



**Kebaso v Kebaso (Environment & Land Case 371 of 2012)
[2022] KEELC 8 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 8 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 371 OF 2012**

JM ONYANGO, J

MAY 5, 2022

BETWEEN

FRANCIS MOSE KEBASO APPLICANT

AND

HARRISON MOKAYA KEBASO RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion dated 3rd August, 2020 filed by the Applicant herein seeking an order of eviction against the Defendant/Respondent from land parcel number MATUTU SETTLEMENT SCHEME/620 (hereinafter referred to as the (“suit property”).
2. The application is based on the grounds set out on the face of the Notice of Motion and the Plaintiff’s Supporting Affidavit sworn on the 3rd August, 2020.
3. In his Supporting Affidavit, the Applicant averred that the court entered a default judgement in his favor on 23rd October, 2019. He further averred that the court in its judgement had ordered the Defendant to vacate the suit property within 60 days from the date of service of the court decree upon him. He further averred that he extracted the decree and served the same upon the Defendant on 13th December, 2019.
4. He lamented that since 13th December, 2019 when he was served with the judgment and decree directing him to move out of the suit property, the Respondent had not delivered vacant possession. He therefore prayed that the application be granted.
5. The application was opposed by the Respondent who filed a Replying Affidavit dated 21st January, 2021 and another one dated 18th February, 2021 alleging that he had been in occupation of the suit property together with his family and children for over 20 years given that the same was originally registered in the name of his late father.



6. He denied having been served with the decree and Notice of Entry of Judgement in respect of this matter. He deponed that there was no other land he could move to as he had established his matrimonial home on the suit property and buried his kin thereon and if eviction orders were issued, the same would amount to a violation of his constitutional rights under Article 43 of the Constitution of Kenya.

Brief background of the case

7. The Plaintiff/Applicant while acting on behalf of her late mother under a Power of Attorney, commenced this suit vide a Plaint filed on 10th October, 2012 which he later with leave of the Court amended on 6th July, 2018. In the said Plaint he seeks the following orders:
 - a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession, occupation and user of land known as LR MATUTU SETTLEMENT/620;
 - b. A declaration that the Defendant whether by himself, servant agents, assigns or otherwise howsoever is unlawfully in occupation, possession and use of the suit property and is equally a trespasser;
 - c. A permanent injunction restraining the Defendant whether by himself or his agents, servants, assignees or otherwise howsoever from remaining or continuing in possession, occupation and user of the suit property
 - d. Eviction from the suit property and/or surrender vacant possession of the suit property
 - e. Costs of the suit and interest; court rate; and
 - f. Any other or better relief the Honourable Court may deem fit to grant.
8. The Defendant through the firm of M/S Sonye Ondari & Co. Advocates filed a Memorandum of Appearance on 25th October 2012, together with a Statement of Defence denying all the averments in the Plaint.
9. The matter was mentioned on 19th May, 2014 to confirm whether the parties had complied with pre-trial directions given on 23rd July, 2013 when the matter came before this court for the first time. On this day both Advocates for parties were present and learned counsel for the Defendant sought more time to comply with the pre-trial directions.
10. On 15th December, 2014 the matter came up for hearing and the Advocate for the Plaintiff indicated that he was ready to proceed with two witnesses who were present in court. However, the advocate for the Plaintiff was not ready to proceed on the grounds that he had not managed to trace his client, the Applicant because the contact that he had given him was not going through. The court allowed the application for adjournment and the Defendant was ordered to pay adjournment fees and the Plaintiff's costs before the next hearing date.
11. On 10th December, 2016 the representative of the firms representing the parties and parties themselves appeared before the registry to fix the matter for hearing. By consent the matter was fixed for hearing on 23rd May, 2016.
12. Unfortunately, on 23rd May, 2016, both the Defendant and his Advocate failed to attend court for hearing despite having been present when the hearing date was taken. The court after



confirming that the Defendant and his Advocate were absent without any explanation, allowed the Plaintiff to proceed ex-parte.

13. However, in the course of the Plaintiff's giving his testimony the court discovered that the Plaintiff's mother, Prisca Moraa who had donated a Power of Attorney to the Plaintiff to file the suit on her behalf had died and as such he was stood down to allow for the appropriate substitution of the deceased.
14. On 26th April, 2018, the firm of M/S Sonye Ondari & Co. Advocates acting for the Defendant filed an application to cease acting for the Defendant.
15. On 22nd June, 2018 the Court allowed the application to cease acting filed by the Defendant's former Advocate and the application for substitution of the original Plaintiff thus the current Plaintiff became the substantive party. The court further granted the Plaintiff leave to file an amended Plaintiff within 21 days and serve the same upon the Defendant in person.
16. The matter came up for directions on 8th October, 2018 when the court noted that the Plaintiff had served the Defendant directly. On the 26th February, 2019, the matter came up for hearing. The Court upon being satisfied that the Defendant had been properly served as per the Affidavit of Service which was on record, ordered for the matter to proceed ex-parte. The Plaintiff testified in support of the suit and called two witnesses.
17. On 23rd October, 2019 the court delivered its Judgment in favor of the Plaintiff. In the said judgment the Defendant was ordered to vacate the suit property after a period of 60 days. The Defendant was served with a Notice of entry of judgment and a copy of the decree.
18. On 3rd August, 2020, the Plaintiff/Respondent filed a Notice of Motion application seeking an order of eviction of the Defendant after the expiry of the 60 day period within which the Defendant was to render vacant possession of the suit property.
19. However, the Plaintiff's application was placed in abeyance awaiting the hearing and determination of the Respondents application dated 29th January, 2021 seeking an order for stay of execution and leave to file his defence out of time.
20. Vide its Ruling dated 21st September 2021, the court dismissed the Defendant/Respondent's application with costs thus giving room for this application that had been placed in abeyance to proceed.

Issues for determination

21. From my analysis of the application, the response by the Respondent and the submissions filed by both parties, the only issue for determination is whether the Applicant is entitled to an order of eviction.

Analysis and determination

22. It is not in dispute that this court entered a default judgment in favor of the Applicant, on 23rd October, 2019. It is also clear that after the expiry of 60 days which the court had set as the period within which the Respondent was supposed to move out of the suit property, the Applicant filed this application. The record also reveals that this application was put in abeyance after the Respondent filed an application seeking a stay of execution and setting aside the default judgment delivered by this court on 23rd October, 2019 which application was dismissed by this Court vide its ruling delivered on 21st September, 2021.



23. I have considered the two Replying Affidavits filed by the Respondent and his written submissions, all I can conclude is that the Respondent is being repetitive of the position he took while arguing his application for stay which application was dismissed for lack of merit.
24. This Court, in its ruling dated 21st September, 2021 made an observation that the Respondent had not made any steps to follow up on his case since 2014, when he was sued by the Applicant. The court further observed that he had left the suit against him in the hands of his advocates only to show up in court 6 years later after being served with this application for eviction, claiming that he was not aware of what had transpired. The position of this court cannot be reversed.
25. The Respondent was given adequate time to argue his application for setting aside the ex-parte judgment but he failed to convince the court that he had met the grounds for setting aside the judgment. Litigation must come to an end.
26. Since the judgment dated 23rd October, 2019 has not been set aside or stayed, it would only be fair and just if the Applicant is allowed to enjoy the fruits of his judgment.
27. The upshot is that I find merit in the application and I make the following orders:
 - a. An eviction order is hereby issued evicting the Defendant /Respondent from land parcel number MATUTU SETTLEMENT SCHEME/620.
 - b. The costs of this application shall be borne by the Defendant/Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF MAY, 2022.

J.M ONYANGO

JUDGE

