



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC CASE NO. 844 OF 2013 (OS)

DUNCAN NG'ANG'A NJENGA.....PLAINTIFF

VERSUS

NJIHIA NJOROGE.....DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 16th January 2020. The Application is brought by the Defendant/Applicant. The Applicant seeks eviction of the Plaintiff/Respondent and demolition of illegal structures on the suit property.
2. The subject matter which led to the filing of this application is LR.No. Limuru/Kamirithu/T 101 which is registered in the name of the Applicant. This property has been the subject of litigation in a number of suits both in the lower court, the High Court, the Environment & Land Court and is possibly headed to the Court of Appeal as the Respondent has filed a Notice of Appeal.
3. The Respondent had entered the suit property in 1975 as a tenant. He later married the Applicant's sister. He at some stage stopped paying rent. The Applicant gave him a verbal notice to vacate but he did not. The Applicant filed a suit against the Respondent in the Lower Court at Limuru. This suit was referred to the Land Disputes Tribunal which ruled in favour of the Applicant. The Respondent moved to the High Court and had the Tribunal verdict quashed for lack of jurisdiction to make the orders it did.
4. The Respondent moved to the High Court and filed a suit seeking to have the property by way of adverse possession. This suit was later dismissed for want of prosecution. The Respondent thereafter filed the current suit seeking adverse possession. The suit was dismissed in a Judgement delivered on 19th September 2019.
5. The Applicant has now moved to this court seeking an order of eviction and demolition of the illegal structures which the Respondent has erected on the suit property. The Applicant contends that he is an elderly man who wishes to enjoy his property. He has tried to ask the Respondent to move out of the suit property but the Respondent has refused. It is on this basis that he seeks eviction of the Respondent and police assistance to oversee the eviction.
6. The Respondent filed a replying affidavit in which he contends that the Applicant should have filed a separate suit to seek eviction as there was no prayer in the pleadings seeking eviction. The Respondent further contends that he has preferred an Appeal to the Court of Appeal and as such this application should not be allowed.
7. The court directed parties to file written submissions in respect of the application. The Applicant filed his submissions dated 28th January 2021. The Respondent filed his submissions dated 5th February 2021. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The issues which emerge for determination are firstly whether an eviction order should issue. Secondly, whether the police should oversee the eviction. Lastly, which order should be made on costs.
8. As I have already indicated herein-above, judgement was delivered on 19th September 2019 dismissing the Respondent's claim for adverse possession. Though the Respondent has filed Notice of Appeal to the Court of Appeal, he has not obtained any order of stay from the Court of Appeal. The law is clear that an appeal does not automatically operate as stay. In the instant case, there is a Judgement which has been given against the Respondent. The only logical conclusion is that the Respondent has to vacate.
9. Even though the Applicant had no counter claim where he would have prayed for eviction upon dismissal of the Respondent's suit, this does not necessarily mean that the Applicant has to bring a fresh suit seeking eviction. The court has already found that the Respondent is not entitled to the suit property. There is no need for the Applicant to go and file a suit for eviction. The eviction order can be obtained through a motion as in this case. This is why I agree with the ruling by my brother Justice Angima in the case of **Mariko Ndwiga Vs Edith Muthanje**

(2020) e KLR where he stated that there was no need for one to bring a suit for eviction where such order could be obtained through an application. I therefore find that the prayer for eviction and demolition of the illegal structures is well founded.

10. The Applicant is seeking police assistance to oversee the eviction. It is common knowledge that people who are set to be evicted usually resist eviction. To avoid a situation where there is likely to be a breach of the peace and possibly violence, it is necessary for courts to direct that the police do assist in ensuring that there is peace during the eviction process. I find that the prayer for police assistance is well founded.

11. Even though the Applicant and the Respondent are related due to the latter being married to a sister of the former, I find that this is a case where costs should be given to the successful litigant. The Respondent has caused the Applicant to be in the corridors of justice for long. The Applicant should get costs.

12. All in all, therefore, I allow the Applicant's application and direct that the Respondent be evicted from LR No. Limuru / Kamirithu/T101 and the illegal structures he has erected thereon be demolished. The OCPD Limuru to avail police officers from the nearest police station where the suit property is situate to oversee the eviction. The Applicant shall have the costs of this application.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 15th day of April 2021.

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

Ms Mwai for Applicant

Court Assistant: Okumu

E.O.OBAGA

JUDGE