



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. 971 OF 2014

(FORMERLY CIVIL APPEAL NO. 311 OF 2009)

GRACE MUTHONI GICHUNGWA.....1ST APPELLANT

SALOME WANJIKU MBIRWA.....2ND APPELLANT

VERSUS

SAMUEL KIBUI MBIRWA.....1ST RESPONDENT

SAMSON KAMAU GICHERU.....2ND RESPONDENT

ZIPPORAH NJERI MBURU.....3RD RESPONDENT

RULING

Through the application dated 29/5/2019, the 2nd and 3rd Respondents sought an order to evict Grace Muthoni Gichungwa or anyone occupying the land known as Dagorretti/Thogoto/TT.315 at her behest and to have that order supervised by the Officer Commanding the Kikuyu Police Station who were to provide security during the eviction. The application was made on the grounds that this court delivered a judgement on 13/3/2018 in which it found that the 2nd and 3rd Respondents were innocent purchasers for value of the Suit Property without notice of any defect. The Appellant, Grace Muthoni Gichungwa filed the application dated 5/4/2018 seeking an injunction pending appeal. The court heard that application and dismissed it vide its ruling dated 10/7/2018.

The 2nd and 3rd Respondents contended that the Appellant filed a Notice of Appeal on 23/3/2018 but had not filed the substantive appeal. Further, that the Appellant caused her son and agents to continue occupying the Suit Property despite the judgement of this court and the orders made by the court which had denied them the right to enjoy their property. They urged the court to issue an order of eviction against the Appellant. They jointly swore the affidavit in support of the application and stated that they had not occupied the land despite this court's judgment due to the Appellant's illegal occupation of the suit land. They attached a copy of this court's judgement together with the Appellant's application dated 5/4/2018 and the Notice of Appeal dated 23/3/2018 which was accompanied by a letter seeking copies of the proceedings and the judgment of the court.

The Appellant filed grounds of opposition in which she contended that the application was incompetent and not merited because this court was *functus officio* having rendered its judgement. The Appellant also pointed out that the present cause was an appeal from the determination of the Nyeri Provincial Land Appeals Tribunal sitting in its appellate jurisdiction and that this court lacked the jurisdiction to grant the orders on a second appeal.

Parties filed submissions which the court has considered. The 2nd and 3rd Respondents submitted that there was nothing the Appellant was clutching onto after she failed to obtain an injunction to prevent her eviction from the Suit Property when she lost her appeal. The 2nd and 3rd Respondent submitted that this court had powers to determine any remaining question after pronouncing its judgment and they relied on Section 28 of the Civil Procedure Act on execution of court decrees and orders. They also relied on Section 29 of the Civil Procedure Act which defines "the court which passed a decree" to include the court of first instance where the decree to be executed was passed in exercise of appellate jurisdiction and if the court of first instance has ceased to exist or to have jurisdiction to execute the decree, the court which if the suit in which the decree was passed were instituted at the time of the application for execution of the decree would have had jurisdiction to try the suit. They maintained that this court could enforce its judgement dated 13/3/2018 by allowing the application dated 29/5/2019.

The Appellant submitted that the effect of the judgement that this court delivered on 13/3/2018 was that the court affirmed the judgement of the Provincial Land Appeals Tribunal of 29/4/2009. The Appellant urged that any enforcement of the judgment of the Provincial Land Appeals Tribunal was a function of the magistrate's court which in this case would be in **CMCCC No. 19 of 2008** where the judgement and decree were issued on 23/4/2010 and that that was not the function of the appellate court. She submitted that under the repealed Land Disputes Tribunal Act, the award of the tribunal would have been filed in the magistrate's court for judgment to be entered by that court following which a decree would ensue.

The Appellant further urged that her appeal before this court sought to overturn the decision of the Lands Appeal Tribunal of the 29/4/2009 which this court declined to do and that there was therefore nothing pending before this court. The Appellant relied on the doctrine of *functus officio* which she described as an enduring principle of law that prevents the re-opening of cases before a court which has rendered its final decision on the matter. The Appellant submitted that in their application, the 2nd and 3rd Respondents were seeking to evict anyone in occupation of the Suit Property yet those persons were not parties to the proceedings. She maintained that the application was made by the 2nd and 3rd Respondent who were not parties to the dispute before the Nyeri Provincial Land Appeals Tribunal.

The Appellant went further to submit that the present application was not the correct forum for the 2nd and 3rd Respondents to pursue the reliefs they seek while pointing out that the Respondents were not estopped from filing a fresh suit to ventilate their own cause of action.

The Appellant emphasised that having rendered its judgement on 13/3/2018, this court lacked jurisdiction to grant additional orders whose effect would be to decide matters that were not the subject of the appeal as to do so would amount to granting orders or reliefs that were neither sought in the case before the Tribunal, the Appeals Tribunal or this court sitting in its appellate jurisdiction.

The issue for determination is to whether this court should grant the orders sought in the application dated 29/5/2019 or it is *functus officio*. The appeal was lodged against the decision of the Nyeri Provincial Land Appeal Tribunal. This court heard the appeal and delivered its judgement on 13/3/2018. The court agrees with the Appellant that it became *functus officio* after it rendered its judgement on 13/3/2018.

The Appellant introduced the issue of **CMCCC No. 19 of 2008** when she urged that that was the suit in which the 2nd and 3rd Respondents should have sought to enforce the judgement from the Nyeri Provincial Land Appeals Tribunal. The court agrees with the Appellant's assertion that the 2nd and 3rd Respondents would not be able to enforce the decision of the Nyeri Provincial Land Appeals since they were not parties to those proceedings. The remedy for the 2nd and 3rd Respondents may lie in Section 152 of the Land Act which sets out the procedure for carrying out evictions.

The court declines to grant the orders sought in the application dated 29/5/2019. Each party will bear its own costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. M. Machira holding brief for Mr. R. Mutiso for the Appellant

Mr. V. Owuor- Court Assistant

No appearance for the Respondents