



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 84 OF 1994

PAUL K. BULLUT.....1ST PLAINTIFF

ISAIAH MUTAI.....2ND PLAINTIFF

-VERSUS-

SYLVESTER K.C. TOROITICH.....DEFENDANT

RULING

[1] This is a fairly old matter that was filed in **1994** by the two Plaintiffs, **Paul K. Bullut** and **Isaiah Mutai** against **Chemwolo Toroitich**, now deceased, in connection with the ownership of the property known as **Uasin Gishu/Elgeyo Border Scheme/226** (hereinafter “**the Suit Property**”), which had been charged by the late **Chemwolo Toroitich** (the deceased) to the now defunct **Continental Credit Finance Ltd** (the Chargee) as collateral for a loan. The record shows that the deceased defaulted in meeting his obligations under the loan agreement; and that when the Official Receiver was appointed to handle the affairs of the Chargee, the Official Receiver took a decision to dispose of the Suit Property in exercise of the Chargee’s statutory power of sale. Thus, the Suit Property was sold at a public auction in Eldoret Town to the Plaintiffs, who were the highest bidders.

[2] The record shows that all the conveyance documents were signed and filed in favour of the Plaintiffs, who are brothers; whereupon they were registered in **1994** as proprietors in common, with equal shares to the Suit Property, and a Title Deed issued to them. However, they were not given vacant possession, as the deceased continued to occupy the Suit Property; hence this suit, in which the Plaintiffs sought, *inter alia*, the eviction of the deceased. In its Judgment dated **7 April 2000**, the Court (**Hon. Nambuye, J.**, as she then was) noted that the deceased, though served, did not enter appearance or file a defence. Thus, in its Judgment, the Plaintiffs had made a good case against the deceased.

[3] In particular, Court, having given due consideration to the evidence placed before it, was of the view that:

“...indeed the defendant mortgaged the suit property as pleaded and he failed to meet the installments whereupon the Official Receiver advertised the property for sale. The defendant took no measures to prevent the same or offer to pay off the indebtedness to the institution concerned. The plaintiffs rightfully, lawfully and correctly purchased the suit land. They followed the correct procedure in acquiring the same. They are now the registered owners...They are entitled to use and possession of the suit land. I find that they have formally proved their claim...”

[4] The Court then proceeded to enter Judgment in the Plaintiffs’ favour and issued orders as follows:

[a] A declaration be and is here made and declared that the defendant, **Chemwolo Toroitich** is a trespasser on land parcel No. **UASIN GISHU/ELGEYO BORDER SCHEME PLOT NO. 226**;

[b] That the defendant **Chemwolo Toroitich**, be and is hereby given 3 months from the date of judgment to remove himself, his family members, agents and servants as well as properties from the suit land;

[c] That in the event that the defendant, **Chemwolo Toroitich** fails to comply as above, the plaintiffs shall be at liberty to evict him;

[d] The claim for mesne profits is refused as it was based on estimates and no documentary proof was tendered in evidence;

[e] The Plaintiff will have costs of the suit.

[f] There will be liberty to apply.

[5] Being dissatisfied with the Judgment of the Court, the Defendant lodged an appeal before the Court of Appeal, being **Civil Appeal No. 60 of 2006**. However, the same was struck out for having been filed out of time. Undeterred, the Defendant filed **Civil Appeal 72 of 2007: Chemwolo Toroitich vs. Paul K. Bullut and Another**, after being granted extension of time by the Court of Appeal in **Civil Application No. NAI 262 of 2006**. That appeal was thereafter heard and determined on **19 September 2012** and a copy of the Judgment is on the file and it shows that the Court of Appeal upheld the decision taken by the High Court. It observed, *inter alia*, that:

“...The appellant was granted an extension of time to seek leave, and an extension of time to file amended defence out of time. He did not avail himself of that opportunity. When the time ran out without him taking the essential step of applying as ordered, the respondents quite properly moved the court for an order granting them interlocutory judgment. The appellant’s conduct throughout the proceedings prior to entry of judgment was reminiscent of a person who was unwilling to let the respondents make progress in their suit. That fact was noted by the trial court, and quite clearly his failure to take the step of clearing the way for the filing of an amended defence and counterclaim was deliberate...”

[6] The Court of Appeal further held that:

“...Looking at the draft defence, neither the Official Receiver nor Continental Credit Ltd (in Receivership) is named as a party. Nor was the auctioneer who allegedly conducted the sale. The allegations of fraud appear to us to have been directed mainly at the Official Receiver. Without the proper parties being joined these allegations were of no assistance to the appellant. We think that the learned trial Judge was right in holding that as against the respondents herein there was no triable issue disclosed. Besides, the subject property appears to be registered under the Registered Land Act Cap 300 Laws of Kenya. Under Section 77(3) of that Act no registration in exercise of a statutory right of sale of land may be set aside even where fraud is alleged. The remedy available to a person aggrieved is damages. The rationale for that is that the equity of redemption becomes extinguished upon sale of the property in exercise of a statutory right of sale...”

[7] The deceased’s appeal was thus found to be lacking in merit and was accordingly dismissed by the Court of Appeal. That decision then paved the way for enforcement of the Judgment dated **7 April 2000** by way of Notice to Show Cause why the Defendant should not be evicted from the Suit Property. The court record shows that the Notice to Show Cause was disposed and an Eviction Order issued on **27 March 2015**. It is also manifest that in the course of time, the Defendant died, and was substituted by his son, **Sylvester K.C. Toroitich**, the Applicant. He now contends, vide his application dated **7 June 2017**, that the Eviction Order was issued in error, as it was over 12 years since the date of the Judgment in which the order for eviction was given.

[8] The application dated **7 June 2017** shows that the principal enabling provision for it is **Section 100** of the **Civil Procedure Act**, which provides that:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question in issue raised by or depending on the proceeding.”

[9] Granted that this is a matter that has been fully decided both by the High Court and Court of Appeal, there is no question or issue remaining to be determined on the basis of the pleadings filed herein. Moreover, all indications are that the Applicant is no longer in possession of the Suit Property and that the Eviction Order may have already been executed. In the premises, it is my considered view that the application is misconceived and therefore an abuse of the process of the Court; and that the parties ought to pursue their grievances, if any, before the Environment and Land Court before which they are already litigating. In this regard, I find succor in the opinion expressed in the 18th Edition of **Mulla on the Code of Civil Procedure**, with regard to such applications, thus:

"It is needless to point out that interlocutory orders are of various kinds, some ... are designed to preserve the status quo pending the litigation and to ensure that parties might not be prejudiced by normal delay which the proceeding before the court usually takes. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge...if the applications were made for the relief on the same basis after the same has once been disposed of, the court would be justified in rejecting the same as an abuse of process of court..." (emphasis added)

[10] The foregoing being my view of the matter, I find it superfluous to consider the merits of the application dated **7 June 2017**. It is accordingly ordered that the said application be and is hereby struck out with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF DECEMBER 2019

OLGA SEWE

JUDGE