

REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 87 of 2006

JOHN K. THEURI PLAINTIFF/RESPONDENT

VERSUS

GODFREY M. GATIMU DEFENDANT/APPLICANT

RULING

The applicant had filed an application seeking orders of eviction and/or vacant possession to issue against the plaintiff on suit **No.Laikipia/Kinamba/Mwenje Local 1/1421**. The reason for seeking these orders is that the suit relating to this property has been concluded yet the Respondent remains on the suit land. The background to this is that on 15th April 2011, the High Court delivered judgment dismissing the plaintiff's suit where the plaintiff John K. Theuri had sought for an order of adverse possession. The Respondent filed a notice of preliminary objection on grounds that the application is unprocedural and should be dismissed. Counsel argues that the suit herein is already spent and the court did not give any reliefs for vacant possession in favour of the present applicant, nor had the applicant filed any counterclaim seeking eviction or vacant possession. It is argued that the proper procedure is to file a suit for vacant possession/eviction. The applicant's response is that since the High Court declined to confirm adverse possession in favour of the Respondent, then the most natural consequence should be his eviction and/or orders of vacant possession.

Whereas the applicant did not seek orders of vacant possession or eviction, the question to consider is whether justice will be done by insisting that the applicant files a fresh suit seeking vacant possession when the High Court in its judgment had made a finding that the suit land belonged to the defendant/applicant, and that the respondent was in occupation with the authority and consent of the defendant.

Although a finding was made against the Respondent, he must be given a chance to be heard on the issue of eviction from the land, since this was never addressed in the determined suit. The only fair and just manner to deal with the matter is for the Applicant to file suit, citing the decision here, with specific prayers for vacant possession and eviction orders. The applicant cannot ride on the orders of dismissal per se to obtain eviction. From what is presented, the Respondent is now perceived as a trespasser, and he must therefore be given a chance to state his defence in proper pleadings, heard, before he can be ordered to vacate. My finding is that the Preliminary Objection has merit and is sustained.

Delivered and dated this 9th day of October, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**