



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MAKUENI

ELC CASE NO 11 OF 2017

MICHEAL MWANZIA KITAVI.....PLAINTIFF/APPLICANT

VERSUS

LUKENYA UNIVERSITY TRUST.....1ST DEFENDANT/RESPONDENT

REGISTERED TRUSTEES

THE HON ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS HOUSING AND

URBAN DEVELOPMENT.....3RD DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION.....4TH DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 6th of August 2021, brought under Section 1A, 1B, 3A of the Civil Procedure Act and High Court Rules, the Contempt of Court Act and all the enabling provisions of the law the Applicant sought for the following orders: -

a) Spent.

b) That the Honourable Court be pleased to issue an order that the 1st Respondent be summoned to appear before this court and show cause why they should not be committed to civil jail for disobeying the orders issued on the 20th December 2018 in Makueni ELC case number 11 of 2017.

c) That the Honourable Court be pleased to issue an injunction restraining the 1st Respondent/Defendant herein either by themselves, agents, employees, proxies or servants from entering, evicting, demolishing, encroaching, dispossessing, wasting, alienation and or dealing in any way with parcel number 118 Ngai Ndethya Settlement Scheme in Mtito Andei Ivani area pending the hearing and determination of this application.

d) That the O.C.S. Mtito Andei Police Station to serve and supervise the orders.

e) That the cost of this application be provided for.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of the Applicant.

APPLICANT'S CASE

3. A summary of the grounds and the supporting affidavit of the Applicant is that the Applicant and his entire family have been residing on the suit land since 1979.

4. That during demarcation, the adjudication officer allocated the suit land to Justice Kasanga Mulwa without prove that he had been residing on the land. That after demarcation in 2001, the family of Justice Kasanga Mulwa through the 1st Respondent started threatening the Applicant's family with eviction by serving the Applicant with an eviction notice.

5. That being dissatisfied with the 1st Respondents action, the Applicant filed a suit at Makueni ELC claiming for adverse possession but the suit was dismissed on 6th of December 2017. He further averred that the 1st Respondent vide an application dated 23rd of March 2018 sought for orders to evict the Applicant from the suit land but the same was dismissed vide a ruling delivered on 20th of April 2018. The Applicant stated that contrary to the court's ruling, the 1st Respondent had fenced off the suit land and constructed permanent buildings.
6. The application is opposed by Martha Mulwa, a trustee of the 1st Respondent vide the replying affidavit sworn on 2nd September 2021. She avers that the 1st Respondent is the bona fide registered owner of the suit land. She further averred that the court dismissed the Applicant's suit claiming for adverse possession vide a ruling dated 6th of December 2017. She argued that the 1st Respondent had always been in possession of the suit land until 2014 when the Applicant encroached on one acre prompting the 1st Respondent to issue the Applicant with an eviction notice. She argued that after they issued the Applicant with the eviction notice, the Plaintiff instituted the present suit which was struck out with costs to the Defendants.
7. That thereafter the 1st Respondent sought for orders to evict the Applicant from the suit land but the court declined to grant the orders so that parties could await the settlement on adjudication. She argues that the ruling did not order that the 1st Respondent to be evicted from the suit land nor had they evicted the Plaintiff from the land. She contends that the Plaintiff was out to mudsling the good name of Justice Mulwa posthumously who had purchased the suit land from one Moses Rukwaro.
8. The application was canvassed by way of written submissions. The Applicant through his written submissions filed on 12th November 2021 submitted that the 1st Respondent was in contempt of the court's ruling delivered on the 20th of December 2018. He argued that the 1st Respondent was aware of the ruling as it was delivered in the presence of Mr. Hassan who was holding brief for Mr. D M Kituku for the 1st Respondent. The Applicant placed reliance on Section 4(1)(a) of the Contempt of Court Act and on the case of **Direct Line Assurance Co Ltd Vs Jamii Bank Ltd & 5 others eKLR.**
9. The Applicant further submitted that he had established a *prima facie* case, as he had been residing with his family on the suit land without interruption since 1979 which was also confirmed by the Chief's letter dated 31/01/2017. He further submitted that the ruling delivered on 20/01/2018 confirmed that a letter of allotment was not a title and that it also acknowledged that the adjudication process of the suit land was still ongoing and as such the property was Government land.
10. The Applicant submitted that unless the 1st Respondent is restrained from cutting down trees, carrying on construction works and demolition, he would suffer irreparable loss. To buttress his submission, he relied on the case of **Said Ahmed Vs Mannaseh Benga & Another (2019) eKLR.**
11. The Applicant contends that the balance of convenience was in his favour as they were in possession of the suit land.
12. The 1st Respondent through its written submissions filed on the 2nd of November 2021 submitted that the Applicant's suit herein, claiming adverse possession was dismissed by the court on 06/12/2017. The 1st Respondent argued that the court was *functus officio* and that therefore the Applicant could not seek for prayers 3 and 4 as there was no substantive suit. The 1st Respondent submitted that the Applicant had not demonstrated that it had disobeyed the court's ruling as the penal notice was not served upon it or its trustees as required by the law.
13. The 1st Respondent submitted that it was the *bona fide allottee* and that it had been occupation of the suit land up to 2014 when the Applicant encroached on one acre of the suit land.
14. The 1st Respondent contends that the court did not in its ruling order for its eviction. The 1st Respondent argues that it was shameful for the Applicant to drug the name of Justice Kasanga Mulwa as it was clear from the pleadings that he had purchased the suit land from Mr Moses Rukwaro.
15. I have considered the application, the affidavits and the rival submissions and I find that the issue for determination is whether the Applicant is entitled to the orders sought.
16. I have carefully perused the court record and I find that by a Plaint dated 17th of February 2017 and filed in court on the same day, the Plaintiff sought for the following orders against the Defendants: -
- a) **A declaration that the Plaintiff is the bona fide and rightful owner of Parcel No 118 Ngai Ndethya Settlement Scheme measuring 50 acres or thereabouts having acquired ownership status of the land through adverse possession since he has for a period of more than 12 years been in actual, open, physical and uninterrupted possession exercising all rights and privileges of ownership thereto.**
- b) **An order be issued to cancel the 1st Defendant's certificate of ownership in respect to parcel no 118 Ngai Ndethya Settlement Scheme measuring 50 acres or thereabout and the 3rd and 4th Defendant be ordered to issue a certificate of ownership in the name of Micheal Mwanzia Kitavi.**
- c) **A permanent injunction do issue restraining the Defendants, their agents, servants, assigns or any other person whomsoever from evicting, trespassing and/or with interfering with the Plaintiff's quiet possession in respect of Parcel number 118 Ngai Ndethya Settlement Scheme measuring 50 acres or thereabouts or in any manner howsoever from interfering with the Plaintiff's possession or from laying claim over the said land.**

d) Any other or further order that this Honourable Court may deem fit in the circumstances to grant.

17. In response, the 1st Defendant denied the Plaintiff's claim vide a Statement of Defence filed on 21st of March 2017 and an Amended Statement of Defence filed on 6th of April 2017. The 2nd and 3rd Defendants denied the Plaintiff's claim vide a statement of defence filed on 27th of March 2017.

18. Thereafter, the 1st Defendant filed a Notice of a Preliminary Objection dated 21st of March 2017 to strike out the Plaintiff's entire suit for being fatally defective as it offended;

a) Article 60(1) (b) of the Constitution of Kenya.

b) The mandatory provisions of Section 13A and 16 of the Government Proceedings Act (Cap 40 Laws of Kenya).

c) Section 38 and 41 of the Limitation of Action Act (Cap 22 Laws of Kenya).

d) Order 37 Rule 7 of the Civil Procedure Rules 2010.

19. The Preliminary Objection was canvassed by way of written submissions. It is not in dispute that the Plaintiff's suit was struck out vide the ruling marked MM3 annexed to the 1st Respondent's affidavit.

20. I have looked at the copy of the court's ruling by Hon Justice C. Mbogo delivered on 6th of December 2017, and I find that the court upheld the 1st Respondent's Preliminary Objection and struck out the Plaintiff's entire suit for being fatally defective with costs to the 1st, 2nd and 3rd Defendants.

21. That after the plaintiff's suit was struck out vide the ruling dated 6th December 2017, the Plaintiff did not file any appeal or take any other step to have the order striking out the suit reviewed and /or set aside.

22. The Plaintiff's entire suit having been struck out, ceased to exist. The Plaintiff could not therefore file an application in a suit that had already been struck out. Currently, there is no suit pending before this court upon which this application can be hinged on.

23. In light of the foregoing, I find that the Plaintiff's application is devoid of merit and the same is dismissed with costs to the 1st Respondent.

RULING DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY, 2022.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

KITUKU PRESENT FOR THE RESPONDENT

MUTHONI PRESENT FOR THE PLAINTIFF/APPLICANT

COURT ASSISTANT KWEMBOI