



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC MISCELLANEOUS APPLICATION NO. 7 OF 2018**

**SIMON PARKOYIET MOKARE.....APPLICANT**

**VERSUS**

**PETER KOKAI & ANOTHER.....1<sup>ST</sup> RESPONDENT**

**JOHN MBUGUA GITAU.....2<sup>ND</sup> RESPONDENT**

**DANIEL PARSIMIA MATINDI.....3<sup>RD</sup> RESPONDENT**

**RULING**

By a Notice of Motion dated the 29<sup>th</sup> January, 2018 brought pursuant to sections 1, 1A, 3 and 3A of the Civil Procedure Act, the Applicant seeks for the following orders:

1. Spent.
2. That this Honourable Court be pleased to issue an order of eviction against the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent by themselves or their agents and/or servants from land reference numbers Kajiado/ Kaputiei South / 2241 (Now Kajiado/ Kaputiei South/ 2625 & 2626, the resultant subdivisions) pursuant to the orders/ decree of the Hon. Court granted on 25<sup>th</sup> September, 2014 in ELC No. 929 of 2012 consolidated with ELC No. 1055 of 2012 Nairobi.
3. That the Officer Commanding Police Division (OCPD) and the Officer Commanding Mashuru Police Station (OCS) be authorized to enforce Compliance of the Court Orders.
4. That Costs of this application be borne by the Respondents..
5. Any other further orders that this Hon. Court may deem fit to grant.

The Application is premised on the summarized grounds that Justice Mutungi entered Judgement on 25<sup>th</sup> September, 2014 in favour of the Applicant herein in ELC Petition No. 929 of 2012 consolidated with ELC 1055 of 2012 where he declared the Applicant as the legal owner of land parcel number Kajiado/ Kaputiei South/ 2625 and 2651 respectively. The Court of Appeal delivered its judgement on 1<sup>st</sup> December, 2017. Further, despite the Judgement of the Superior Court and the Court of Appeal, the Respondents have refused to vacate the suit premises and embarked on a mission to destroy the vegetation thereon. The Court ordered the Respondents to vacate the suit premises within 90 days from the Judgement date in default, the Applicant was at liberty to apply for an eviction order. Before the expiry of the 90 days, the Respondents filed an Appeal being Civil Appeal No, 361 of 2014 and the Court of Appeal ordered the parties to maintain status quo pending the determination of the Appeal. Further, the Appeal was heard and dismissed on 1<sup>st</sup> December, 2017. The Applicant wrote a letter to the Respondents' Advocate on Record to advise their clients to vacate the suit premises in good faith but they have declined to do so. Hence the eviction orders should be issued and the OCPD and OCS Mashuru Police Station be authorized to enforce compliance as well as keep peace. Applicant's land is in danger of being wasted away.

The application is supported by the affidavit of SIMON PARKOYIET MOKARE where he reiterates his claim above and deposes that he was member No. 46 of the Nkama Group Ranch who allotted him land reference number Kajiado/ Kaputiei South/ 2241 while the Respondents' father was member no. 302. Further, that the 2<sup>nd</sup> Respondent was allotted land reference number Kajiado/ Kaputiei South/ 2211 which was a share belonging to his deceased father. He explained that after the allocation of the suit premises, he subdivided his land into two portions resulting to land parcel number Kajiado/ Kaputiei South/ 2625 and 2626 respectively. He contends that when he wanted to settle on his land, the Respondents herein wilfully refused to relocate to their land culminating in his filing a suit at Machakos being ELC No. 278 of 2012 seeking for a declaration as well as eviction orders against the said Respondents. Further, that while awaiting the hearing and determination of the said suit, the Respondents herein filed a Constitutional Petition No. 929 of 2012 which was consolidated with his suit.

The 2<sup>nd</sup> Respondent in opposing the instant application filed Grounds of Opposition dated the 26<sup>th</sup> February, 2018 where he stated as follows:

- That the entire suit and the motion are misconceived, scandalous, vexatious and an abuse of this court's process.
- That the orders sought are incapable of being granted in a Miscellaneous Application.
- That this Court as moved lacks jurisdiction to grant the orders sought.
- That in any event there is an Appeal against the Court of Appeal Judgment in the Supreme Court and an Application for stay of the High Court Orders which has been certified urgent awaiting hearing by the full Court and as such good order dictates that the status quo prevailing be maintained.
- That given the factual circumstances outlined above, it would be contemptuous for this Court to entertain the present application, leave alone to grant the orders sought.
- That the present Application is a disguised application for execution of a High Court Decree, which application is in the province of the Deputy Registrar by virtue of Order 22 of the Civil Procedure Rules, 2010.
- That on the basis of the aforementioned grounds, the Respondent shall seek the dismissal of the Miscellaneous Application dated the 29<sup>th</sup> January, 2018 in limine.

Both the Applicant and 2<sup>nd</sup> Respondent filed their respective submissions to canvass the instant application.

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated the 29<sup>th</sup> January, 2018 including the supporting affidavit, Grounds of Opposition and parties' submissions, the issue for determination is whether or not the Applicant is entitled to the orders sought in the Miscellaneous Application.

The Applicant in his submissions reiterated his claim and stated that the Court had jurisdiction to grant the orders sought. Further, that he was entitled to the orders as sought. He relied on the cases of **Owners of the Motor Vehicles 'Lillian S' Vs Caltex Oil (K) Ltd (1989) KLR 1; Misc Application No. 1019 of 2004 Nairobi Hon. Basil Criticos V Attorney General & 2 Others and Misc Application No. 16 of 2017 Kajiado, Wambui Gikwa Vs Paul Kimani Muraba** to support his averments. The 2<sup>nd</sup> Respondent submitted that the Court did not have jurisdiction to hear the Miscellaneous Application and the Applicant was not entitled to the orders sought. He relied on the following cases: **Owners of the Motor Vehicles 'Lillian S Vs Caltex Oil (K) Ltd (1989) KLR 1; Speaker of the National Assembly V Karume (2008) KLR 425; Paul Ngobia Njoroge & 2 Others V Kenya National Assurance Co. (2001) Ltd (2012) eKLR and James Wainaina & 6 Others V Karanja Mbugua & Co. Advocates (2012) eKLR** to buttress his opposition to the instant application.

It is not in dispute that the Applicant is the owner of the suit premises. It is further not in dispute that Justice Mutungi entered Judgement on 25<sup>th</sup> September, 2014 in favour of the Applicant herein in ELC Petition No. 929 of 2012 consolidated with ELC 1055 of 2012 where he declared the Applicant as the legal owner of land parcel number Kajiado/ Kaputiei South/ 2625 and 2626 respectively. Further, the 2<sup>nd</sup> Respondent lodged an Appeal which the Court of Appeal dismissed vide its judgement dated the 1<sup>st</sup> December, 2017. The Applicant contends that despite the existence of the two favourable judgments in his favour, the Respondents have neglected and or refused to vacate the suit premises and commenced destroying the trees thereon. The 2<sup>nd</sup> Respondent claims that he has lodged an Appeal to the Supreme Court which is yet to be determined. I note the genesis of this miscellaneous cause is from the Judgement dated the 25<sup>th</sup> September, 2014, in favour of the Applicant as against the 2<sup>nd</sup> Respondent, where Justice Mutungi ordered as follows: **' (a) vacate and deliver vacant possession of LR. Kajiado/ Kaputiei South 2241 (now LR Nos. Kajiado/ Kaputiei South/ 2626 and 2626 following subdivision) to the Plaintiff/ 1<sup>st</sup> Respondent within ninety (90) days from the date of this judgement. (b) In default an eviction order to issue on application. (c) As the issues raised involved some aspect of public interest I direct that each party will bear their own costs.'** Since the Respondents' Appeal was dismissed, I hold that the terms of the judgement delivered on 25<sup>th</sup> September, 2014 are still valid.

As directed in the said judgement, the Applicant filed this miscellaneous cause to obtain an eviction order as against the Respondents. The Respondents have claimed that it had lodged a Notice of Appeal and sought to Appeal the Court of Appeal's decision to the Supreme Court but has not furnished Court with any order staying the said decision. On the issue that this Court does not have jurisdiction to deal with the instant application. I wish to make reference to section 13 of the Environment and Land Court Act which confers jurisdiction to this Court and provides that: **' (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'**

The above provisions are distinct in terms of the jurisdiction of the Environment and Land Court. I note that the cause herein arose as a result

of the implementation of an eviction order issued by a Judge in an ELC suit and in relying on the legal provisions cited above, I find that this court indeed has jurisdiction to handle the instant suit. In the circumstance, I beg to disagree with the 2<sup>nd</sup> Respondent that this Court is devoid of jurisdiction to determine this miscellaneous cause.

As to whether the Court cannot grant the orders sought. I note the Applicant is merely seeking for an order from Court to issue eviction orders as directed by Justice Mutungi in the Judgement dated the 25<sup>th</sup> September, 2014 in favour of the Applicant herein in ELC Petition No. 929 of 2012 consolidated with ELC 1055 of 2012. The 2<sup>nd</sup> Respondent contends that the Application is an abuse of the court process and the Orders sought cannot be granted. He insists this is an execution of the Decree in disguise which is a preserve of the Deputy Registrar as stipulated in Order 22 of the Civil Procedure Rules. To my mind, I believe the Deputy Registrar is devoid of jurisdiction to grant eviction orders as directed by the learned Judge in his judgment unless the said Orders are clearly issued by the Environment and Land Court. Since the substratum of this cause revolves around implementation of a judgement, I find that it is not res judicata as the orders sought only seek to implement the judgement. Further, it does not bring in the same cause of action that had previously been heard and determined. I further find that the 2<sup>nd</sup> respondent has failed to demonstrate how the Applicant has abused the Court process by filing a formal application for eviction as per directions granted in the aforementioned Judgement.

It is against the foregoing that I find the application herein merited and will proceed to allow it. I further proceed to make the following final orders:

- i. An order of eviction be and is hereby issued against the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent by themselves or their agents and/or servants from land reference numbers Kajiado/ Kaputiei South / 2241 (Now Kajiado/ Kaputiei South/ 2625 & 2626, the resultant subdivisions) pursuant to the orders/ decree of the Hon. Court granted on 25<sup>th</sup> September, 2014 in ELC No. 929 of 2012 consolidated with ELC No. 1055 of 2012 Nairobi.
- ii. That the Officer Commanding Police Division (OCPD) and the Officer Commanding Mashuru Police Station (OCS) are hereby authorized to enforce Compliance of the Court Order.
- iii. The Respondents to bear the costs of this Application.

**Dated signed and delivered via email this 23<sup>rd</sup> day of April , 2020**

**CHRISTINE OCHIENG**

**JUDGE**