



**Endesia v Odhiambo & another (Environment & Land Case
66 of 2013) [2023] KEELC 20399 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20399 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 66 OF 2013
JM ONYANGO, J
OCTOBER 3, 2023**

BETWEEN

MARGARET MOLLY ENDESIA PLAINTIFF

AND

CLEMENT ODHIAMBO 1ST DEFENDANT

CHERRYLYNE KHAKAI ACHOKA 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 23rd March 2023 the 2nd defendant/Decree Holder filed an application seeking the following orders:
 - i. Spent
 - ii. That this Honourable court be pleased to issue an order that the 2nd defendant /Decree Holder be put in possession of the suit property known as Soy/Soy Block 10/(/)Navillus)/2411 in line with the judgment of the Honourable Court dated March 17, 2021.
 - iii. That an eviction order do issue against the Plaintiff/ Judgment debtor and/or any other third party occupying the suit property.
 - iv. That this Honourable Court be pleased to issue an order that the Plaintiff/ Judgment –debtor or such other person acting on her directions be detained in prison for 30days for obstructing / restraining the Decree/Holde- from obtaining possession of the suit property
 - v. That this Honourable Court be pleased to direct the Officer Commanding Station (OCS) Soy Police Station to provide security during the exercise.
 - vi. That the costs of this application be paid by the Plaintiff/ Respondent.



2. The grounds upon which the application is premised are outlined on the face of the notice of motion. The application is supported by the applicant's affidavit sworn on the 23rd March 2023.
3. The applicant deposes that the Plaintiff filed an Originating summons against her on 19th February, 2019 claiming that she was entitled to the suit property by way of adverse possession. The case proceeded for hearing and the court dismissed the plaintiff's case in a judgment delivered on 17.3.2023. The Plaintiff has however, refused to vacate the suit property and obstructed the 2nd defendant from taking possession thereof.
4. The Plaintiff lodged an appeal at the Court of Appeal in 2021 but the same has not yet been prosecuted yet there is no order for stay of execution.
5. The applicant laments that she is yet to enjoy the fruits of her judgment which was delivered 2 years ago and seeks the court's assistance in enforcing the decree which she claims the Plaintiff is in contempt of.
6. The application was opposed by the Plaintiff/ Respondent through his Replying Affidavit sworn on 28th March 2023. In the said Affidavit she deposes that other than the dismissal of the suit and an order for her to pay the costs of the suit there is no other order issued in favour of the applicant. She adds that the judgment did not direct that she vacates the suit property. She maintains that the defendants were free to file a counterclaim for eviction but they opted not to and the court cannot issue an eviction order when none was issued in the judgment.
7. She deposes that the court is functus officio and it cannot direct the OCS to enforce an order that does not emanate from the judgment.
8. The application was disposed of by way of written submissions.
9. In the 2nd defendant's submissions dated 28th April 2023 filed by Miss Oduor Advocate, the 2nd defendant relies on sections 34 and 51 of the *Civil Procedure Act* and contends that since the Plaintiff has obstructed her from obtaining possession of the suit property therefore the Plaintiff should be detained in prison for 30 days and the defendant put in possession thereof. She relies on the case of *Simon Ngao Mbithi v Daniel k. Ngomo* (2020) eKLR.
10. On the other hand, the Plaintiff in his submissions dated 16.5. 2023 filed by Mr. Annassi Momanyi Advocate contends that there is no positive order for eviction in the judgment as the plaintiff's suit was dismissed with costs and therefore the only order that can be enforced is for payment of the defendants' costs. He adds that a dismissal is a negative order which is unenforceable and the orders the 2nd defendant seeks to enforce were not granted by the court nor were they sought in the pleadings. He places reliance on section 38 of the *civil Procedure Act* which precludes the respondent from seeking enforcement of a decree for delivery of property where it is not specifically decreed in the judgment or a decree of the Honourable Court:
11. The only issue for determination is whether the orders sought in the application should be granted.
12. It is common ground that the plaintiff filed suit claiming the suit property which is registered in the 2nd defendant's name by way of adverse possession. In its judgment dated March 17, 2021, the court dismissed the plaintiff's claim for adverse possession with costs to the defendants. No order of eviction was granted by the court.

Indeed, the decree of the court states as follows:

“Decree



Plaintiff's Claim For:

- a. The Plaintiff has obtained title to part of Soy/SOY Block 10(Navillus)/65 registered as SOY/ SOY Block 10(Navillus)/2411 by adverse possession.
- b. The defendant's title over the suit land has been extinguished by lapse of time.
- c. The defendants are holding the title to the suit land in trust for the plaintiff.
- d. The Land registrar to delete the name of the defendant and enter that of the Plaintiff in its place and issue her with a title to the suit land.
- e. The defendants to pay the costs of the suit.

Upon this suit coming for hearing on diverse dates and for judgment before Hon. Justice S.M Kibunja on December 2, 2020 An Upon considering the evidence of the parties , the submissions of counsel and judicial authorities,

It is hereby ordered and Decreed:

1. That the court finds no merit in the Plaintiff's case and the same is dismissed with costs.
2. Given under my Hand and the Seal of this Honourable court this March 17, 2021.
3. Issued At Eldoret this 9th day of April 2021.

Deputy Registrar

Environment and Land Court –eldoret.”

13. It is evident from the decree that no order for eviction was sought or decreed by the court.

Order 38 of the [Civil Procedure](#) provides that:

38. “Powers of Court to enforce execution

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree-

By delivery of any property specifically decreed”

14. As already observed, the court did not decree the delivery of the suit property to the defendants. In the circumstances, this court cannot issue orders that were neither granted in the judgment nor decreed in the decree.
15. The case of [Simon Ngao Mbithi](#) (supra) is distinguishable from the instant suit as in that case there was an order of injunction which the court held was a prohibitory and mandatory injunction for eviction of the defendants from the suit premises and that the said order could only be effected through eviction of the defendants from the suit premises. In the instant suit there was no counterclaim for injunction by the defendants and there would be no basis for granting an order of eviction.
16. Consequently, the application lacks merit and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 3RD DAY OF OCTOBER 2023.

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J.M ONYANGO



JUDGE

In the presence of;

Miss Oduor for the applicant

No appearance for the Respondent

