



M’Inoti v Mwiti ((Substituting Cyprian Mwiti M’Mburugu (Deceased) and Legal Representative of the Estate of Cyprian Mwiti M’Mburugu)) (Environment & Land Case 32 of 2014) [2023] KEELC 21208 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 32 OF 2014
CK YANO, J
NOVEMBER 2, 2023**

BETWEEN

JAMES MUTHOMI M’INOTI PLAINTIFF

AND

**EUGENIA NCERI MWITI DEFENDANT
(SUBSTITUTING CYPRIAN MWITI M’MBURUGU (DECEASED) AND LEGAL REPRESENTATIVE OF THE ESTATE OF CYPRIAN MWITI M’MBURUGU)**

RULING

1. There are two applications for determination. The first one is a notice of motion dated 21st June 2023 by the plaintiff seeking orders to authorize the Deputy Registrar of this court to execute all documents necessary for transfer of land Parcel Number Nkuene/Taita/2473 from the defendant to the plaintiff and for the Land Registrar Meru to dispense with the production of the original title deed in respect of the said land when registering the transfer.
2. The second application is a notice of motion dated 11th July, 2023 by the interested party seeking stay of execution of the decree herein, that the interested party be enjoined as an interested party and to have the judgment herein set aside. I will start with the application by the interested party.

The Interested Party’s Application Dated 11th July, 2023

3. The interested party’s application is said to be brought under Order 1 Rule 1 and Order 10 Rule 11 of the *Civil Procedure Rules* and Section 3 and 3A of the *Civil Procedure Act*. The application is supported by the affidavit of Elias Mwebia, the applicant sworn on 11th July, 2023 and is premised on the grounds that the applicant and the plaintiff own the suit land jointly where the applicant has occupied a portion which he has constructed permanent houses and ought to have been joined as a party to the suit. That if



the decree herein is executed, the applicant will lose his portion which will cause him suffer irreparable loss and damage.

4. In the affidavit in support of the application, the interested party has deponed that he has occupied a portion of L.R No. Nkuene/Taita/2473 where he has built permanent houses and that the plaintiff/respondent is his neighbour and is aware of the interested party's claim. The interested party avers that the plaintiff filed this case without his knowledge whereas he should have either been included in the case as a plaintiff or notified of the same. He further avers that the family of Cyprian Mwiti (deceased) is aware of the interested party's ownership of part of the suit land.
5. The interested party states that he only came to know about the existence of this case when the application dated 21st June 2023 (by the plaintiff) was shown to him by the defendant. He claims to have obtained a portion of the suit land by way of adverse possession.
6. The interested party submitted inter alia, that the judgment herein ought to be set aside in order to accommodate him in these proceedings as he is an important ingredient and that since the application is not opposed, the same can be allowed.
7. The court has carefully considered the application, the affidavit in support and the submissions. The main issues in this application are whether the applicant should be joined in this suit, whether there should be stay of decree herein, and whether the judgment herein should be set aside.
8. Under Order 1 of the Civil Procedure Rules a party may seek joinder either as a plaintiff or defendant. Order 1 Rule 10(2) states as follows-;

“ 10 (2) the court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, Order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.”
9. In his application, the interested party seeks to be joined in this suit and have the judgment herein set aside. From the wording of the application the applicant simply wants to be joined as an interested party. However, a perusal of the affidavit in support of the application discloses that the applicant is claiming to be entitled to a portion of the suit land by way of adverse possession. In my view, the interested party's recourse could have been to be joined either as a plaintiff where he can rightly agitate his rights of ownership of the suit property by way of adverse possession or as a defendant where he could defend the suit and probably raise a counter-claim to assert his rights.
10. In this case, there is already a judgment entered in favour of the plaintiff. The decree has already been extracted and is pending execution. Ordinarily, a suit would come to an end when a court has rendered a decision and that decision has been acted upon. At that point, the court is said to be “*functus officio*” and any party who is aggrieved must now pursue the course of Appeal or review to a higher court. In my view, the application to be joined has come too late. Moreover, the applicant has not exhibited a draft of his alleged claim nor has he specified the portion he claims to be in occupation of. The applicant has not even stated the time from which he took possession and occupation, if at all. If the applicant wants to agitate his rights over the suit property, he can pursue it through a separate suit and not this case. From the material presented to the court, I do not think that it is necessary to join the applicant in this suit at this stage and especially in the manner sought by the applicant. In addition, the applicant



has in my view not satisfied the conditions for setting aside a judgment. Accordingly, I decline to grant the orders sought by the interested party and the application dated 11th July, 2023 is dismissed.

The Plaintiff's Application Dated 21st June 2023

11. In this suit, the plaintiff claimed to have been entitled by virtue of adverse possession of land parcel No. Nkuene/Taita/2473. The defendant did not enter appearance nor file a defence. In the judgment delivered on 22nd March, 2023, this court entered judgment in favour of the plaintiff and declared that the plaintiff is entitled to be registered as proprietor of the said land by adverse possession.
12. By his application dated 21st June 2023, the plaintiff seeks orders empowering the Deputy Registrar of this court to execute all documents necessary for the transfer of the suit land from the defendant to the plaintiff and for an order allowing the land Registrar Meru to dispense with the production of the original title deed when registering the transfer. The plaintiff has explained that the defendant has been uncooperative since the matter was instituted before court and concluded.
13. In his submissions, learned counsel for the plaintiff cited the provisions of Order 22 Rule 6 of the Civil Procedure rules which states that a decree can be executed by the court that issued it or the court wherein the decree has been sent. The plaintiff's counsel also cited Section 98 of the Civil Procedure Act and relied on the case of Shevji Naran Virji v Oglia Jemeli Barngatuny [2021] eKLR, Simon Pkite Chemotor vs William Loishakou [2017] eKLR, and Charles Mukoma Kimaru vs Johnstone Muchomba Kaguyu [2020]eKLR and Nyakagwa Osoro vs Hezron Mogere & Another [2016] eKLR and submitted that the defendant failure to execute the transfer documents even after the same have been delivered to her amounted to defiance of court orders thereby curtailing the plaintiff's rights to enjoy the fruits of his judgment.
14. Learned counsel for the plaintiff also cited Sections 14(1) and 31(1) of the Land Registration Act, 2012 and relied on the case of William Juma Mbui vs Public Trustees & another [2019] eKLR and urged the court to allow the application and grant the orders sought.
15. The defendant did not file any response to the plaintiff's application. However, an interested party herein filed a replying affidavit dated 24th July, 2023. However, the interested party's application dated 11th July, 2023 for joinder, stay of execution and setting aside of the judgment herein has been dismissed in this ruling.
16. I have considered the application by the plaintiff. Section 31 of the Land Registration Act deals with the production of certificate of title or lease while Section 33 deals with lost or destroyed certificates. The issue at hand, however is not about a lost or destroyed certificate, but that the defendant has refused to cooperate in the execution of the decree herein. A look at Section 31 shows that the Registrar may dispense with the production of the original certificate. In this case, there is a decree in favour of the plaintiff which has not been set aside and it has been explained that the defendant has frustrated the implementation of the said decree.
17. It is trite law that courts do not issue orders in vain. Having given a judgment in favour of the plaintiff, it is my opinion that it is only fair that the orders sought are granted to enable the plaintiff/decree holder enjoy the fruits of the said judgment. I therefore allow the application as prayed.
18. In the result, I make the following orders-;
 1. The interested party's application dated 11th July, 2023 is dismissed.
 2. The plaintiff's application dated 21st June 2023 is allowed as prayed.



3. Each party to bear their own costs.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF NOVEMBER, 2023

C.K YANO

JUDGE

In the presence of

Court Assistant – V. Kiragu/Lena M

Njindo holding brief for Kariuki for plaintiff

Interested party in person

