



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT AT MAKUENI**

**ELC NO 80 OF 2017**

**LAZARU MUVUVA SYANO .....1<sup>st</sup> PLAINTIFF/RESPONDENT**

**SUSAN KIMENZE SYANO .....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**BONIFACE NZYOKA SYANO .....DEFENDANT/APPLICANT**

**RULING**

1. Before this court is a Notice of Motion dated 15<sup>th</sup> of February 2021, brought under Order 22 Rule 29(1) and Order 51 Rule 1 of the Civil Procedure Rules 2010, as well as Section 1A, 1B and 3A of the Civil Procedure Code Cap 21 Laws of Kenya. The Applicant sought for the following orders;

- 1. That the Plaintiffs/Respondents by themselves, their agents and or employees or anyone acting or claiming under them be compelled by an order of eviction to deliver vacant possession of Land Parcel No. NZAUI/MUMBUNI/677 to the Defendant/Applicant.**
- 2. That the OCS Wote Police Station to oversee and provide security for the eviction exercise so as to keep peace.**
- 3. That the cost of the application be awarded to the Defendant/Applicant.**

2. The Application is premised on the grounds on the face of the Application and on the Applicant's supporting affidavit sworn on the 15<sup>th</sup> of February 2021. These grounds are: -

- a) That the matter is pending before the ELC Court.**
- b) That the Applicant is the owner and occupier of 2 acres of title No. NZAUI/IKANGAVYA/650 which he inherited from his father the Plaintiff herein.**
- c) That it has come to the attention of the Applicant that the third party herein visited the Nzau Land Control Board on the 25<sup>th</sup> of May 2021 with the intention of transferring the said land to unknown parties.**
- d) That the said process has been done without the Applicant's knowledge and with the aim of depriving him of his rightful property.**
- e) That the chairman of Nzau Land Control Board advised the Applicant to procure a court order restraining the third party from transferring and or interfering with the land.**
- f) That the third party is intent on selling the said land to the loss and detriment of the Applicant.**
- g) That the Applicant seeks for injunctive orders to restrain the third party from transferring, sub-diving, or interfering in any other manner with the registration of land parcel no. NZAUI/IKANGAVYA/650.**
- h) That if an injunction order is not issued the Applicant's application and counter claim will be rendered nugatory.**

3. The Applicant avers that the Plaintiffs suit was dismissed with costs vide a ruling dated the 20<sup>th</sup> of November 2017. That the Plaintiffs did not file an appeal or an application for stay of execution. The Applicant further avers that the Plaintiffs had refused to vacate the land despite

being served with decree of the court. He contends that their continued occupation of the suit property would occasion irreparable harm as the Applicant is unable to cultivate the suit property.

4. The Plaintiffs/Respondents opposed the application vide the replying affidavit sworn on the 2<sup>nd</sup> July, 2021. The Respondents averred that the suit property was part of the larger estate of their late father Siano Katunga. They averred that the sub division of their late father's property and the resultant suit property was done by the Defendant secretly without involving his siblings and other family members. They further averred that they had been in occupation of the suit property where they had constructed their permanent houses.

5. The Respondents further averred that no evidence was tendered in Court to prove that he Applicant was the owner of the suit land as the suit was dismissed for want of prosecution and not on merits.

6. The Application was canvassed by way of written submissions. The Applicant's written submissions were filed on 7<sup>th</sup> of October, 2021 while the Plaintiffs/Respondents submissions were filed on the 1<sup>st</sup> of October, 2021 which I have considered.

**ANALYSIS AND DETERMINATION**

7. This suit was initiated by the Plaintiffs against the Defendant on the 23<sup>rd</sup> of May 2011 where the Plaintiffs sought for the following orders against the Defendant: -

- a) **A declaration that the Defendant holds land parcel number NZAUI/MUMBUNI/677 in trust for the Plaintiffs.**
- b) **An order that the land register be rectified and the Plaintiffs be jointly registered as the owners of land parcel number NZAUI/MUMBUNI/677.**
- c) **A permanent injunction against the Defendant restraining either by himself, his servants and or agents from evicting the Plaintiffs, selling, alienating, charging or in any other way dealing with land parcel number NZAUI/MUMBUNI/677.**
- d) **Costs of the suit.**

8. The issue for determination is whether the Applicant herein is entitled to the orders sought.

9. It is not in dispute that on the 20<sup>th</sup> of November 2017, this suit was dismissed with costs to the Defendant for want of prosecution.

10. Currently there is no suit pending before this Court that this application can be hitched on. Accordingly, the Defendant cannot purport to file an application to evict the Plaintiffs from the suit land. The only process that can flow from the dismissal order is execution for costs.

11. Given that the suit was dismissed for want of prosecution, I find that the proper avenue is for the Applicant to file a fresh suit for an eviction order where the case will be decided on merits.

12. In the case of **Tatecoh Housing and Co-op Sacco Ltd Vs Qwetu Sacco Ltd (2021) eKLR** the court held that;

*“without much ado, I will agree with the position of the Respondent.....that the Appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought are orders of eviction. One will ordinarily only obtain an order of eviction after a full hearing of a case. What the Applicant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon the hearing of such suit, and if successful, that an order of eviction would issue.”*

13. In the end I find that this is application has no merit. I therefore dismiss it accordingly with costs to the Respondents.

**SIGNED, DATED AND DELIVERED AT MAKUENI IN OPEN COURT THIS 17TH DAY OF NOVEMBER, 2021.**

.....

**HON T. MURIGI**

**JUDGE**

**IN THE PRECENCE OF: -**

**COURT ASSISTANT - MR KWEMBOI**

**MR. MUTHIANI FOR THE PLAINTIFF/RESPONDENT.**

**MS. KYALO HOLDING BRIEF FOR MS KALOKI FOR THE DEFENDANT/APPLICANT.**