



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 60 OF 2002

JOSEPH MUSAU MWANZIA.....PLAINTIFF

versus

RICHARD KASONGO NGOOSA

RICHARD MWAU NGOOSA

(Both sued as the Legal Administrators of the Estate of

DAVID NGOOSA MUA).....DEFENDANTS

RULING

What is before Court for determination is the Notice of Motion application dated the 17th January, 2020 brought pursuant to Order 22 Rule 20 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act. The Plaintiff seeks the following orders:

- 1. Spent**
- 2. That an eviction order do issue evicting the Respondents herein from a portion of land measuring four (4) acres comprised in the parcel of land known as MACHAKOS / KATHE – KAI BLOCK 5/173 and the same be executed by a Court Bailiff or licensed auctioneer.**
- 3. That the OCS and/or Ward Commander Machakos Police Station do provide security.**
- 4. That costs of this application and the intended eviction be borne by the Defendant/ Respondents.**

The application is premised on the grounds on the face of it as well as the supporting affidavit of JOSEPH MUSAU MWANZIA where he confirms that he obtained a Decree of the Court dated the 12th November, 2018 wherein he had been awarded four (4) acres of land in MACHAKOS/ KATHE – KAI BLOCK 5/173. He contends that the Respondents have declined to transfer the four (4) acres to him despite being ordered by the Court. Further, he obtained orders from court authorizing Fredrick Nzambuli Joshua or any other surveyor he appointed to survey, transfer and register a portion of land measuring four (4) acres comprised in the parcel of land known as MACHAKOS/KATHE – KAI BLOCK 5/173. He explains that the surveyor did visit the suit land on 1st October, 2019 and successfully marked out a portion of land measuring four (4) acres from the entire parcel of land known as MACHAKOS/KATHE – KAI BLOCK 5/173. Further, after the Surveyor proceeded to place beacons clearly demarcating the four (4) acres from the rest of the land, the Respondents herein together with their children have since trespassed onto the said four (4) acres and uprooted the beacons that had been placed mapping his portion of land. He reiterates that the Respondents have denied him access to the land and proceeded to cultivate it which actions are causing wanton destruction on the said land as well as irreparable loss to him. He contends that during the forceful entry and uprooting of beacons by the Respondents, his children were badly injured. He seeks for eviction orders and for the OCS Machakos Police Station or the Ward Commander to provide security during the exercise.

The application is opposed by the Defendants who filed a replying affidavit sworn by RICHARD KASONGO NGOOSA who confirmed being aware of the judgement of the court and wishes to abide by the said orders. He denied residing on the suit land nor interfering with the portion allocated to the Applicant by either trespassing, uprooting beacons thereon nor assaulting his agents. He refers to the Decree issued on 28th November, 2018 with Order extracted on 10th September, 2019 respectively and explains that although the survey has been conducted, the transfer as well as registration of land is yet to be done for full identification of the portion on the ground. He contends that transfer and registration will not be possible pending outcome of the Succession Cause No. 969 of 2009, in respect to the estate of DAVID NGOOSA MWAU, the alleged Seller to the Applicant. Further, that this Court lacks jurisdiction to grant the prayers sought at this juncture. He reiterates that the Applicant should have used the Judgement and Decree from this Court to enforce his claim in the Succession Cause wherein he is a Protestor.

The application was canvassed by way of written submissions. However, from the Court file, it is only the Plaintiff who filed his written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 17th January, 2020 including the respective affidavits and rivaling submissions, the only issue for determination is whether the Plaintiff is entitled to orders sought in this instant application.

The Plaintiff in his submissions reiterated his averments as per the instant application. To buttress his arguments he relied on the following decisions: **Samuel M N Mweru & Others V National Land Commission & 2 Others (2020) eKLR; Simon Parkoyiet Mokare V Peter Kokoi & 3 Others (2020) eKLR;**

I note this is a matter that had been concluded and judgement delivered. Further, a Decree dated 21st September, 2018 was extracted and issued on 28th November, 2018 wherein it was ordered as follows:

- i. That the Defendants do appoint a surveyor to survey, transfer and register a portion of land measuring four (4) acres comprised in parcel of land known as MACHAKOS/KATHEKA KAI BLOCK 5/173 to the Plaintiff.***
- ii. That in default, the Deputy Registrar to sign all relevant documents required, on behalf of the Defendants, for the survey, sub division and transfer of the four (4) acres of the suit land in favour of the Plaintiff.***
- iii. That the Defendant to pay the costs of the suit.***

The Defendants who are judgement debtors have not informed court whether they appealed against this decision or not. Be that as it may, it is my considered view that there exists a valid judgement which has not been challenged in any other forum. Further, to my mind, it seems the Defendants are raising issues which they ought to have brought up in an appeal, to delay the execution of a valid Decree. I opine that since this matter is at the execution stage and the Defendants have not provided plausible reasons why they continue to defy an order of the court by trespassing on the Plaintiff's portion of land, I find that they are actually in violation of the said court order. I find that the issues raised by the Defendants are merely excuses.

Based on the facts before me, I find that the Plaintiff is indeed entitled to the orders sought and will allow the application in the following terms:

- i. That an eviction order be and is hereby issued evicting the Respondents herein from the Plaintiff's portion of land measuring four (4) acres comprised in the parcel of land known as MACHAKOS /KATHE – KAI BLOCK 5/173 and the same be executed by a Court Bailiff or licensed auctioneer.***
- ii. That the OCS and/or Ward Commander Machakos Police Station be and is hereby directed to provide security.***
- iii. That costs of this application and the intended eviction be borne by the Defendant/Respondents.***

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF DECEMBER, 2021

CHRISTINE OCHIENG

JUDGE