



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL SUIT NO. 121 OF 2007**

**DAVID JAMES MBOGO ..... PLAINTIFF**

**VERSUS**

**ALFRED C. ASIKOYO .....}**

**STEPHEN O. EKISA .....}**

**ROSEMARY W. KAMAU .....}**

**JOSEPH ALLISON.....} DEFENDANTS**

**RULING**

The Applicant International Childcare Trust (Kenya) brought a Notice of Motion under the provisions of Section 1A, 1B, 80 and 63 of the Civil Procedure Act as well as order 45 Rules 1 and 2 (2) of the Civil Procedure Rules of 2010 seeking among the other orders that an eviction order issued by the Court be reviewed and or amended to remove the words “*and anybody claiming under her*”. The Applicant contends that the words it is asking the Court to review and or amend were imported into the eviction order so as to ensure that it was evicted from the suit land yet it was not party to the suit.

The brief facts leading to the eviction order herein are that the Respondent, David James Mbogo had brought a suit against four Defendants in Kitale Hccc No. 121 of 2007 seeking among other orders that the registration of Plot No. 212 Liyavo Settlement Scheme in the names of the first, second and third Defendants be cancelled and the said plot be re-registered in his name. The plot in issue had initially been registered in the name of James David Mbogo but the three Defendants had themselves registered as owners pursuant to a Court order emanating from a Criminal Case in which David James Mbogo was involved. David James Mbogo succeeded in his case against the four Defendants. He had the plot re-registered in his name and in further execution of the decree, the Deputy Registrar of the Court issued the eviction order which is the subject of this application.

Before the decree was fully executed, the first and the second Defendants passed on. The judgment had directed that the Defendants do move out of the suit land within 60 days. The decree holder (David James Mbogo) aware that the 1st and 2nd Defendants had died petitioned the Court for an eviction order to issue against the 3rd Defendant Rosemary W. Kamau. The Court then issued an eviction order directed to the District Commissioner Kwanza District. The eviction order was couched in the following manner:

“WHEREAS it was *inter-alia* ordered by Hon. Lady Justice Martha Koome on the 12th day of November 2010 that the Defendants do move out of the land comprised in Title No. Trans-Nzoia/Liavo/212 within 60 days and whereas the 3rd Defendant has so far not moved out of the suit land, YOU ARE NOW COMMANDED and DIRECTED by this Honourable Court to

*remove the 3rd Defendant and anybody claiming under her from the said parcel of land aforesaid, and you are further authorized to use such force as may be necessary in order to execute this order”.*

The Respondent opposed the application through Replying Affidavit sworn on 26/08/2013 in which he contends that the application herein is an abuse of the process of the Court and that the Applicant has filed numerous applications and that it has never complained that the eviction order was wrong and that therefore it is too late in the day to do so now. The Respondent further contends that once an eviction order is issued it binds and affects those claiming under such person. The Respondent further contends that it is only a decree which can be reviewed and not an extracted order.

I have considered the Applicant's application as well as the opposition to the same by the Respondent. There is no doubt that the applicant was not a party to the suit which resulted in the decree sought to be reviewed. Any party aggrieved with a decree or order of a Court is at liberty to apply for its review. The issue which emerges for determination is whether an Applicant can apply for review of an extracted order which is given in furtherance of execution of a decree of the Court. The provision for review provided under Section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules are meant to apply in cases where an aggrieved party is seeking to have a decree or order of the Court reviewed. In the present case, the Applicant is not seeking to have a decree or order of the Court reviewed. In the present case, the Applicant is not seeking to have the decree of the Court reviewed. What the Applicant is seeking to be reviewed or amended is an order in furtherance of execution of a decree issued by the Court. This Court cannot be called upon to review an order given by a Deputy Registrar in furtherance of execution of a decree properly issued by the Court.

There is no problem with the decree of the Court. There is a decree of the Court issued on 24/01/2011 which the Applicant annexed as annexure TMH 3 (b). This decree was properly extracted and is in accordance with the judgment delivered by the judge on 12/11/2010.

The eviction order complained of was couched in a way as to include other parties which were not party to the suit. The decree holder had not indicated in his prayers in the Plaintiff that the orders he was seeking were to affect the Defendants and or their agents or servants or anybody claiming under them. It was therefore clear that the Deputy Registrar who endorsed the eviction order did not ascertain whether the eviction order had been drafted properly and was in accordance with the judgment of the Court. If the Applicant was aggrieved with the way the eviction order was phrased, its advocate should have brought that anomaly to the attention of the Deputy Registrar to rectify the same and not to apply to Court for review as what is complained of is not a decree of the Court but an order issued in furtherance of execution of a decree which had earlier on been properly extracted and partly executed by the decree holder having the plot in issue re-registered in his name.

What the decree holder wanted to do was to complete the execution by having an eviction order to issue against the surviving Defendant so that he could have vacant possession of the suit land. It is apparent that in phrasing the eviction order in such a way as to include any other persons claiming under the 3rd Defendant the Respondent/decreed holder was deliberately targeting the Applicant whom he all along knew was in the suit land but who had not been made a party to the suit. The Deputy Registrar should not have endorsed such an eviction order as it was clearly not in accordance with the judgment of the Court.

The mistake of the Registrar notwithstanding, it was not open for the Applicant to come to Court by way of review as what was complained of was not a decree or order resulting from the judgment of the Court. The contention by the Respondent that once an eviction order is issued, it binds the Defendant and anyone claiming under him is not correct. If the Respondent intended to have the orders affect the Applicant herein, he should have made the Applicant a party to the suit. Otherwise he cannot rely on the amorphous phrase of “any other person claiming under her” He was aware that the Applicant was in the suit property even before he filed the suit herein. There is nothing on record to indicate that the Defendants were litigating on behalf of the Applicant. To this extent, the application herein cannot succeed.

The finding of the Court notwithstanding it has been brought to the attention of the Court that the eviction

order was wrongly extracted. In the interest of justice and so as not to let the process of the Court be abused, I direct that no further execution of the decree herein should be undertaken based on the current eviction order until a properly extracted eviction order is applied for and given by the Deputy Registrar.

It is so ordered.

**Dated, signed and delivered in Open Court on this 8th day of October, 2013.**

**E. OBAGA**

**JUDGE**

In the presence of Mr. Kiarie for the Respondent.

Court Clerk: Kassachoon.

**E. OBAGA**

**JUDGE**

**08/10/2013**