



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 62 OF 1998**

**GERALD MWITHIA .....APPELLANT**

**VERSUS**

**STANLEY GITONGA .....RESPONDENT**

**SARAH KANYUA MWITHIA.....1<sup>ST</sup> APPLICANT**

**HENRY MURITHI MWITHIA.....2<sup>ND</sup> APPLICANT**

**RULING**

**Brief Background**

1. This ruling is in respect of the application dated 14.10.2013 whereby I am writing the ruling for a second time. Earlier on 3.10.2018, I had delivered another ruling in respect of the aforementioned application, but it turned out that the court had not considered the replying affidavit to the application of 14.10.2013. Vide my ruling of 17.12.2018, the earlier ruling of 3.10.2018 was set aside.
2. Gerald Mwithia the initial plaintiff had sued his brother Stanley Gitonga in Meru **SPMCC no. 120 of 1993** seeking orders inter-alia to have Stanley evicted from land parcel no. 498. This case was dismissed on a technicality. Gerald had then moved to **Meru High Court in H.C.A No. 62/1998** where he won. Stanley moved to the Court of appeal in **Nyeri COA Civil case no. 297/2010** where he won. Stanley desires that the decision of the court of appeal be implemented.
3. Meanwhile the original file appears to have gotten lost but was reconstructed. Also Gerald Mwithia has since passed on and has been substituted by his legal representatives namely Sara Kanyua and Henry Murithi Mwithia.

**Applicant's case**

4. Vide the application dated 14.10.2013, the applicant (Stanley) is seeking for court orders that the district land adjudication officer and the demarcation officer Kianjai adjudication section do rectify their records and reinstate land parcel no. 447 Kianjai adjudication section measuring 7 acres to the name of the respondent/applicant herein Stanley Gitonga M'Itimitu as per the judgment of the court of appeal at Nyeri in **Civil appeal no. 297 of 2010 (Stanley Gitonga vs Gerald Mwithia)**, that the respondent herein Gerald Mwithia be ordered to vacate parcel no. 447 Kianjai adjudication section and in default to be forcibly evicted, that the OCS Ngundune police station be directed to provide security to the land adjudication officers in order to implement the judgment of the court of appeal and to show the parties their respective boundaries, and that costs of this application be provided for.

**Respondent's case**

5. The respondents have opposed the application vide the replying affidavit of Gerald Mwithia dated 4.2.2014. He contends that on 22.2.1993 he filed the case, **Meru CMCC no. 122 of 1993** seeking inter-alia orders for the applicant's eviction from his parcel no. 498 Kianjai land adjudication section of which that suit was heard and dismissed on a technicality. The trial Magistrate held that the respondent should have exhausted the procedure laid down in the land adjudication act chapter 284 Laws of Kenya.
6. The respondent was aggrieved by the decision of the trial magistrate, so he filed **Meru HCCA No. 62 of 1998** which appeal was successful, but the applicant moved to the court of appeal and was successful in the judgment that he now desires this honourable court to implement.
7. The respondent avers that he has filed a notice of appeal to the supreme court as the Court of appeal judgment unsettles the hackneyed

legal practice and a plethora of judicial holdings that a second appellate court should only concern itself with issues of the law and not facts like what the court of appeal did. He expects that the supreme court will address a major point of law.

8. The respondent also averred that the notice of motion is misconceived as the applicant had not set up a counter claim before the magistrate's court and nowhere in the high court did the present applicant cross appeal. He also contended that all that the court of appeal did was to dismiss the respondent's suit before the chief magistrate and set aside the high court judgment. Consequently, there is nothing that this honourable court can be called upon to execute.

9. The respondent further stated that the land parcel no. 447 Kianjai Land Adjudication Section has never been part of his land parcel no. 498 Kianjai Land Adjudication Section or ever been incorporated therein. He therefore contends that there is no factual or legal basis for the applicant to seek to intrude into his parcel of and no. 498 Kianjai Land Adjudication Section in pursuant of land parcel no. 447 Kianjai Land Adjudication Section.

10. The respondent avers that if the applicant has a remedy, then it should be before another forum but not this court. He contends that the prayers for eviction are serious remedies which cannot be granted through a simple notice of motion as in what the applicant is doing.

11. It was argued for the respondent (Gerald) that applicant has not demonstrated whether the judgment in file no. 6 of 1998 dated 6.11.2009 was ever executed against the applicant. Further, it is argued that in the court of appeal judgment dated 18.7.2013, the only positive order given by the court of appeal is that;

***“The appeal is allowed the judgment of the High Court is set aside and the respondent's suit before the trial Magistrate is dismissed”.***

12. It was further argued that in prayer no. 2 and 3 of the application, the applicant is seeking for cancellation of some land parcels and he is seeking for eviction, yet the court of appeal did not grant such orders.

#### **Determination**

13. I have considered all the issues raised herein as well as the submissions of the parties. In particular this court has perused the decisions in the previous suits. What is before me for determination is the execution of the Court of Appeal Judgment.

14. Firstly, I will consider the respondent's (Gerald) contention that he was destined to go to the Supreme Court. I find that there is no order of stay of the Court of Appeal judgment from any court, thus the execution cannot be halted on the basis that the respondent will pursue this litigation to the Supreme Court.

15. The other point to consider is whether this court is capable of executing the Court of Appeal Judgment on the face of the claim by the respondent that there was no counter claim by the applicant in the magistrate's court, nor was there a cross appeal in the high court.

16. In order to have a better perspective of the issue at hand, it is paramount that the gist of the judgment of the high court in **HCA no. 62/98 Meru** delivered on **6.11.2009** be captured herein as follows;

***“1) The learned trial magistrate judgment delivered on 15.7.1998 in PMCC Meru 120 of 1993 is hereby set aside.***

***2) This court does hereby declare the appellant (read Gerald) as the lawful owner of plot number 498 Kianjai adjudication section and in that regard, this court issues an order of cancellation of plot number 447 Kianjai adjudication section and on that cancellation being undertaken, the land represented by that number 447 should be returned to plot number 498 (Empasize added).***

***3) The court orders the respondent to hereby vacate the appellants parcel number 498 adjudication section forthwith and in default an eviction order is hereby issued against him (Empasize added).***

***4) The appellant is awarded the costs of the lower court suit and of this appeal”.***

17. This judgment of the high court is the one which was set aside vide the **Court of Appeal Judgment of 18.7.2013 in Court of Appeal Nyeri 297 of 2010**. It follows that the execution of the court of appeal judgment entails undoing what had been done by the high court. The application by Stanley, the applicant herein is in line with the process of undoing the high court judgment. In essence, the incorporation of land parcel no. 447 into parcel no. 498 and the eviction of the current applicant from what was parcel no 447 is what was set aside by the court of appeal.

18. In the circumstances I find that the application dated 14.10.2013 is merited. The same is allowed with costs to the applicant.

**DATED, SIGNED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF APRIL, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. L. MBUGUA**

**ELC JUDGE**