



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**AP v TMG & another (Miscellaneous Application 34 of 2022)
[2023] KEHC 17471 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 34 OF 2022**

JN ONYIEGO, J

MAY 12, 2023

BETWEEN

AP JUDGMENT CREDITOR

AND

TMG 1ST JUDGMENT DEBTOR

QFG (MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND

TMG 2ND JUDGMENT DEBTOR

RULING

1. By a notice of motion dated September 16, 2022, brought pursuant to Sections 1A,1B,3A,63 of the [CPA](#), Order 22 rule 29 and order 51 of the [CPRS](#), the applicant/ judgment creditor herein seeks orders to the effect that;
 - a. spent
 - b. The judgment debtor/respondent be forcefully evicted from plot No 40958/7 subdivision No 17235(Original No 13324/4) of Section I mainland north by the court bailiff or the judgment holder/applicant's duly instructed auctioneers in execution of the decree herein
 - c. The officer commanding Bamburi Police Station does provide security during the exercise
 - d. The judgment debtors/respondents
2. The application is anchored on grounds set out on the face of it and averments contained in the affidavit in support sworn by the applicant on September 16, 2022 in which he deposed that by a judgment and decree issued by this court, the respondent/JD was to give vacant possession of plot No 40958/7 subdivision No 17235 (Original) No 13324) of section I mainland North to the applicant. That despite that order, the respondent has refused to vacate hence the prayer for eviction. He further deponed that



- the respondent's appeal case No 138 of 2019 to the court of appeal where she was claiming beneficial interest over the property having been dismissed, the respondent has no further claim on the property.
3. In response, the respondent filed a replying affidavit sworn on October 25, 2022, denying the claim that she lost her claim under this file. She averred that the orders in question were made under matrimonial property no.1 of 2016 where she lost her claim hence the current suit is afresh suit as there is no judgment entered under this file to be executed. She further stated that she has since filed a notice of appeal to the supreme court and an application under Matrimonial property cause No 1 of 2016 seeking an injunction restraining the applicant from evicting her. That in return, the applicant has filed a Preliminary Objection challenging the said application and the same is pending. In her view, the application herein is filed in bad faith with the sole purpose of defeating the sub strum of the suit.
 4. When the matter came up for directions, parties agreed to canvass the same by way of written submissions. The applicant through the firm of Mulei advocates filed submissions on November 17, 2022 reiterating the content of the affidavit in support of the application herein. The respondent equally filed her submissions on November 22, 2022 through the firm of Gikandi Advocates also adopting the averments contained in the replying affidavit.
 5. According to Mr Gikandi, there is no Judgment in place under this file hence no judgment creditor nor judgment debtor. In counsel's view, the application is incurably defective, incompetent and amounts to abuse of the court process. That this court has no jurisdiction to issue an eviction order as there is no decree in respect to this suit.
 6. I have considered the application herein and the response thereof. Further, I have considered the brief submissions by both counsel. The only issue for determination is whether the applicant is entitled to the order of eviction of the respondent from the plot in question. There is no doubt that the property in question was the subject of proceedings in Matrimonial suit number 1 of 2016 Mombasa high court in which the respondent lost her claim for a beneficial interest over the subject plot. Her appeal to the court of appeal was dismissed.
 7. It is an undisputed fact that the respondent has since filed an application under the same high court file seeking an injunction against any possible eviction. The application which is being opposed by the applicant herein is still pending. The issue in contention is whether this court can issue an eviction order under this miscellaneous file. For sure, there is no substantive suit under this file. In other words, there is no decree issued in respect to this file capable of execution under order 22 of the *CPRS*. For that reason, this court cannot issue substantive orders under a notice of motion application. To that extent, this court has no jurisdiction to issue the orders sought hence must down its tools as per the wise counsel of Nyarangi JA as he then was in *Owners of Motor Vessel "LillianS" vs Caltex Oil (kenya) Ltd* in civil Appeal No 50 of 1989.
 8. Accordingly, it is my holding that the orders sought can be implemented under the file where they were made. In a nutshell, it is my holding that the application herein is incompetent and amounts to an abuse of the court process. To that extent, the application is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MAY, 2023

J. N. ONYIEGO

JUDGE

