



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 62 OF 1998

GERALD MWITHIA.....APPLICANT

VERSUS

STANLEY GITONGA.....RESPONDENT

RULING

1. The application dated 14.10.2013 seeks the following orders:

(i) Spent.

(ii) That the court do order 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 Versus Gerald Mwithia).

(iii) That the respondent herein Gerald Mwithia be ordered to vacate parcel no. 447 Kianjai adjudication section and in default to be forcibly evicted.

(iv) That the O.C.S 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.

(v) That the costs of this application be provided for.

2. The grounds in support of the application are that:

(i) That the high court in Meru HCCA no. 62 of 1998 had ordered for cancellation of plot no. 447 Kianjai adjudication section which belonged to the applicant herein and for the land represented by P/No.447 to be returned to plot no. 498 Kianjai adjudication section owned by the respondent herein and for an order of eviction.

(ii) That the court of appeal at Nyeri vide its judgment dated 18th July 2013 allowed the appeal and hence set aside the high court's judgment hence reversing the orders issued by the high court at Meru.

(iii) That the applicant is merely executing the judgment of the court of appeal.

3. Applicant has also filed a supporting affidavit where he has deponed as follows:

(i) That he was the registered owner of land parcel/plot no. 447 Kianjai adjudication section measuring approximately 7 acres.

(ii) That the appellant/respondent herein filed Meru CM's Civil case no. 120 of 1993 claiming Stanley's land parcel which suit was dismissed on a technicality.

(iii) That the appellant/respondent herein filed Meru HCCA no. 62 of 1998 where the learned Judge ruled in favour of the appellant/respondent and declared the appellant/respondent as the lawful owner of plot no. 498 Kianjai adjudication section and for the land herein to be returned to plot no. 498 Kianjai adjudication section.

(iv) That Stanley was further ordered to vacate land parcel no. 498 Kianjai adjudication section which was then combined with his land no. 447 Kianjai adjudication section.

(v) That he lodged an appeal to the court of appeal at Nyeri and the honourable court allowed the appeal set aside the judgment of the high court and dismissed the appellant/respondent's suit before the trial magistrate and Stanley was awarded the costs of the appeal. See annexure marked "SGM 1 (a) & (b) is a copy of the judgment and the court order dated 7th October, 2013.

(vi) That Stanley desires to have the judgment herein executed and to that extent he is seeking the rectification of adjudication records in respect of plot no. 498 Kianjai adjudication sections so that his 7 acres are returned and registered in his name and be restored to his parcel number 447 adjudication section.

(vii) He is also seeking for an order of the boundaries to be fixed by the land adjudication officer and for security to be provided.

(viii) He is also praying to this court to order the appellant/respondent herein to vacate the said 7 acres and in default to be forthwith evicted.

4. I have not seen any replying affidavit from the respondent but both sides have filed submissions.

5. Before I embark on determining the issues herein, I find it necessary to give a brief history of this matter.

6. On 23.2.1993, Gerald Mwithia M'Itimu sued his brother Stanley Gitonga in Meru SPMCC No. 120 of 1993 seeking for orders inter alia that Stanley Gitonga be ordered to vacate the portion he was occupying in plot no. 498 at Kianjai. Gerald lost the case and he moved to the high court as the appellant in Meru HCC No. 62/1998. He won the case against Stanley. One of the orders given at the High court is framed as follows; **"This court does hereby declare the appellant as the lawful owner of plot no. 498 Kianjai adjudication section and in that regard this court issues an order of cancellation of plot no. 447 Kianjai adjudication section and on that cancellation being undertaken, the land represented by that number 447 should be returned to plot no. 498"**.

7. Stanley was dissatisfied with this decision and he moved to the court of appeal in Court of appeal case no. 297/2010 where he won the case, the high court judgment was set aside and it was declared that Gerald's suit before the magistrate stood as dismissed.

8. This decision has never been implemented. It appears that the court file got lost and was only reconstructed through the application of 28.9.2017, which was allowed by consent on 6.11.2017.

9. It is the usual procedure that in an appeal, the lower court file is moved to the higher court which meant that the original magistrate's court file was called for and put in the high court file which in turn must have moved to the court of appeal file. Such process for a period of 25 or so years would certainly affect proper record keeping and management systems.

10. The reconstructed file (bundle) however contains all the relevant materials and the court is able to discern the litigation trail.

11. It appears that no Replying affidavit has ever been filed in respect of the pending application since 2013. That is not surprising since there is no basis for opposing this application and. The court of appeal decision has not been implemented since July 2013. The pending application is meant to execute the said judgment. The application dated 14/10/2013 is hence allowed as drawn.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 3RD OCTOBER, 2018 IN THE PRESENCE OF:-

C/A: Galgalo/Faith

Mutegi for appellant

MMamu for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE