



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MAKUENI

ELC CASE NO 336 OF 2017

MARY JUSTER MAKAU.....PLAINTIFF

VERSUS

NAHASHON KINGOO WAMBUA.....RESPONDENT

RULING

1. By an Amended Ex parte Notice of Motion dated 30th of July 2021 brought under Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant is seeking for the following orders: -

a) Spent.

b) Spent.

c) That an order of eviction be and is hereby issued against the Respondent by themselves or their agents and/or servants from land reference number Makueni/Nguu Ranch/535 in Makueni pursuant to the order/decreed of the Hon Court granted in Makueni Environment and Land Court No. 336 of 2017 dated 29th August 2019.

d) That the Honourable Court hereby makes an order directing the OCS Email to enforce the Decree in Makueni Environment and Land Court NO 336 of 2017 dated 29th August 2019.

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 sworn on 30th of July 2021.

3. A summary of the grounds and the averment of the Applicant is that the Applicant filed the present suit and sought for a permanent injunction restraining the Defendant from trespassing on the suit property. The Applicant averred that the matter was heard and that the judgment was delivered on 14th of May 2018 in her favour. The Applicant further averred that despite the court having delivered the judgment and decree in her favour, the Defendant has refused to vacate the suit property. The Applicant argued that she was unable to enforce the decree without the order of the court.

4. Upon perusal of the Court record, it is evident that the Plaintiff commenced this suit vide a Plaint dated 18th September 2017 and sought for the following orders: -

a) Orders of permanent and mandatory injunction to restrain the Defendant whether by himself, his servants or agents or whomsoever from continuing with the acts of trespass complained of or in any other manner howsoever from interfering with the Plaintiff's peaceful occupation and use of his parcel of land number Makueni/Nguu Ranch/1536 in Makueni County.

b) An order of possession and eviction of the Defendant from the Plaintiff's parcel of land number Makueni/Nguu Ranch/1536 in Makueni County.

c) General damages for trespass on the Plaintiff's land.

d) Costs of the suit with interest thereon of (c) at court rates from the date of judgment until payment in full.

5. The Defendant did not enter appearance or file his defence. The Court directed that the matter proceeds as an undefended suit. The matter proceeded for hearing on 5th of March 2018. The Court rendered its judgment on 14th of May 2018 in favour of the Plaintiff in the following terms: -

a) Orders of permanent and mandatory injunction to restrain the Defendant whether by himself, his servants or agents or others whomsoever from continuing with the acts of trespass complained of or in any other manner howsoever from interfering with the Plaintiff's peaceful occupation and use of his parcel of land number Makueni/Nguu Ranch/1536 in Makueni County.

b) An order of possession and eviction of the Defendant from the Plaintiff's parcel of land number Makueni/Nguu Ranch/1536 in Makueni County.

c) Kshs 100,000/- being general damages.

d) Cost of this suit and/with interest thereon of (c) at court rates from the date of judgment until payment in full.

6. The Applicant filed the present application on 3rd of August 2021 under certificate of urgency. The Applicant was directed to serve the application upon the Respondent for inter partes hearing. This matter came for inter partes hearing on 24th of January 2022 and Mr Shamulla appeared for the Applicant. There was no appearance for the Respondent. Mr Shamulla informed the court that the Respondent had been served and an affidavit of service had been filed and placed on record.

7. I have carefully looked at the affidavit of service sworn by Ali Simba Kalii on 7th of January 2022 relating to the service of the present application. At paragraph 4, the process server states as follows **"That, on the same day i.e 7/1/2022 I proceeded to the defendant's home via Masimba Town along Mombasa-Nairobi Highway where I boarded a boda boda whose rider knew the Defendant/Respondent's home where I met a young man who gave me his name as Charlse Kingoo the son to the Defendant/Respondent.**

8. Paragraph 5 states **"That, after informing the said Charlse Kingoo my purpose of visit he also informed me that the Defendant/Respondent (his father) died about four (4) years ago, and is buried on the land parcel just in front of his son's house. He also informed me that he was the only son to the deceased and was not aware that there was a case concerning the land.**

9. The process server in paragraph 9 of his affidavit stated **that having no one to serve, I hereby return to this Honourable Court the Mention Notice, Ex Parte Notice of Motion and supporting affidavit UNSERVED as the Defendant/Respondent is deceased.**

10. Order 5 Rule 8(1) of the Civil Procedure Rules provides that:

"Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient."

11. It is clear from the above provisions that service should be effected personally upon the Defendant.

12. Order 24 of the Civil Procedure Rules provides for the procedure applicable in case of the death of a party to a suit.

13. Order 24 sub rule provides that: -

(1) "Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues to survive, the court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under sub rule 1 the suit shall abate as against the deceased defendant."

14. In the present suit, this matter was determined as per the judgment of this court delivered on 14th of May 2018. What is pending before the court is execution proceedings.

15. The process server confirmed in his affidavit of service that he was unable to effect service as the Respondent was deceased. On 2nd of December 2021, Mr Shamulla told the court that the defendant was deceased.

16. The court of Appeal in the case of **Joseph Ngángá Njoroge Vs Kabiri Mbiti (1986) eKLR** held that: -

"There can never be any proceedings against a dead person. A personal representative should have been brought in the suit by the decree holder."

17. Similarly, in the case of **Athman Omar Zuberi Vs Mamson Asol Apinde (2012) eKLR** the court held that;

“A process could not be effected on a dead person...”

18. It is apparent that the instant application was filed against a dead person. That by itself is irregular. Upon perusal of the court record, it is evident that a personal representative has not been brought in the suit.

19. In light of the foregoing, the application cannot proceed as it were as it is filed against a deceased party.

.....

HON T. MURIGI

JUDGE

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

IN THE PRESENCE OF: -

Shamulla for the Plaintiff/Applicant

Court assistant – Mr. Kwemboi