



**Ongaro v Odipo (Environment & Land Case 55 of 2017)
[2022] KEELC 14797 (KLR) (8 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 55 OF 2017
MN KULLOW, J
NOVEMBER 8, 2022**

BETWEEN

OKAL ONGARO APPLICANT

AND

JAMES OWIYO ODIPO RESPONDENT

RULING

1. The plaintiff/ applicant herein filed a notice of motion dated February 9, 2021, seeking the following Orders: -
 - a) Spent.
 - b) The defendant/respondent to immediately vacate and/or surrender to the plaintiff/ applicant vacant possession of the said parcel of land or failure to which the defendant/ respondent be forcibly and forcefully evicted forthwith.
 - c) That this honourable court be pleased to issue a permanent injunctive order restraining the defendant/ respondent by himself, servants, employees, agents or any other persons acting under his instructions or his interests from entering, interfering with the Applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as L.R. No. Kamagambo/ Kanyajuok/ 1331.
 - d) The Officer Commanding Station (OCS) Kamagambo Police Station to provide sufficient number of police officers for purposes of provide security, oversee the execution of this order and ensure that law and order is observed during the eviction and that this order is duly and fully complied with.
 - e) The costs of this application be provided for.



2. The application is premised on the 11 grounds thereon and on the supporting affidavit sworn on even date. the applicant contends that the suit was decided in his favor vide a judgment delivered on 05.06.2015 and a Decree evenly dated was issued to that effect; wherein the court held that he is the registered owner of the suit parcel.
3. That subsequent to the delivery of the judgment in his favor, the defendant/ respondent filed an application for Stay of Execution of the judgment and decree and the same was also dismissed.
4. It is the applicant's claim that despite the judgment having been rendered in his favor and whose effect was for the defendant/ respondent to immediately vacate the suit land; the defendant has denied him access to the suit land and is still in actual occupation and possession of the said land despite the court orders to vacate the same.
5. The defendant/ respondent in response to the instant application, filed a notice of preliminary objection dated 24.02.2021 which was determined vide a ruling delivered on 16.12.2021 and whose effect was to dismiss the said preliminary objection.
6. The instant Application was canvassed by way of written submissions, both parties filed their rival submissions together with authorities which I have read and taken into account in arriving at my decision.
7. The sole issue for determination before me is whether the notice of motion dated 09/02/2021 is merited and I will proceed to discuss it as hereunder;
8. Order 22 rule 18 (2) of the [Civil Procedure Rules](#) on Applications for execution provides that: -

“(2) 2) Nothing in sub-rule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice...”
9. Further, section 34(1) of the [Civil Procedure Act](#) provides as follows:

“34(1) All questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit”.
10. The applicant maintains that judgment having been issued in the matter; all parties including the respondent are bound by the terms of such judgment and decree and the same must be respected and obeyed at all times. The effect of the said judgment was that he is the absolute proprietor of the suit land and was thus legally entitled to all the rights and privileges appurtenant thereto. He contends that the respondent's continued occupation of the suit land and refusal to vacate the same thus amounted to continued trespass and a forcible detainer of the suit property. He urged the court to issue an order of eviction against the respondent and his agents to enable him occupy, use and benefit from his lawful property. He also sought an order of permanent injunction to restrain the respondent from his continued illegal activities, use and refusal to vacate the property.
11. The respondent on the other hand urged the court to dismiss the Application. It is his contention that the court is functus officio having delivered its judgment on the 05/06/2015 and thus does not have the requisite jurisdiction to entertain the instant application. He further contends that the issue of permanent injunction was already determined and issued by the court in its judgment and therefore



the same is res judicata. Lastly, he averred that the issue of eviction was not pleaded in the Applicant's Plaintiff and thus the same should not be awarded as sought since parties are bound by their pleadings.

12. The Court of Appeal in the case of *Bruce Joseph Bockle vs Coquero Limited* [2017] eKLR in determining an application for enforcement of an eviction order held as follows: -

“Looking at the orders issued in the judgment dated 14th March, 2013 and in particular the mandatory injunction, it is clear to us that they required the appellant to give vacant possession of the suit property to the respondent. Enforcement of such an order could only be by way of eviction as stipulated under Order 22 Rule 29 of the Civil Procedure Rules. Therefore, we find that the learned Judge correctly issued an order of eviction of the respondent from the suit property”.

13. Counsel for the Respondent submitted that the issue of eviction was never pleaded in the Plaintiff and further that the same was not addressed in the judgment of 05/06/2015, he thus urged the Court to disallow the said prayer. I have carefully looked at the judgment issued on 05/06/2015 by Okong'o J. and I note that he issued an Order of Permanent Injunction against the Defendant/ Respondent; restraining him from re-entering, trespassing, cultivating and/or otherwise interfering in any way with the suit property. Guided by the Court of Appeal decision above, I find that the enforcement of an Order of Permanent Injunction could only be by way of eviction and further the Applicant has sufficiently demonstrated the need for the said order of Eviction. Consequently, I find that there is need to issue an Order of eviction as sought.
14. I further note that from the said judgment; the court held that the Plaintiff/ Applicant was the legal owner/proprietor of the suit property L.R. No. Kamagambo/ Kanyajuok/ 1331. Therefore, having held that the Applicant is the legal proprietor of the suit land, I find that he is entitled to absolute ownership together with all the rights and privileges appurtenant thereto as provided under sections 24 and 25 of the *Land Registration Act*.
15. The respondent has not advanced any plausible explanation for his non-compliance with the valid orders which have neither been set aside nor varied by a superior court. Even though he contends that he lodged a notice of appeal to the Court of Appeal on 11.04.2017 and the same is still pending for hearing and determination; As it were, he has not adduced any copy of the same or the Memorandum of Appeal in support of his assertions.
16. In view of the foregoing, I find that the judgment issued on 5th June, 2015 and all the consequential orders thereto are valid and effective orders of the court; the same have neither been set aside, varied nor substituted in any way. It is also important to note that there is no Order of stay of execution of the said judgment and decree and therefore nothing precludes the applicant from enforcing the same and enjoying the fruits of his judgment.

Conclusion

17. The upshot of the foregoing analysis is that the plaintiff/ applicant's notice of motion dated February 9, 2021 is merited and the same is hereby allowed on the following terms: -

I. The defendant/respondent be and is hereby ordered to immediately vacate the suit land and surrender to the plaintiff/ applicant vacant possession of the suit parcel of land L.R. No. Kamagambo/ Kanyajuok/ 1331 forthwith.



II. Failure to comply with order (I) above, an order is hereby issued for the eviction of the defendant/ respondent from the suit parcel within 30 days from the date of this ruling. Further, the said eviction be carried out in strict compliance with the provisions of section 152 (E) of the Land Act.

III. further, an order of permanent injunction is hereby issued restraining the defendant/ respondent either by himself, servants, employees, agents or any other persons acting under his instructions or his interests from re- entering, interfering with the applicant's entry, occupation and possession, otherwise dealing, remaining, trespassing or in any other manner interfering with all that parcel of land known as L.R. No. Kamagambo/ Kanyajuok/ 1331.

IV. The Officer Commanding Station (OCS) Kamagambo Police Station is hereby directed to provide security during the execution process and ensure compliance with order herein.

V. The costs of this application be borne by the defendant/ respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF NOVEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Dr. Ogendi for the Plaintiff/ Applicant

Non-Appearance for the Respondent

Court Assistant - Tom Maurice

