



Kibochi (Suing for and on behalf/attorney of Lucy Mumbi Kibochi) v Nderitu (Environment & Land Case 126 of 2014) [2023] KEELC 18588 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18588 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 126 OF 2014**

JO OLOLA, J

JULY 6, 2023

BETWEEN

**SUSAN WANGUI KIBOCHI (SUING FOR AND ON BEHALF/ATTORNEY OF
LUCY MUMBI KIBOCHI) PLAINTIFF**

AND

RICHARD KARIMI NDERITU DEFENDANT

RULING

1. By the Notice of Motion dated and filed herein on November 2, 2022, Susan Wangui Kibochi suing for and on behalf/Attorney of Lucy Mumbi Kibochi (the Plaintiff) prays for orders:
 5. That this Honourable court be pleased to set aside the orders made herein on May 18, 2022 and issued on June 7, 2022;
 6. That this Honourable Court be pleased to restrain the Defendant from evicting the Plaintiff from the said property Aguthi/Gatitu/595/13 pending the hearing and determination of the Plaintiff's Nyeri Court of Appeal Civil Appeal No 186 of 2020; Susan Wangui Kibochi vs Richard Karimi Nderitu; and
 7. That the costs of this application be provided for.
2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds *inter alia*, that:
 - (i) The said order made on May 18, 2018 was obtained by the Defendant through deception of the Court in the following ways:
 - (a) The Defendant's application was prosecuted and allowed without being served either on the Plaintiff's Advocate on record or the Plaintiff herself;



- (b) The said application was supported by an affidavit which concealed the fact that the Plaintiff was appealing to the Court of Appeal against the Judgment delivered on March 12, 2019;
 - (c) The Supporting Affidavit was false in that the Defendant falsely claimed that the decree required the Plaintiff to remove the restriction put on the title and that it was paramount that the Plaintiff gives vacant possession of the property to him despite the fact that the Defendant had not claimed vacant possession in his Counter-claim;
 - (d) The order for vacant possession was therefore obtained fraudulently as it was not contained in the decree and was issued after the Court became *functus officio*;
- (ii) Where the Court has been deceived, it sets aside summarily the order which has been obtained and deprives the applicant the fruits of the fraud; and
 - (iii) It is in the interest of justice that the prayers sought herein be allowed.
3. Richard Karimi Nderitu (the Defendant) is opposed to the Plaintiff's application. By his Grounds of Opposition dated November 12, 2022 but filed herein on November 21, 2022, the Defendant opposed the application on the grounds:
- (i) That the instant application is bad in law, frivolous and an abuse of the Court process; and
 - (ii) That the Applicant is guilty of undue delay.
4. I have carefully perused the Plaintiff's application together with the response thereto by the Defendant. I have similarly perused and considered the submissions made by the Learned Counsels representing the Parties herein.
5. By this application before the Court, the Plaintiff urges the Court to be pleased to set aside the orders made herein on May 18, 2022 as issued on June 7, 2022. In addition, the Plaintiff urges the Court to be pleased to restrain the Defendant from evicting her from all that parcel of land known as Aguthi/Gatitu/595/13 pending the hearing and determination of Nyeri Court of Appeal Civil Appeal No 186 of 2020; *Susan Wangui Kibochi vs Richard Karitu Nderitu*.
6. The application which is brought under Order 42 Rule 6 of the [Civil Procedure Rules](#) is premised on the grounds that the said order made on May 18, 2022 was obtained by the Defendant through deception and fraud in that the said application was neither served upon the Plaintiff nor her counsel on record.
7. It is further the Plaintiff's case that while by the said orders the Defendant obtained an order of vacant possession for the suit property, such orders were obtained irregularly as the Defendant had not counter-claimed for an order of vacant possession and none had been awarded in the Judgment delivered on March 12, 2019.
8. The orders sought to be set aside are the result of an application dated November 20, 2020 as filed by the Defendant herein on December 2, 2020. By the said application, the Defendant sought orders as follows:
- (1) That the Honourable Court be pleased to certify the current application as extremely urgent and that the same be heard ex-parte in the 1st instance;
 - (2) That this Honourable Court be pleased to appoint Providence Auctioneers and Bailiffs to carry out the decree of this Court dated the April 24, 2019;



- (3) That this Honourable Court be pleased to issue orders of vacant possession of that suit property known as Aguthi/Gatitu/595/13 belonging to the Applicant;
 - (4) That an order to the OCS Nyeri Police Station to provide security during eviction; and
 - (5) That the costs of this application be in the cause.
9. When that application came up for hearing before the Court on May 18, 2022, the Defendant had filed an Affidavit of Service in Court indicating that they had on April 13, 2022 effected service of a hearing notice upon M/S Warutere & Associates Advocates and that a Secretary at the said office had refused to accept service stating that they no longer acted for the Plaintiff. On the basis of that Affidavit, the Court proceeded to grant the orders sought in the application.
10. From the material now placed before the Court, it is apparent that the Plaintiff had by a Plaint dated June 10, 2014 sought to be declared as the lawful owner of the suit property and for the leasehold in respect of the Defendant's name to be cancelled. In his Statement of Defence and Counter-claim dated August 21, 2014 as filed herein on September 2, 2014, the Defendant had sought an order as follows:
- (i) The Plaintiff's suit be dismissed with costs and Judgment be entered in favour of the Defendant as per the Counter-claim.
11. As it were, the Defendant's said Counterclaim was contained at paragraphs 8 to 10 of the Statement of Defence and Counter-claim as follows:
- “8. The Defendant reiterates and affirms the content of paragraph 1 – 7 (inclusive);
 9. The Defendant is the registered owner of all that suit property known as Aguthi/Gatitu/595/13 with all the attendant rights attached to it; and
 10. The Defendant claims that his title has unjustifiably been restricted and such restriction should be removed by an order of this Court.”
12. In her Judgment dismissing the Plaintiff's suit as delivered on March 12, 2019, the Honourable Lady Justice Lucy Waithaka stated as follows at the penultimate Paragraphs 32 and 33 of the Judgment:
- “32. With regard to the Counter-claim by the Defendant, having determined that his registration as the proprietor of the suit property was lawful, I find and hold that he is entitled to the order for removal of the restriction registered against the title he holds as the restriction related to pendency of this suit which has with delivery of this Judgment been determined; and
 33. The upshot of the foregoing is that the Plaintiff's suit is dismissed with costs to the Defendants and the Defendant's Counter-claim allowed with costs.”
13. With respect, I was unable to discern how the above orders could be construed to have granted the Defendant vacant possession of the suit premises. There was no reference to the issue of vacant possession in his entire Statement of Defence and counter-claim and the court did not grant him any such orders in its Judgment as delivered on March 12, 2019.
14. It follows that I am persuaded that the orders made on May 18, 2022 were obtained by way of deception of the Court and suppression of material facts and that the Court must move with haste to deprive the Defendant of any benefit accruing therefrom.



15. In the premises, I allow the Motion dated November 2, 2022 in terms of Prayers 5 and 6 thereof with costs to the Plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 6TH JULY, 2023.**

In the presence of:

Mr Ndung'u holding brief for Dr Kuria for the Plaintiff/Applicant

Ms Maina for the Defendant/Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

