



**Kimulu (Suing as guardian ad litem of the Children at Kisii Children Home)
& 3 others v Abuga & 5 others (Sued as Officials, Trustees and Agents of
the Seventh Day Adventist Church - Millenium) (Environment & Land Case
220 of 2017) [2022] KEELC 14554 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 220 OF 2017**

**JM ONYANGO, J
NOVEMBER 3, 2022**

BETWEEN

**KELVIN KIMULU (SUING AS GUARDIAN AD LITEM OF THE CHILDREN AT
KISII CHILDREN HOME) 1ST PLAINTIFF
CHILD WELFARE SOCIETY OF KENYA 2ND PLAINTIFF
CHILD WELFARE SOCIETY OF KENYA (KISII BRANCH) 3RD PLAINTIFF
THE HON. ATTORNEY GENERAL 4TH PLAINTIFF**

AND

**JOSHUA ABUGA 1ST DEFENDANT
PAMELA ISENSI 2ND DEFENDANT
REBECCA MBOYA 3RD DEFENDANT
PETERSON ONDICHO 4TH DEFENDANT
FRED NYAKUNDI 5TH DEFENDANT
PETER OYARO 6TH DEFENDANT
SUED AS OFFICIALS, TRUSTEES AND AGENTS OF THE SEVENTH DAY
ADVENTIST CHURCH - MILLENIUM**

RULING

1. By a notice of motion dated May 14, 2020 the plaintiff moved the court seeking the following orders against the defendants:



- a. Spent
 - b. Spent
 - c. The honorable court be pleased to issue an order of forcible eviction of the defendants/respondents herein, by enforcing the eviction decree granted by this honorable court the day of May 2012 against the on defendants/respondents, from a parcel of land known as Kisii Municipality/Block II/xxx(converted into LR No Kisii Municipality/ Block L/xxx) (hereinafter referred to us the suit property) and reiterated by the Court of Appeal vide Kisumu Court Of Appeal Civil Appeal No 152 of 2019.
 - d. The eviction order herein be executed by M/s Odongo Investment Auctioneers or any other licensed auctioneers or court bailiff.
 - e. The honorable court be pleased to order and/or direct the OCS in charge of Kisii Central Police Station and the County Commissioner Kisii to provide the necessary security to facilitate the execution, enforcement and/or implementation of the eviction decree issued by this court.
 - f. Costs of this application be borne by the defendants.
 - g. Such other and/or further orders as this honorable court may deem just and expedient be granted.
2. The application is supported by the affidavit of Irene Mureithi sworn on the May 14, 2022. In the said affidavits he averred that this court delivered its judgment on the May 13, 2019 in relation to this matter wherein it decreed that the defendants/respondents do vacate the suit land hitherto known as Kisii Municipality/block M/xxx (now converted into LR No Kisii Municipality/ Block I/xxx) within 90 day from the date of the judgment.
 3. She further that the defendants/respondents were aggrieved by the determination of this court and preferred an appeal to the Court of Appeal under Kisumu Civil Appeal No 152 of 2019. However the Court of Appeal through its judgment dated the December 18, 2020 sustained and confirmed the decision of this court in its entirety and directed that the defendants/respondents vacate the suit land forthwith.
 4. She claimed that the defendant/respondents in attempt to evade and circumvent the implementation of the Court of Appeal judgment filed another suit to wit, Kisii ELC No 9 of 2021 through Seventh Day Adventist Church (EA) Limited. He contended that this court in its ruling dated the February 2, 2022 struck out the new suit with costs, for the reasons that the suit was res-judicata and that the plaintiff lacked the locus standi to institute it.
 5. She averred that it was now over 2 years since the Court of Appeal and this court ordered the respondents to vacate the suit property but the defendants have been adamant. He lamented that the defendants/respondents are engaging in all manner of tricks and mischief to prolong their illegal stay on the suit land.
 6. She stated that the defendants/respondents have intensified their acts of nuisance by playing loud music and other church activities which compromise the safety and security of the vulnerable children staying at the Kisii Children's Home and there is need to have them evicted therefrom as directed by the court.



7. It is her contention that the continued presence of the respondents on the suit property poses a serious danger and risk to the wellbeing, best interests and safety of the vulnerable children housed therein and there is urgent need for this court to intervene.
8. She is of the view that the respondents have exhausted all dispute resolution mechanisms and they had now resorted to theatrics and evasion tactics to delay the day of reckoning thus there was need for immediate implementation of eviction orders issued by this court.
9. In response to the application the respondents filed a replying affidavit sworn by one Peterson Ondicho, the 4th respondent herein on behalf of himself and the other defendants. Mr Ondicho acknowledged that there was a judgment in relation to this matter but however reiterated that the application was seeking an order of eviction against the respondents from parcel xxx which was purportedly converted to parcel 6xxx.
10. According to Mr Ondicho the applicants filed a plaint seeking eviction of the respondents from parcel no xxx which measures 0.6309 hectares or thereabouts. He contended that parcel no xxx which the applicants now seek to have the respondents evicted from is not in any way related to parcel no xxx. It is his contention that the applicants have not provided the basis upon which parcel no xxx became parcel no xxx.
11. Mr Ondicho reiterated that the judgment of court relates to parcel no 15xx and cannot be applied with respect to parcel no 64xxx. He contends that the parties are bound by decisions of the court. It was his averment that parcel no 649 measures 1.429 hectares hence it is bigger than parcel 15xx which is the subject of this application which only measures 0.6309.
12. He contends that the application for eviction is a mischief by the applicants intended to sanctify and acquire rights over a piece of land that has never been the subject of litigation. The respondents maintain that they are not in occupation of parcel 6xxx and thus the application has in the circumstances been filed in vacuum.
13. The court directed that the application be disposed of by way of written submissions and both parties have filed their written submissions.

Issues for determination

14. From my analysis the application, the response by the respondents, the judgment of this court delivered on May 13, 2019, the Court of Appeal judgment in relation to Ksm Civil Appeal No 152 of 2019 and the ruling of this Court in relation to Kisii Elc No 9 of 2021, I find that the sole issue for determination is whether, the applicants are entitled to an order of eviction against the respondent alongside the rest of the prayers sought in the application.

Analysis and determination

15. It is common ground that in its judgment dated May 13, 2019 the court issued an order against the defendants to vacate the parcel of land known as Kisii Municipality/Block II/1xxx. However according to the defendants, the applicant is now in his application seeking enforcement of eviction orders in relation to parcel 6xxx with an increased acreage an act the defendant feels is a mischief geared towards the plaintiff acquiring land beyond parcel 15xx as ordered by the court.
16. In response to this allegation by the respondents, the applicants argue that the issue alluded to by the respondent was litigated before this court in KISII ELC No 9 of 2021. While dismissing the said suit for



being res-judicata, the court considered the ingredients of the res-judicata principle in paragraphs 20 to 30 of its ruling delivered on February 22, 2022 and respondents could not feign ignorance of the same.

17. Suffice is to say that there comes a time when litigation has to come to an end so that a party in whose favour a judgment has been issued can be allowed to enjoy fruits of his judgment. The court cannot wish away its ruling in Kisii ELC No 9 of 2021 delivered on February 2, 2022 dismissing the suit for being res judicata. Doing so would amount to this court sitting on appeal on its own decision, a move that would occasion injustice to the applicants herein who are entitled to the fruits of their judgment.
18. It is also not contested that the judgment of the court dated May 13, 2019 was based on the Land Registrar's report dated July 8, 2018 which conclusively stated that the suit property formed part of parcel 15xx which belongs to the applicants. It was the determination of the court that the respondent's documents which demonstrated that they owned parcel 15xx were incomplete and could not be relied upon to prove ownership. The court pointed out that according to the replying affidavit, there was an instance in 2015 when Mr Ondicho, the deponent of the replying affidavit had admitted that parcel 15xx belonged to the plaintiff and that the defendants were looking for another plot within Jogoo estate to relocate to.
19. Even without considering the change of character of parcel 153 to 649 which I have already found to have been subject of this court's ruling in KISII ELC No 9 of 2021 dated February 22, 2022, it is clear that the defendants have not in any way demonstrated that the change of character of the suit property has changed the findings of the Land Registrar's report that their structures are on a parcel of land belonging to the applicants.
20. The respondents were given adequate opportunity to establish their interest in parcel 15xx, which they failed to do. Surprising they participated in the site visit by the Land Registrar and surveyor that returned a finding that the church was an illegal occupant of parcel 15xx and that the same belonged to the applicants exclusively. Thus, this court cannot allow them to introduce new issues touching on the change of character of parcel 15xx to 64xxx to circumvent the orders of this court and the Court of Appeal that required them to move out of the suit property which they are occupying illegally.
21. Since the respondents' structures still exist on the parcel of land which the court determined belongs to the applicant, the respondents must be evicted with immediate effect.
22. The upshot is that the application is merited and the same is allowed in its entirety with costs to the applicants.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF NOVEMBER, 2022.

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J.M ONYANGO

JUDGE

