

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 82 OF 2018

MICHAEL MUGERA KIHUGWA

ZAKIEL ODIRA LUKE.....PLAINTIFFS/RESPONDENTS

VERSUS

HESBON OBOTE VIKIRU.....DEFENDANT/APPLICANT

RULING

The application is dated 27th November 2020 and is brought under Section 3A of the Civil Procedure Act seeking the following orders:-

1. That the District Land Registrar, Vihiga County and the District Land Surveyor, Vihiga County be directed to visit Land Parcel Kakamega/Kegoye/35 and restore the boundary.
2. That an eviction order be issued to forcefully evict the respondents/plaintiffs from Land Parcel Kakamega/Kegoye/35.
3. That the Officer Commanding Mbale Police Station be directed to provide security during the execution of the decree issued herein against the respondent herein.
4. That costs be provided for.

It is based on the annexed affidavit Hesbone Obote and the following grounds that the respondents/plaintiffs herein filed this case claiming Land Parcel No. Kakamega/Kegoye/35 under adverse possession. That the case was heard and determined vide judgment delivered on 20th February, 2020 wherein the suit was struck off with costs to the applicant/defendant. That the respondents/plaintiffs herein have neglected and/or refused to move and deliver up vacant possession of the L.R. Kakamega/Kegoye/35. That the respondents/plaintiffs have destroyed original boundary beacons. That there is need for the Land Registrar and Land Surveyor to visit the site and restore the boundary as per the original map. That security is also needed during the eviction of the respondents/plaintiffs so as to avoid breach of peace.

The respondents stated that this court delivered judgment in this case on 20th February, 2020 in which it was to the effect that "this suit is therefore struck out with costs to the defendant". That this suit was concluded upon the delivery of judgment of 20th February, 2020. Annexed marked ZOL-1 is a copy of the judgment. That there was no counterclaim or any other relief sought by the defendant/now applicant in this suit. That the plaintiffs/respondent had commenced this suit by way of originating summons, to be declared to have acquired rights over the subject matter. That there was no relief sought or granted as regards eviction or restoration of boundary in this case by any of the parties. That the prayers in the application, the reasons adduced are basis of a separate cause of action. That in the circumstance this application is not intended to enforce the judgment of 20th February, 2020. That they preferred an appeal against the judgment of 20th February, 2020, as a notice of appeal was lodged and served on the applicant, annexed marked ZOL-2 is a copy of the Notice.

This court has considered the application and the submissions therein. The applicant submits that the respondents/plaintiffs herein filed this case claiming Land Parcel No. Kakamega/Kegoye/35 under adverse possession. That the case was heard and determined vide judgment delivered on 20th February, 2020 wherein the suit was struck off with costs to the applicant/defendant. That the respondents/plaintiffs herein have neglected and/or refused to move and deliver up vacant possession of the L.R. Kakamega/Kegoye/35. I have perused the court record and find that this suit was struck out for being res judicata Kakamega High Court HCCC No. 177 of 2010. This court never went into the merits and demerits of the case, Secondly, there was no counter claim. How then is the court expected to make orders in favour of the defendant which were not sought for or proved. I find this application is frivolous and vexatious and an abuse of the court process. The same is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 20TH APRIL 2021.

N.A. MATHEKA

JUDGE