



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 313 OF 2009**

**SIMON NGAO MBITHI.....PLAINTIFF/APPLICANT**

**VERSUS**

**DANIEL K NGOMO....DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling relates to the Application dated 3<sup>rd</sup> October, 2019 that was brought by way of a Notice of Motion under Sections 3A, 28, 30 and 38 (f) of the Civil Procedure Act, Order 22 Rule 29 and 4, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. The Plaintiff sought for the following orders:

**a. Spent;**

**b. This Honourable Court be pleased to grant an eviction order against the Defendant/Respondent from the suit property, Muputi/Kimutwa/1820;**

**c. This Honourable Court be pleased to grant a demolition order of permanent structure that the Defendant constructed on the suit property during the pendency and in which the Defendant's wife and daughter operate shops;**

**d. The OCS Machakos Police Station be directed to provide security during the eviction and demolition exercise; and**

**e. The costs of this application be borne by the Defendant/Respondent.**

3. The Application is supported by the Affidavit of the Plaintiff who deponed that he is the registered owner of the land known as Muputi/Kimutwa/1820 (*the suit property*) by dint of the Judgment of this court delivered on 25<sup>th</sup> May, 2018 and that in the said Judgment, a permanent injunction was issued restraining the Defendant either by himself, his agents and servants from trespassing into, cultivating, cutting trees, grazing or in any manner interfering with the suit property.

4. The Plaintiff deponed that a Decree dated 28.8.2019 was extracted and served on the Defendant's advocates vide a letter dated 29<sup>th</sup> August, 2019; that the Defendant has failed to comply with the Decree and that this court has the power to issue an order of eviction of the Defendant as well as demolition of the permanent structure the Defendant built on the suit property in execution of the Decree.

5. It was deponed that unless an order of eviction of the Defendant and his agents from the suit property, as well as demolition of the Defendant's structure illegally erected on the suit property, is issued, he (the Plaintiff) might never enjoy the fruits of the Judgment delivered after ten (10) years of litigation.

6. In response, the Defendant deponed that the Application is frivolous, vexatious and wrought with falsehoods; that the Application is *res judicata* since a similar Application dated 15<sup>th</sup> August 2018 where the Plaintiff alleged he was encroaching on his land was dismissed and that he undertook all developments on his parcel of land known as Muputi/Kimutwa/1819 and not the Plaintiff's land.

7. The Defendant deponed that there was no finding by the court that he had encroached on the Plaintiff's land to warrant an order of eviction or demolition of his structures and that no such order was issued by the court.

8. The Application was canvassed vide written submissions. Counsel for the Applicant submitted that this suit was filed against the

Defendant seeking for the following orders:

- a. A permanent injunction to restrain the Defendant either by himself, his agents and servants from trespassing into cultivating, cutting, trees, grazing or in any other manner interfering with land title number Muputi/Kimutwa/1820 (“the suit property”);
- b. General damages for trespass;
- c. Costs of the suit;
- d. Interest on (b) and (c) at court rates; and
- e. Any other and/or further relief this Honourable Court deems fair and just to grant.

9. Counsel submitted that the court delivered its Judgement on 25<sup>th</sup> May 2018 in the following terms:

- a. A permanent injunction is hereby issued restraining the Defendant either by himself, his agents and servants from trespassing into, cultivating, cutting trees, grazing or in any manner interfering with the suit property;
- b. The Defendant to pay the costs of the suit; and
- c. The Defendant’s Counter-Claim is dismissed with costs.

10. It was submitted that the Respondent continued to trespass on the suit property even after the delivery of the Judgement. Counsel relied on the provision of Order 22 Rule 28(5) of the Civil Procedure Rules which provides as follows:

“Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder, or some other person appointed by the court, at the cost of the Judgment debtor and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.”

11. According to counsel, the order of permanent injunction issued by the court on 25<sup>th</sup> May 2018 is a prohibitory and mandatory injunction and that the said order can only be effected through eviction and demolition. Counsel cited the case of *Grace Maundu Kilungya vs. Matheka Makuthi & Another [2019] eKLR* where the court held as follows:

“It is common ground that there was no prayer for eviction of the Defendants/Respondents from land parcel No. Nzai/Kikumini/158. Prayer 2 in the Plaintiff’s/Applicant’s plaint sought, ‘a permanent injunction restraining the Defendants by themselves, their agents and/or servants from entering onto and/or encroaching and/or remaining on and/or grazing on and/or any other manner whatsoever interfering with the land parcel No. Nzai/Kikumini/158. The above order is in effect a prohibitory and mandatory injunction for the eviction of the Defendants/Respondents from the suit premises. The two defendants ought to have complied with the order since they did not appeal against the Judgment delivered on 10<sup>th</sup> April 2018. On the 10<sup>th</sup> April 2018, Judgment was entered against the two Defendants/Respondents in terms of the aforementioned prayer 2 as well as prayers 1 and 2. The two Defendants/Respondents have neither appealed against the said Judgment nor have they sought to set aside and/or have it been reviewed. It is on the basis of the said Judgment that the decree dated 10<sup>th</sup> April 2018 was drawn...whereas I agree with the Defendants’/Respondents’ counsel that there was no prayer for eviction of the Defendants/Respondents from the suit premises, prayer 2 of the Judgment dated 10<sup>th</sup> April 2018 and the subsequent decree can only be effected through the eviction of the Defendants/Respondents from the suit premises. In the circumstances, therefore, my finding is that the application has merits and I proceed to allow it in terms of prayers 2, 3 and 4.”

12. Reliance was also placed on the case of *Josphat Kuria Gathoni v James Maina Njoroge & 3 Others [2019] eKLR*, where Munyao J. held as follows:

“Whichever way I look at it, I do not see how the plaintiff can fail in his suit. He is the title holder and the defendants have not demonstrated any right over the suit land...the defendants have no right to be on the land without the permission of the plaintiff. The plaintiff is otherwise entitled to the orders of eviction and permanent injunction as prayed against the defendants. I will give the defendants 30 days to vacate the land and if they do not do so, the plaintiff is at liberty to apply for their eviction.”

13. It was therefore counsel’s argument that to enforce the Judgment delivered on 25<sup>th</sup> May 2018 and the decree issued on 28<sup>th</sup> August 2019, the Defendant/Judgment Debtor should be evicted from the suit property.

14. On the issue of costs, reliance was placed on the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR*, where Mativo J stated as follows:

“In determining the issue of costs, the Court is entitled to look at among other things; the conduct of the parties, the subject of litigation, the circumstances that led to the institution of the proceedings, the events which eventually led to their termination, the stage at which proceedings were terminated, how they were terminated, the relationship between the parties; and the need to promote reconciliation amongst the disputing parties according to Article 159(2) (c) of the Constitution”.

15. Counsel urged the court to grant the Applicant costs.

16. In response, counsel for the Respondent submitted that the parties in the Application dated 15.8.2018 are the same parties in the current Application and that the Application of 15<sup>th</sup> August, 2018 sought for the following orders:

- a. The Respondent be cited for contempt of court and be committed to civil jail until he purges his contempt and complies with the Judgment of this Honourable Court delivered on 25<sup>th</sup> May, 2018 by Justice Angote.
- b. The Respondent be cited for contempt of court for not complying with the Judgment of this Honourable Court as he proceeded to construct a commercial building on the parcel known as Muputi/Kimutwa/1820 with the knowledge of the existence of the Judgment issued by Justice Angote on 25<sup>th</sup> May, 2018.
- c. The Respondent be cited for contempt of court for not complying with the Judgment of this Honourable Court issued on 25<sup>th</sup> May, 2018 as he refused to move out of Muputi/Kimutwa/1820 and has been cutting down trees and grass growing on the parcel.
- d. This Honourable Court be pleased to make any such other order for purposes of enforcing the Judgment delivered on 25<sup>th</sup> May, 2018.

17. It was submitted that the Application was founded on the Judgment of this court and that in the instant Application, the Plaintiff has sought the same reliefs for eviction and demolition based on the same Judgment. Therefore, it was submitted, the dispute remains the same in substance and that the Application offends the doctrine of *res judicata*.

18. The Defendant's counsel cited the case of *George W M Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR* where Ringera J. stated thus;

"... In that regard, I accept the submission by counsel for the defendants that the doctrine of *res judicata* would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments. I wholly agree with the opinion of Kuloba J in *Mwangi Njangu v Meshack Mbogo Wambugu (supra) where he said:-*

"If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of *res judicata* plays".

It cannot be otherwise if the doctrine is to serve the two public policy objectives for which it was fashioned, namely, that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same matter."

19. Counsel submitted that on the ground of the Application being *res judicata*, the Application should be struck out with costs.

20. Counsel submitted that the Plaintiff has not adduced evidence to support the allegation that the Defendant is in occupation of the suit property and that he has built permanent structures thereon.

21. According to counsel, the Defendant's case is that he occupies his parcel of land known Muputi/Kimutwa/1819 which is adjacent to the Plaintiff's land and that the Plaintiff has not adduced evidence to the contrary.

22. It was submitted that the Judgment of this court did not make any findings that the Defendant had encroached on the Plaintiff's land and that the court only ordered the Defendant not to encroach on the Plaintiff's land. It was counsel's argument that the instant Application seeks to expand the scope of the Decree and give the Defendant reliefs that are not contained in the Judgment or Decree.

23. This suit was finalized vide the Judgment of this court dated 25<sup>th</sup> May, 2018. In the said Judgment and Decree, the court rendered itself as follows:

- a. A permanent injunction is hereby issued restraining the Defendant either by himself, his agents and servants from trespassing into, cultivating, cutting trees, grazing or in any manner interfering with the parcel of land known as Muputi/Kimutwa/1820.
- b. The Defendant to pay the costs of the suit.
- c. The Defendant's Counter-Claim is dismissed with costs.

24. The record shows that vide an Application dated 15<sup>th</sup> August, 2018, the Plaintiff sought to have the Defendant committed to civil jail because he proceeded to build a commercial building on the suit property despite the Judgment of the court.

25. In response to the Application, the Defendant did not deny that he has constructed a building on the suit property. His defence was that the said building was constructed way before the suit was heard and determined and that in any event he was never served with the Decree. The Defendant deponed as follows:

“9. THAT in fact it was undisputed fact that there was a commercial building in the plot subject matter of this Application during hearing and through the oral testimony by the witness and thus it cannot be said that I did the said construction after the Judgment of the honourable court.”

26. The Application for contempt was dismissed by this court on the sole ground that the Plaintiff had not proved that the Defendant had put up the impugned building after the Judgment of the court.

27. In the current Application, the Applicant is praying that this court enforces execution of the Decree that was issued against the Defendant. The Application has been filed pursuant to the provisions of section 38 of the Civil Procedure Act and Order 22 Rule 28 (5) of the Civil Procedure Rules.

28. Section 38 of the Civil Procedure Act provides for powers of the court to enforce execution. It provides as follows:

‘Subject to such conditions and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree—

...

(f) in such other manner as the nature of relief granted may require.

29. Order 22 Rule 28 (5) of the Civil Procedure Rules that state as follows;

“Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder, or some other person appointed by the court, at the cost of the Judgment debtor and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.”

30. The Applicant’s grievance is that the Respondent has built structures on the suit property, an assertion that was denied by the Defendant. Indeed, as correctly submitted by the Plaintiff’s counsel, the order of permanent injunction which was issued by the court on 25<sup>th</sup> May 2018 prohibiting the Defendant from trespassing on the suit property is a prohibitory injunction.

31. That being so, and considering that courts do not issue orders in vain, the structures put up by the Defendant on the suit property should be removed, either by the Defendant himself, or by the Plaintiff at the Defendants costs as stipulated by Order 22 Rule 28 (5) of the Civil Procedure Rules.

32. Indeed, that is the position that was taken by Mbogo J. in the case of *Grace Maundu Kilungya vs. Matheka Makuthi & Another [2019] eKLR* where he stated as follows:

“It is common ground that there was no prayer for eviction of the Defendants/Respondents from land parcel No. Nzai/Kikumini/158. Prayer 2 in the Plaintiff’s/Applicant’s plaint sought, ‘a permanent injunction restraining the Defendants by themselves, their agents and/or servants from entering onto and/or encroaching and/or remaining on and/or grazing on and/or any other manner whatsoever interfering with the land parcel No. Nzai/Kikumini/158. The above order is in effect a prohibitory and mandatory injunction for the eviction of the Defendants/Respondents from the suit premises. The two defendants ought to have complied with the order since they did not appeal against the Judgment delivered on 10<sup>th</sup> April 2018. On the 10<sup>th</sup> April 2018, Judgment was entered against the two Defendants/Respondents in terms of the aforementioned prayer 2 as well as prayers 1 and 2. The two Defendants/Respondents have neither appealed against the said Judgment nor have they sought to set aside and/or have it been reviewed. It is on the basis of the said Judgment that the decree dated 10<sup>th</sup> April 2018 was drawn...whereas I agree with the Defendants’/Respondents’ counsel that there was no prayer for eviction of the Defendants/Respondents from the suit premises, prayer 2 of the Judgment dated 10<sup>th</sup> April 2018 and the subsequent decree can only be effected through the eviction of the Defendants/Respondents from the suit premises. In the circumstances, therefore, my finding is that the application has merits and I proceed to allow it in terms of prayers 2, 3 and 4.”

33. Having not obtained an order staying the Judgment of this court, it is my finding that the orders that were issued by this court allows the Plaintiff to demolish the structures put up by the Defendant on the suit property at the Defendant’s costs.

34. Although the Defendant has pleaded that the current Application is *res judicata* the Application dated 15<sup>th</sup> August, 2018, he has not shown how the issues in the said Application are similar to the current Application.

35. As already stated in this Ruling, in the Application dated 15<sup>th</sup> August, 2018, the Defendant was accused for having disobeyed the orders of this court by constructing the commercial building during the pendency of the Judgment of the court. However, there was no evidence that was placed before the court that the building was put up after the court had rendered its Judgment.

36. The current Application is not seeking for the committal of the Defendant to jail for disobeying an order of the court, but rather, to enforce the order of permanent injunction that was granted by the court. In the circumstances, it is my finding that the issues raised in the current Application are different from the issues that were raised in the Application dated 15<sup>th</sup> August, 2018 which was dismissed by the court.

37. For those reasons, I allow the Plaintiff's Application dated 3<sup>rd</sup> October, 2019 as follows:

- a. An eviction order against the Defendant/Respondent from the suit property, Muputi/Kimutwa/1820 be and is hereby granted.**
- b. A demolition order of the permanent structure that the Defendant constructed on land known as Muputi/Kimutwa/1820 be and is hereby granted.**
- c. The demolition of the building standing on land known as Muputi/Kimutwa/1820 to be carried out by the Plaintiff at the Defendant's costs.**
- d. The OCS Machakos Police Station to provide security during the eviction and demolition exercise.**
- e. The costs of this application to be borne by the Defendant/Respondent.**

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF OCTOBER, 2020.**

**O. A. ANGOTE**

**JUDGE**