



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 94 OF 2017

JAMES MATHUVA MAKEWA.....PLAINTIFF/APPLICANT

VERSUS

NZAVI NGULUI.....DEFENDANT/RESPONDENT

RULING

1. What is before this Court for ruling is the Plaintiffs/Applicant's Notice of Motion application expressed to be brought under Sections 1A, 1B, 3A and 38 of the Civil Procedure Act as well as Order 22 Rules (sic) of the Civil Procedure Rules, 2010 for orders:-

1) Spent.

2) THAT the Honourable Court be pleased order the immediate eviction of the Respondent Nzavi Ngului by himself, his agents, servants, assignees from the suit property LR No.Makueni/Nguu/1283 formerly Plot No.464/1283 Nguu Settlement Scheme.

3) THAT the orders of eviction in 2 above be executed by Kiriiyu Merchants Auctioneers or any other auctioneer who may be appointed by the Court.

4) The Officer Commanding Police Division at Wote Makueni to supervise and offer the required security.

5) The Respondent do bear the costs of such eviction.

6) The costs of this application be provided for and be borne by the Respondent.

2. The application is dated 16th August, 2018 and was filed in Court on 23rd August, 2018. It is predicated on the grounds on its face and is supported by the affidavit of James Mathuva Mukewa, the Plaintiff/Applicant herein. On the 20th September, 2018 the Defendant/Respondent filed Notice of Objection on a point of law, the same being dated 18th September, 2018. The grounds are:-

1) The relief of eviction was not sought in the plaint. It cannot be sought in an application. It cannot be implied.

2) The Decree was not prepared in accordance with the judgment of the court. It is null and void.

3) The Decree was not served on the Respondent for approval.

4) The execution should adopt the procedure described in the Order 22 of the Civil Procedure Rules (Revision 2012).

5) The property subject of dispute in the plaint and judgment is Nguu Settlement Scheme 464/1283 and not Makueni/Nguu/1283.

6) The Registration particulars were illegally altered after the judgment was delivered as the Green Card indicated that the land was originally owned by Kyavi Mutua Kithyaka.

3. Further, on 04th October, 2018 the Defendant/Respondent filed a Notice of Motion application dated 25th September, 2018. The Defendant/Respondent sought the following orders:-

(1) A replying affidavit filed on 25th September, 2018 and Notice of Objection filed on 22nd September 2018 be deemed to

have filed and served within the prescribed time.

(2) Costs be provided for.

4. However the Defendant/Respondent did not prosecute his application.

5. In his written submissions, the Counsel for the Plaintiff/Applicant framed two issues for determination namely:-

(1) Whether the Plaintiff deserves the orders of eviction/or vacant possession prayed.

(2) Whether the Applicant used the correct procedure to apply for eviction.

6. In answer to the first issue, the Plaintiff's/Applicant's Counsel submitted that the Plaintiff/Applicant has demonstrated that he was and is the lawful allottee of suit property LR No.464/1283/Nguu Ranch Settlement Scheme which was later given new registration number Makueni/Nguu Ranch/1283. That the judgment issued by his Court on 19th July, 2018 is undisputed and clear. That the Defendant/Respondent is in unlawful occupation of the suit property. That by refusing and/or failure to give vacant possession of the suit property, the Defendant/Respondent is in utter contempt of Court's decree.

7. Regarding the second issue, the Counsel cited Sections 1A, 1B and 3A that touch on the overriding objective and the duty of Court to do justice to parties expeditiously. The Counsel further cited Section 3A of the Civil Procedure Act which gives the Court inherent powers to do justice as well as Article 159 of the Constitution that requires justice to be dispensed without undue technicalities. He cited the case of Gulam Miriam Noordin vs. Julius Charo Karisa [2015] eKLR where the Court of Appeal observed that;

“When the Respondent elected to raise the defence of adverse possession without a counterclaim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the Court to do substantive justice is today wider than before me. We see no harm to make appropriate orders from that finding that.....”

8. Arising from the above ruling, the Plaintiff's/Applicant's Counsel submitted that the substantive issue in this case is to order the Defendant/Respondent to move out of the suit property which the Court had ordered in the judgment and decree default of which he has already done, he should be evicted with the enforcement by the auctioneer and security of the police.

9. On the other hand, the Counsel for the Defendant/Respondent submitted that the description of the property in the judgment is different from the description of the property in the Title deed which was issued in the year 2011. The Counsel went on to submit that in the judgment decree, the property should be 464/1283 Nguu Settlement Scheme but it changed to Makueni/Nguu Ranch/1283. That no title deed to parcel number Makueni/Nguu Ranch/1283 was produced during the hearing of the case which was filed 2003. That the title deed refers to a Ranch but in the judgment, the property is a Settlement Scheme which parcels of land are of different tenure. The Counsel cited **Order 21 Rule 7(2) of the Civil Procedure Rules** which requires a decree to comply with a judgment.

10. It was further submitted that the judgment does not contain a relief of “Eviction” at all and therefore the prayer for such relief contradicts the content of the judgment. The Counsel pointed out that eviction was not adjudicated upon by the parties and neither was it in the findings of the Court.

11. I have read the application together with the supporting affidavit. I have also read the grounds of objection as well as the submissions that were filed by the Counsel on record. The Counsel for the parties appear to have dwelt solely on the issue of eviction.

12. **Order 21 Rule 7(1)** provides as follows:-

“The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit”.

13. The aforementioned rule is couched in mandatory terms. One should bear in mind that it is procedural law and under Article 159(2)(d) of the Constitution, justice shall be administered without undue technicalities. In the circumstances, therefore, my finding is that plot number 464/1283 Nguu Settlement Scheme and land parcel number Makueni/Nguu Ranch/1283 refer to one and the same parcel of land. However in the plaint dated 26th March, 2003 and as well as the amended plaint dated 10th May, 2007, eviction was not one of the prayers sought. In so far as the Plaintiff/Applicant seeks to have an order of eviction against the Defendant/Respondent, my finding is that the Plaintiff/Applicant seeks to enforce that which is not indicated in the decree issued on 19th July, 2018 and annexed as JMM-2 to the Plaintiff's/Applicant's supporting affidavit.

14. In the circumstances, I hold that the application lacks merits and same is dismissed with costs to the Defendant/Respondent. It is so ordered.

Signed, dated and delivered at **Makueni** this 25th day of **February, 2019**.

MBOGO C.G.,

JUDGE.

In the presence of:-

Mr. Masaku holding brief for Mr. Kisongo for the Defendant/Respondent

No appearance for the Plaintiff/Applicant

Ms. Nzioka – Court Assistant

MBOGO C.G, JUDGE,

25/02/2019.