



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO 107 OF 2017

SOLOME NALIAKA WABWILE.....PLAINTIFF

VERSUS

ALFRED OKUMU MUSINAKA.....DEFENDANT

R U L I N G

1. By a Judgment delivered on 27th May 2020 in respect to a dispute involving the land parcel **NO BUNGOMA/KABISI/161** (the suit land), this Court dismissed the plaintiff's suit and entered Judgment for the defendant as sought in his Counter – Claim as follows: -

1. The plaintiff shall vacate the land parcel NO BUNGOMA/KABISI/61 within 6 months from the date of this Judgment or be evicted therefrom in accordance with the relevant provisions of Section 152 of the Land Act.

2. Thereafter, the plaintiff by herself, her agents, workers, servants and any other persons claiming through her shall be permanently enjoined from entering, occupying trespassing or in any other manner interfering with the defendant's use occupation and access to the land parcel NO BUNGOMA/KABISI/61.

3. Costs follow the event. However, in the circumstances of this case and given the age of the plaintiff who is a widow, I direct that each party meets their own costs.

A Decree was extracted in those terms.

2. The plaintiff being aggrieved by that Judgment lodged a Notice of Appeal on 17th June 2020 but did not file any appeal against the decision. An application to stay execution of that Judgment was dismissed vide this Court's ruling delivered on 2nd March 2021.

3. The plaintiff did not vacate the suit land as decreed by this Court. An order issued on 8th September 2021 directing the Officer Commanding Mbakalo Police Station (**OCS**) to provide security to the firm of **DAMSEY AUCTIONEERS** while evicting the plaintiff appears not to have borne any fruits.

4. I now have before me the plaintiff's Notice of Motion dated 9th September 2021 seeking the following orders: -

(a) Spent

(b) Spent

(c) That any process of the execution of any aspect of the Judgment herein be stayed pending compliance with the mandatory terms of Section 152 of the Land Act.

(d) That costs of this application be provided for.

The application is predicated upon the provisions of **Sections 1A, 1B, 3, 3A, 18(1) (b) and 63** of the **Civil Procedure Act, Order 40 Rule 1 and 2** and **Order 51 Rule 1** of the **Civil Procedure Rules**. It is premised on the grounds set out therein and supported by the plaintiff's affidavit.

5. The gravamen of the application is that by this Court's Judgment delivered on 27th May 2020, the plaintiff was ordered to vacate the suit land within 6 months or be evicted therefrom. That the plaintiff has been making plans to relocate her family from the suit land but in utter – disregard of the mandatory provisions of **Section 152 E** of the **Land Act**, the defendant has obtained an eviction order. That the eviction order obtained on 25th August 2021 is irregular and unlawful and the orders sought herein should be granted in the interest of justice.

6. The defendant filed grounds of opposition to the application describing it as a flagrant abuse of the due process of the law and lacking any merit and should be dismissed with costs.

7. That the 6 months was adequate time for the plaintiff to vacate the suit land peacefully. That the plaintiff's application seeking a stay of execution of the Judgment was dismissed by a ruling delivered on 2nd March 2021 and several notices have been issued to the plaintiff to show cause why an eviction order should not issue. That there is no evidence that the intended eviction will not observe the requirements of the law.

8. When the application was placed before me on 27th September 2021, I directed that it be canvassed by way of written submissions with each party having 14 days to file and serve. However, only the plaintiff's Counsel **MR MALOBA** instructed by the firm of **HAMMERTON MALOBA & COMPANY ADVOCATES** filed submissions. **MR MILIMO** Counsel for the defendant informed the Court on 24th November 2021 that he was having challenges getting instructions from his client and was contemplating filing an application to cease acting. However, he did not do so.

9. I have considered the application, the grounds of opposition and the submissions by **MR MALOBA** Counsel for the plaintiff.

10. The Judgment of this Court was very clear. The plaintiff was given 6 months from 27th May 2020 to vacate the suit land or be evicted therefrom. That means that by 27th November 2021, she should have vacated the suit land in compliance with that order against which she did not appeal. Having failed to vacate the suit land or appeal, the only option left to the defendant was to execute the eviction order as decreed by this Court in its Judgment. It is not therefore open for the plaintiff to aver, as she has done in paragraph 5 of her supporting affidavit, that the eviction order **"is irregular and unlawful."** The Judgment delivered on 27th May 2020 not having been set aside or appealed, any consequential orders flowing therefrom are regular and lawful. And it is not disputed that the order for the plaintiff to vacate the suit land within 6 months from 27th May 2020 or be evicted therefrom in accordance with the provisions of **Section 152** of the **Land Act** was embodied in **Order No 2 (a)** of this Court's disposal orders in the Judgment delivered on 27th May 2020.

11. It is clear from paragraphs 3 and 4 of her supporting affidavit that the plaintiff seeks more time to comply with the order to vacate and that her eviction should be carried out in compliance with the law. This is how she has pleaded in those paragraphs: -

3: "That the plaintiff/Applicant has been making plans to relocate her family from the suit land"

4: "That in utter disregard of the order of the Honourable Court and in breach of the mandatory provisions of Section 152 E of the Land Act, the defendant/Respondent moved and obtained an eviction order."

I hear the plaintiff to beseech this Court for two orders: -

1. Give her more time to vacate.

2. Ensure that her eviction is in compliance with the law.

With regard to the prayer for more time, this Court is of the view that the 6 months given to the plaintiff to vacate the suit land was more than adequate. Indeed, the time was sufficient to enable her commence the process of mounting an appeal against the Judgment. Clearly however, the plaintiff has no intention of appealing the Judgment because 18 months after it was delivered, there is not even a fleeting suggestion that the plaintiff may be weighing her options for an appeal. On the other hand, I do not discern any belligerence on the part of the plaintiff. Rather, she is beseeching this Court for more time **"to relocate her family from the suit land."** And although this Court is of the view that the 6 months was sufficient and in fact the plaintiff has unilaterally extended her stay on the suit land for another 12 months, it is said that justice should be tempered with mercy, compassion and a human face. I have not heard the defendant allege, as is common with cases of this nature, that the plaintiff has sworn that any eviction will only be over her dead body. Neither have I heard the defendant complain of any forceful resistance. This ruling is also being crafted during the Christmas and new year vacation. Therefore, it is in that spirit that I am persuaded to allow the plaintiff more time to vacate the suit land and although she has not suggested how much time she requires **"to relocate her family from the suit land,"** the Court will allow her what it considers to be reasonable time taking into account that the defendant is entitled to the fruits of his Judgment.

12. With regard to the complaint that the eviction order issued herein on 25th August 2021 was irregular, the record shows that by a Notice of Motion dated 5th August 2021, the defendant filed a Notice to Show Cause calling upon the plaintiff to show cause why an eviction order should not be issued. Having heard the defendant, the Deputy Registrar issued an order on 25th August 2021 directing that the plaintiff be evicted from the suit land. In my view, the Notice of Motion dated 5th August 2021 and the subsequent order issued on 25th August 2021 were unnecessary and mere surplusage. This Court's Judgment dated 27th May 2020 was clear. The plaintiff had 6 months to vacate the suit land or be evicted therefrom. The eviction was therefore the natural consequence of failure to vacate and would follow as a matter of course without further ado or any reference to the plaintiff. All that the defendant was required to do after the 6 months was to have the eviction order extracted and executed. In any event, the eviction order being a decision of a superior Court, it would be an exercise in excess of jurisdiction for the Deputy Registrar to review it by accommodating any explanation by the plaintiff, no matter how justified, as to why she

did not comply with the order to vacate. That can only be the preserve of the Court which issued the initial eviction order.

13. It must be remembered that under the **Land Act 2012**, the eviction of persons from private land can take either of the following routes:

1. By the land owner issuing a notice to the person in occupation of his land without consent to vacate within 3 months. Such notice is issued under section 152 E of the Land Act. The person served with such a notice has a recourse under Section 152 F to apply to the Court for relief. The Court may confirm the notice and order the person to vacate or it may vary, alter, suspend or make additions to the notice as it deems equitable and just.

2. By the land owner filing a suit for the eviction of a person who is occupying his land without consent. The Court, after hearing both the land owner and the occupier of the land may issue an order for eviction of the person who is unlawfully occupying the land. That is the route that the defendant herein took by his Counter – Claim. Section 152 A of the Land Act provides that no person shall unlawfully occupy private, community or public land.

Whichever route the owner of the land takes in evicting persons who are unlawfully occupying his land, there are mandatory procedures provided under **Section 152 G (a) to (i)** of the **Land Act** which must be adhered to during the eviction process. They include proper identification of those carrying out the eviction, presentation of the eviction order, respect of the dignity, right to life and security of those affected, presence of government officials etc. Those are the provisions that I had in mind in the Judgment delivered on 27th May 2020. And I believe those must be the provisions which the plaintiff has in mind when she seeks compliance with the law during the eviction process. As of now, however, no eviction has taken place and so it is premature for the plaintiff to allege that the defendant has conducted himself in an irregular or unlawful manner.

14. Having said so, however, the plaintiff seeks time **“to relocate her family from the suit land.”** And although I consider the 6 months to have been sufficient and notwithstanding the fact that the plaintiff has even exceeded that time, and bearing in mind the general power to enlarge time as donated by **Section 95** of the **Civil Procedure Act** and **Order 50 Rule 6** of the **Civil Procedure Rules** and the inherent powers of this Court, I shall allow the plaintiff more time to vacate the suit land. In so doing, I am persuaded by her own averment in paragraph 3 of her supporting affidavit wherein she has averred as follows: -

3: “The plaintiff/Applicant has been making plans to relocate her family from the suit land.”

15. Ultimately therefore and having considered the plaintiff’s Notice of Motion dated 9th September 2021, I make the following orders: -

1. The eviction order issued herein is lawful and regular.

2. The plaintiff is allowed another two (2) months from the date of this ruling to relocate her family from the land parcel NO BUNGOMA/ KABISI/61.

3. In default of (2) above, the plaintiff shall be evicted from the land parcel NO BUNGOMA/KABISI/61 in compliance with the mandatory provision of Section 152 G of the Land Act.

4. Each party to bear their own costs of this application.

BOAZ N. OLAO.

J U D G E

2ND FEBRUARY 2022.

Ruling dated, signed and delivered at **BUNGOMA** this 2nd day of February 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

BOAZ N. OLAO.

J U D G E

2ND FEBRUARY 2022.