



**Mucunu v Kariuki (Environment & Land Case 1364 of 2014)
[2023] KEELC 20633 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1364 OF 2014**

**JO MBOYA, J
OCTOBER 12, 2023**

BETWEEN

ESTHER NYAWIRA MUCUNU PLAINTIFF

AND

JOHN MWANGI KARIUKI DEFENDANT

RULING

Introduction And Background

1. The Plaintiff/Respondent filed and/or commenced the instant suit vide Plaintiff dated the 21st October 2014; and in respect of which same contended to be the lawful and legitimate owner of Plot number 3/161- Kayole/Soweto Squatters Resettlement Scheme; Phase II (hereinafter referred to as the suit property).
2. Subsequently, the suit by and on behalf of the Plaintiff/Respondent was heard and determined vide Judgment rendered on the 7th July 2020; whereupon the Honourable court found and held that the Plaintiff/Respondent had failed to prove and/or demonstrate her rights to and in respect of the suit property. Consequently, the Plaintiff/Respondent's suit was dismissed with costs to the Defendant/Applicant.
3. Other than the foregoing, the court proceeded to and proclaimed that the suit property lawfully belongs to the Defendant herein and not otherwise. However, the court neither ventured forward nor issued any Eviction orders, as against the Plaintiff/ Respondent.
4. Furthermore and despite the proclamation by the court pertaining to the ownership of the suit property; the Plaintiff/Respondent failed to vacate and/or hand over the suit property to the Defendant/Applicant. Conversely, the Plaintiff/Respondent has remained in possession of the suit property and has even commenced construction thereon.



5. Arising from the forgoing, the Defendant/Applicant has now approached the court and filed the Application dated the 25th July 2023; and in respect of which same has sought for the following Reliefs;
 - i.Spent.
 - ii. That this Honorable court be pleased to issue a temporary order of injunction restraining the Plaintiff/Respondent either by herself, servants, agents, employees and/or representatives, from constructing and/or in any other manner from interfering with Plot No. 3/161 Soweto Settlement Scheme Phase II; more particularly known as Nairobi/Block 178/1027; pending the hearing and final determination of this application.
 - iii. That the Plaintiff/Respondent either by herself or her legal representatives, assignees or any one in occupation of Plot No. 3/161 Soweto Settlement Scheme Phase II; more particularly known as Nairobi/Block 178/1027; be and is hereby ordered to vacate the property forthwith.
 - iv. That the OCS Kayole Police Station through the Deputy County Commander be notified and ensure protection and compliance.
 - v. That the costs of this Application be provided for.
6. The instant Application is anchored on the various grounds, which have been enumerated in the body thereof. Additionally, the Application is supported by the affidavit of the Defendant/Applicant, sworn on even date; and in respect of which the Deponent has exhibited various annexures, inter-alia, a copy of the Judgment of the court.
7. On the other hand, upon being served with the instant Application, the Plaintiff/Respondent filed Grounds of opposition dated the 2nd August 2023; and similarly, filed a Replying affidavit sworn on the 4th August 2023, respectively.
8. From the averments contained at the foot of the Replying affidavit, the Plaintiff/Respondent admits that indeed a Judgment was delivered in respect of the subject matter on the 7th July 2020; and furthermore, that the Judgment in question has neither been stayed, varied and/or rescinded, whatsoever.
9. Furthermore, the Plaintiff/Respondent herein also does not deny that same has remained in occupation and possession of the suit property, despite the proclamation by the court; which held that same (Respondent), has no proprietary rights to the suit property.
10. First forward, the Application herein came up for hearing on the 25th September 2023; whereupon the advocates for the Parties covenanted to canvass the Application by way of oral submissions. Consequently and in this regard, the court adopted the proposition by the advocate for the Parties and thereafter the Application was duly canvassed.

Parties' Submissions:

Applicant's Submissions:

11. The Applicant herein adopted and reiterated the grounds contained in the body of the Application, as well as the averments contained in the Supporting affidavit and thereafter highlighted and canvassed three (3) salient issues for consideration and ultimate determination by the Honourable court.
12. Firstly, Learned counsel for the Applicant has submitted that the Plaintiff/Respondent herein is the one who filed the instant suit and in respect of which same sought for orders of declaration as pertains to ownership of the suit property.



13. However, Learned counsel for the Applicant has submitted that the Plaintiff's suit was thereafter heard and disposed of by way of Judgment rendered on the 7th July 2020; whereupon the Plaintiff's suit was dismissed with costs.
14. Arising from the dismissal of the Plaintiff's suit, Learned counsel for the Applicant has thus submitted that the Respondent herein therefore ceased to have any lawful and legitimate claims to and in respect of the suit property, whatsoever.
15. Secondly, Learned counsel for the Applicant has submitted that even though the Applicant neither filed a Counter-claim nor sought for an order of Eviction, there is no legal hindrance to this court granting an order of Eviction against the Respondent, whose suit has since been dismissed and claims over the suit property determined.
16. Thirdly, Learned counsel for the Applicant has submitted that the Applicant herein cannot be expected to file a Counter-claim against the Respondent at this juncture, particularly, long after Judgment has since been issued over and in respect of the instant matter. In this regard, Learned counsel has submitted that the filing of a Counter-claim, at this juncture, shall be contrary to and in contravention of the Doctrine of Re-judicata.
17. Lastly, Learned counsel for the Applicant has also submitted that the Honorable court is bestowed and vested with inherent Jurisdiction to ensure that the Rule of Law is not defeated, merely on the basis of procedural technicalities, which runs contrary to Substantive Justice.
18. Further and at any rate, Learned counsel for the Applicant has submitted that the Respondent herein shall not be disposed to suffer any prejudice and/or detriment, if the orders sought are granted, insofar as the Court has already determined that same has no rights and/ or Interests over the suit Property.
19. In any event, Learned counsel for the Applicant has submitted that the Respondent's rights and/or interests to and in respect of the suit property, have since been determined by a court of law and hence the Respondent herein has no lawful basis to remain on and/or to commence development activities on the suit property.
20. In a nutshell, Learned counsel for the Applicant has therefore implored the court to give effect to the import and tenor of the Judgment rendered on the 7th July 2020; and thus enable the Applicant, who is the owner of the Suit Plot to benefit from his ownership rights to and in respect of the suit property.

Respondent's Submissions:

21. The Respondent adopted the Grounds of opposition dated the 2nd August 2023; as well as the Replying affidavit sworn on the 4th August 2023; and thereafter same raised and highlighted two (2) salient issues for consideration by the Honourable court.
22. First and foremost, Learned counsel for the Respondent has submitted that the Application by and on behalf of the Applicant herein does not disclose any reasonable cause of action. In this regard, the Respondent has therefore implored the court to find and hold that the impugned Application is bad in law and is legally untenable.
23. Secondly, Learned counsel for the Respondent has submitted that the Applicant herein is obligated to file and/or commence an appropriate suit, with a view to procuring and obtaining an order of Eviction. In this respect, Learned counsel for the Respondent has submitted that no Eviction orders can be issued, either in the manner sought or at all.



24. Lastly, Learned counsel for the Respondent has submitted that even though the Honourable court delivered a Judgment on the 7th July 2020; and proclaimed the Defendant to be the owner of the suit property, the court herein did not venture forward and/or grant the orders of Eviction, which are now being sought vide the instant Application.
25. Arising from the forgoing, Learned counsel for the Respondent has therefore contended that the orders sought at the foot of the current Application cannot therefore be issued and in event, the Application under reference ought to be dismissed with costs.
26. In support of his submissions, Learned counsel for the Respondent forwarded to the court vide Letter dated the 26th September 2023, two decisions, namely, Tatecho Housing and Co-op Sacco Limited – Vs- Qwetu Sacco Limited (2021) eKLR and Lynette Nasimiyu Wafula vs David Mwangi & 4 Others (2022)eKLR, respectively.
27. For good measure, Learned counsel for the Respondent has therefore implored the court to find and hold that the Application beforehand is incompetent and ought to be dismissed with costs to the Respondent.

Issues For Determination:

28. Having reviewed the Application beforehand, as well as the Response thereto and upon consideration of the submissions ventilated on behalf of the Parties, the following issues do emerge and are thus worthy of determination;
 - i. Whether the Plaintiff/Respondent has any lawful rights or interests over the suit property or otherwise.
 - ii. Whether this Honorable court is seized of the requisite Jurisdiction to grant the orders of Eviction as sought in the body of the Application.

Analysis And Determination

Issue Number 1 Whether the Plaintiff/Respondent has any lawful rights or interests over the suit property or otherwise.

29. There is no dispute that the Plaintiff/Respondent herein laid a claim to and in respect of Plot No. 3/161, Soweto Settlement Scheme and in a bid to vindicate her rights to and in respect of the suit property, the Plaintiff/Respondent filed the instant suit.
30. Following the filing of the instant suit, the Defendant/Applicant herein was constrained to and indeed entered appearance and thereafter filed a Statement of Defense dated the 1st March 2017; wherein the Defendant, inter-alia, disputed the Plaintiff's claim to and in respect of the suit property. Furthermore, the Defendant also laid a claim to ownership of the suit property.
31. Subsequently, the suit by and on behalf of the Plaintiff/Respondent was heard and determined vide Judgment rendered on the 7th July 2020; whereupon the Honorable court dismissed the Plaintiff's suit.
32. Additionally, the court ventured forward and proclaimed that the suit property lawfully belongs to and is thus the property of the Defendant/Applicant. Consequently and in this regard, it suffices to state that the Defendant/Applicant therefore has the rights to enter upon and take possession of the suit property.



33. Pursuant to and upon the delivery of the Judgment rendered on the 7th July 2020; the Plaintiff/Respondent (sic) felt aggrieved and thereafter filed a Notice of Appeal dated the 29th July 2020.
34. Additionally, the Plaintiff/Respondent herein proceeded to and filed an Application under Certificate of Urgency before the Court of Appeal; and wherein the Plaintiff/Respondent sought to obtain an order of stay of execution of the Judgment and decree of the Environment and Land Court.
35. Nevertheless, it is imperative to underscore that despite having filed the said Application seeking stay of execution pending the hearing and determination of the intended Appeal, the Honorable Court of Appeal neither certified the appeal as urgent nor granted any orders of stay of execution.
36. Other than the foregoing, it is also contended that having filed the Notice of Appeal dated the 29th July 2020; the Plaintiff/Respondent has never filed a Substantive Appeal or at all. Consequently and in this respect, it is posited that no substantive appeal has therefore been filed and/or lodged by the Plaintiff/Respondent.
37. Arising from the foregoing facts, the question that the court must grapple with and determine, is whether the Applicant herein has any lawful rights and/or interests to the suit property, on the face of the Judgment rendered on the 7th July 2020.
38. To my mind, the rendition and/or delivery of the Judgment rendered on the 7th July 2020, determined the rights and/or interests of the Parties herein and in particular, the Plaintiff/Respondent, as pertains to ownership of the suit property.
39. Insofar as the Plaintiff/Respondent's rights and/or interests over the suit property, have since been determined, the Plaintiff/Respondent herein cannot therefore purport to be having any further rights and/or interests over the suit property, to warrant her continued occupation thereto and construction thereon.
40. Surely, it is the Plaintiff/Respondent who had approached the Honourable court seeking to be declared as the lawful and legitimate proprietor of the suit property, but despite her contention, the court found otherwise.
41. To my mind, upon the delivery of the Judgment by the court, the Respondent herein, who was found to be having no rights to and over the suit property, therefore ought to have moved out and/or granted vacant possession; unless the Respondent procured an order of stay of execution.
42. However, in respect of the instant matter, there is no gainsaying that the Respondent herein has neither procured nor obtained any order of stay of execution of the decree of the court, arising from the Judgment.
43. Conversely, what the Respondent has done is to file an Application for stay of execution and Injunction before the Honorable Court of Appeal; but which application was neither certified as urgent nor disposed of. Simply put, no order of stay has ever been issued and/or granted.
44. Suffice it to point out that the Respondent is still pursuing the Application for stay of execution before the Court of Appeal, which Application was filed on the 29th July 2020. However, it is important to point out that the subsistence of both the Notice of Appeal and the Application for injunction before the Court of Appeal, do not constitute an order of stay of execution or otherwise.
45. Instructively and to this end, it is appropriate to take cognizance of the provisions of Order 42 Rules 6(1) of the Civil Procedure Rules 2010, which stipulates as hereunder;

Stay in case of appeal [Order 42, rule 6.]



(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

46. Taking the foregoing into account, there is no gainsaying that the Judgment of the court, which has not been set aside, proclaimed the Defendant/Applicant as the lawful and legitimate proprietor of the suit property. Consequently, the proclamation that the Defendant/Applicant is the lawful and legitimate owner of the suit property therefore bestows upon the Defendant/Applicant the legal rights and/or interests of the suit property. See Section 24 and 25 of the [Land Registration Act](#).
47. In my humble view, the rights that accrue to and in favor of the lawful owner of a property, the Defendant/Applicant not excepted, include the right to vacant possession and use of the designated property.
48. To amplify the foregoing observation, it is appropriate to adopt and reiterate the holding of the Court in the case of *Waas Enterprises Limited versus City Council Of Nairobi & another* [2014] eKLR, where the court stated and observed as hereunder;

As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land.

The court further stated as follows;

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2nd defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff.

49. To my mind, the Plaintiff/Respondent claims to and/or in respect of the suit property and in particular, the claim pertaining to be the lawful proprietor of the suit property was determined vide Judgment of the court. Consequently, until and unless the said Judgment is set aside and/or quashed, (which has not happened), the Respondent herein has no lawful rights to the suit property or at all.
50. To the contrary, the Defendant/Applicant, has already been proclaimed to be the lawful and legitimate owner of the suit property and in this regard, same is therefore vested with the lawful rights thereto, as stipulated vide the provisions of Sections 24 and 25 of the [Land Registration Act](#), 2012.

Issue Number 2 Whether this Honorable court is seized of the requisite Jurisdiction to grant the orders of Eviction as sought in the body of the Application.

51. It is common ground that the Defendant/Applicant herein did not file a Counter-claim before the court, pertaining to and/or concerning ownership of the suit property and by extension, seeking for orders of eviction.
52. Having neither filed nor mounted a Counter-claim, (which is a cross suit), the Honorable court which heard the matter and rendered the Judgment dated the 7th July 2020, was therefore right in not



proclaiming and/or granting an order of Eviction. Clearly, no such order could have been issued in the absence of the requisite pleadings to anchor same. See Order 2 Rule 6 of the Civil Procedure Rules, 2010, which underpins the Doctrine of Departure.

53. Nevertheless, to the extent that the court found and held that the Defendant/Applicant herein was the lawful and legitimate proprietor of the suit property, it was incumbent upon the trial court to thereafter effectuate her proclamation and/or Judgment. For good measure, it is incumbent upon a court of law to ensure that the orders issued by itself are capable of being appropriated and/or implemented, short of that, the court order risk being an order in futility and/or vanity.
54. However, it is not lost on this court that orders of court should never be orders in futility. Simply put, courts of law, like nature, never act in vanity.
55. On the other hand, it is important to underscore that even though the Defendant/Applicant had neither filed a Counter-claim nor sought for an order of Eviction, there is no doubt that such an order ought to have flowed from the determination by the Honourable court, which held and proclaimed that the Defendant/Applicant was the owner of the suit property.
56. Additionally, I am obligated to state that despite the legal prescription revolving around the Doctrine of Departure; and coupled with the established position that Parties are bound by their pleadings; it is worthy to underscore that courts of law are still seized of the Inherent Jurisdiction to venture forward and grant appropriate reliefs with a view to averting gross injustice and by extension, meeting the ends of Justice.
57. Essentially, the scope and tenor of the courts inherent Jurisdiction, is so wide and unfettered. For the avoidance of doubt, the Inherent Jurisdiction of the court is meant to ensure that a court of law is able to rise to the occasion and to vindicate the rights of the litigants, who appear before the Court in pursuit of their respective rights.
58. Furthermore, the scope and tenor of the court's Inherent Jurisdiction was elaborated upon and succinctly espoused by the Supreme Court of Kenya in the case of *Narok County Government versus Livingstone Kunini Ntutu* (2018)eKLR, where the court stated as hereunder;

(97) We furthermore note that Jerold Taitz succinctly describes the inherent jurisdiction of the Supreme Court as follows in his book, 'The Inherent Jurisdiction of the Supreme Court' (1985) pp 8-9: ". . . This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the Court would be unable to act in accordance with justice and good reason. The inherent powers of the Court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."

(98) Back home, the Court of Appeal in addressing the point at hand in *Kenya Power & Lighting Company v Njumbi Residents Association & another* [2015] eKLR cited Ouko J (as he then was) In the matter of the Estate of George M'Mboroki, Meru HCSC No. 357 of 2004 and aptly put it that;

"... the Court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties".



- (99) Further in *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR the Court of Appeal set out the principles to guide the Court in exercising inherent jurisdiction in these words;

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection...” (Emphasis added.)

[100] The conclusion drawn from the above citations is that this Court, indeed any other appellate Court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the Court to act to prevent abuse of Court process by one party so that fairness is maintained between all parties.

59. Flowing from the discussion by the Supreme Court in terms of the preceding excerpts, there is no gainsaying that even where there is no express and specific provision of the law to warrant the granting of certain orders, a court of law is at liberty to invoke and apply the inherent Jurisdiction to, inter-alia, avert absurdity and promote the Rule of Law, as well as Social Justice. See Article 10(2) of *the Constitution*, 2010.
60. In this respect, it would be a legal anathema, to direct the Defendant/Applicant to proceed and file another suit and to implead a claim for Eviction, merely because the Rules of Procedure demands so. In such a situation, the court would certainly be making nonsense of her previous decision, which proclaimed the Defendant/Applicant as the owner of the suit property.
61. In the premises, I come to the humble conclusion that the circumstances belying the instant matter, warrant the invocation of the inherent and intrinsic Jurisdiction of the court, with a view to granting the orders of Eviction sought, whose import and tenor would be to be actualize the Judgment rendered on the 7th July 2020.
62. In a nutshell, my answer to issue number 2 is to the effect that the orders of Eviction as against the Plaintiff/Respondent are legitimate and thus ought to be granted. Consequently and in this respect, I invoke and apply the provisions of Article 10(2) of *the Constitution* 2010; as well as Sections 1A and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
63. Other than the foregoing, it is also important to adopt and reiterate the dictum of the Court of Appeal in the case of *Macharia Mwangi Maina & 87 Others versus Davidson Mwangi Kagiri* [2014] eKLR, where the court held thus;



1. We are reminded and guided by the dicta of Madan, JA (as he then was) in Chase International Investment Corporation and Another vs. Laxman Keshra and Others, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that: “If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”

1. Article 159 (2) (b) of *the Constitution* requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2) (a) of *the Constitution* requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of *the Constitution* stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.

64. In my humble view, the sentiments and observations of the Court of Appeal in the decision (supra), apply with equal force to the circumstances of this matter. Consequently, this court must rise beyond legalistic and mechanical application of the law and to render Substantive Justice.

Final Disposition:

65. It would be a legal anathema and absurdity, for this court to decree and/or direct the Defendant/Applicant to go and file a fresh suit seeking for orders of Eviction, yet the court in this matter has since proclaimed the Defendant/Applicant has the legal owner of the suit property.

66. To my mind, the proclamation that the Defendant/Applicant is the legal owner of the suit property, should be sufficient to enable the Defendant/Applicant, to partake of and benefit from the statutory privileges attendant to ownership of the suit property, including but not limited to the right to exclusive occupation and possession thereof.

67. Arising from the foregoing, the Application dated 25th July 2023; be and is hereby allowed on the following terms;

i. The Plaintiff/Respondent either by herself, agents, servants, employees, assignees and/or anyone claiming under the Plaintiff be and are hereby directed to vacate and hand over vacant possession of the suit property, namely, Plot No. 3/161 Soweto Settlement Scheme (L.R No. Nairobi/Block 178/1027) within 90 days from the date herein.

ii. In default to vacate and hand over vacant possession, an Eviction order shall issue and the Plaintiff/Respondent shall be evicted forcibly and/or forcefully from the suit property.

iii. In the event of the Plaintiff being evicted from the suit property in terms of clause (ii) hereof, the costs/expenses incurred in levying Eviction shall be certified by the Deputy Registrar and thereafter be recoverable from the Plaintiff/Respondent as further costs of the suit.

iv. Costs of the Application are awarded to the Defendant/Applicant and same has be certified in the sum of Kes.25, 000/= only to be paid by the Plaintiff/Respondent.



68. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Ombati h/b for Mr. Erick Amati for the Defendant/Applicant.

Mr. T. T Aswani for the Plaintiff/Respondent.

