that suit land was to be made available for the Applicants to move in and /or take possession.
43. The court order required the Plaintiff to remove all his goods and/or assets from the property to enable the Defendants take possession of it. The logical consequences of failure to give the vacant possession to the Defendants necessitates eviction of the Plaintiff.
44. However, the eviction is sought against Joseph Ayabei Kibwalei. He was not a party to the suit Nakuru ELC No. 202 of 2015. The Applicants’ depose that he is their cousin whose father Kibwalei Chemjor (deceased) had filed case number Nakuru ELC No. 202 of 2015.
45. They further depose that despite the Respondent’s father and by extension his family being served with the decree they have disregarded it and continue to trespass on the suit land.



46. The Respondent on the other hand argues that he has never been a party in Nakuru ELC No. 202 of 2015. I have perused the decree and reproduce a paragraph from it and it is as follows;

“...It Is Hereby Decreed That:-

1. The Plaintiff issues vacant possession of the suit property too the 2nd and 3rd defendants
2. A permanent injunction does issue barring the Plaintiff his servants, and/or agents from trespassing or in any other way interfering with the 1st, 2nd and 3rd Defendants ownership of the suit property. (Emphasis is mine)
3. Costs of the suit is awarded to the 1st 2nd and 3rd Defendants...”

47. The Respondent herein does not disclose his relationship with the Plaintiff in Nakuru ELC No. 202 of 2015 but he states that he is neither a servant nor an agent. No proof has been tendered as to his relationship with the Plaintiff in Nakuru ELC No. 202 of 2015.

48. I agree with the Respondent that he was never a party to Nakuru ELC No. 202 of 2015 and therefore the orders of eviction sought against him cannot sustain.

49. The application under consideration strikes me as an application seeking the court’s assistance in execution of the decree. I am not clear on why the application was not files in Nakuru ELC No. 202 of 2015. It would have been easier to interrogate the record to find answers to the questions of fact that this court requires proof of.

B. Which party should bear the costs of this application

50. On the question of costs of the application, the general rule is that cost shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason, directs otherwise.

Disposition.

51. In the upshot, I find that the Notice of Motion Application dated 10th July, 2023 lacks merit and it is hereby dismissed with costs to the Respondent.

52. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO

THIS 2nd DAY OF MAY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Applicants.

No appearance for the Respondents.

Court Assistant; Mr. Joseph Makori.

