



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELCA NO. 48 OF 2020

**NGENDO WAINAINA MUCHUNGO.....DECREE
HOLDER/APPLICANT**

VERSUS

**JAMES THENDU GITAU.....JUDGMENT
DEBTOR/RESPONDENT**

RULING

- 1) This Ruling is in respect of two (2) applications filed for determination before the Court. One is filed by the Decree Holder dated 25/04/2025 seeking eviction orders and assistance of OCS Ruiru Police Station to implement the order of eviction against the Judgment Debtor/Respondent and the second one is filed by the proposed Interested Party dated 20/12/2024 seeking to be enjoined in the suit and to have the Judgment set aside.
- 2) The first application is supported by grounds on the face of the application and supported by the Affidavit sworn by Ngendo Wainaina Muchungo dated 25/04/2025.
- 3) The application is opposed by the Respondent who filed a Replying Affidavit sworn on 17/01/2025 by the Respondent

James Thendu Gitau. He stated that he is the proprietor of the suit property which he subdivided into subplots in 2009. That the subplots were sold to third parties. That prior to filing of the instant suit he sold subplot No. Ruiru/Kiu Block 2/6214 to the 2nd Intended Defendant/Applicant Philip Murithi Mwai.

- 4) It is his contention that the 2nd Intended Defendant has a valid interest in the matter and he should be heard on merit.
- 5) The second application is dated 20/12/2024 though the actual date on the documents is 13/11/2024. The Applicant 2nd Intended Defendant seeks orders to set aside the Judgment of Hon Wanjala, SRM delivered on 29/10/2020 and to be allowed to file a Defence out of time.
- 6) The application is based on the grounds thereupon.
- 7) The Application is opposed vide the Replying Affidavit sworn on 26/11/2024 by the Appellant and she averred that the Defendant being aggrieved by the Judgment of this Court filed an Appeal and the annexure '**NWM-2**' a Notice of Appeal dated 19/09/2023 was attached as evidence.
- 8) It is the Respondent's averment that this Court is *functus officio* having exhausted its jurisdiction in the matter at hand. Further that since the matter was determined, any attempt to add a party or re-open the case is tantamount to abuse of established legal principles on conduct of matters such as this.
- 9) The Appellant/Respondent filed a Further Affidavit sworn on 17/06/2025 opposing the application for joinder and averred that the said Intended Interested Party has no locus to

participate in the current application. Further that the Judgment delivered by this Court on 13/10/2022 found that title had not been issued to the subplot owners and that even if they were to have received title it would have been an exercise in futility since the Respondent had no good title to pass on.

10) On 27/05/2025 the parties appeared in Court and the Court issued directions on filing of submissions to the two applications. I have considered the submissions in writing this Ruling.

Analysis and Determination

11) It is deponed by the Appellant though Judgment was delivered on 13/10/2022 the Respondent has failed to vacate the land and has refused, neglected and or failed to comply with the eviction orders, despite demand and letters sent.

12) From the pleadings filed by both parties, what is before the Court is a post-Judgment application for the execution of the Decree. The Respondent has however sought for an order allowing re-opening of the finalized case despite the fact that he has already preferred an Appeal at the Court of Appeal. It is instructive to note that the Respondent's application is a non-starter since Court delivered a Judgment in this matter on Appeal arising from the Magistrate's Court Judgment which was set aside. Therefore, this Court was sitting on its Appellate jurisdiction and it pronounced itself on the matters in this case on 13/10/2022.

13) So, in actual fact this Court is *functus officio* on issues

touching on whether the Respondent is the proprietor of the suit property and whether he holds a valid title. The Court issued orders for cancellation of title and the Respondent has been divested of ownership to the suit property. Thus the 2nd application dated 20/12/2024 is moot.

14) With regard to the first Notice of Motion Application dated 25/04/2025, Section 38 of the Civil Procedure Act empowers the Court to enforce the execution of its Decrees upon an application by a Decree Holder. Order 22 Rule 7 (2) of the Civil Procedure Rules provides for the mode of applying for execution of a Decree.

15) The Appellant/Applicant has annexed a copy of the extracted Decree that was served upon the Judgment Debtor in line with Order 22 Rules 29, 30, and 80 of the Civil Procedure Rules. There is however no evidence that the Applicant served an eviction notice upon the Judgment Debtor in line with Section 152A-1 of the Land Act, which the Judgment Debtor has refused to comply with. Order 49 Rules 1, 2, 3, 5 and 7 of the Civil Procedure Rules allow the Deputy Registrar to deal with execution proceedings under Order 22 of the Civil Procedure Rules other than under Rules 28 and 75 thereof.

16) It therefore follows as from the cited law, that for any eviction to be sanctioned by the Court it has to comply with the law on execution of Court Decrees or Orders as read together with Sections 152 B, C & F and 152(1) of the Land Act. In

Hillarione Kabuteni & Another -vs- George Kiruki

Mwamba (2019) eKLR, the Court declined to order for eviction since the Defendants in their Statement of Defense had not sought for it.

17) Therefore, an application for eviction must be based on a proper claim, pleadings and Judgment. An eviction order has far-reaching implications as it entails the forceful removal of a party from the land who has been in occupation or possession. It is important that before such an order is issued, the Court has to be satisfied of its merits.

18) I am aware that the issue of ownership and occupation of the land by the Defendant has been determined in this suit and a Decree rendered to the that effect, and so whereas I agree with the Applicant that she is entitled to the land I note that the relief of eviction order or delivery of vacant possession had not been sought for in the primary Plaintiff. So, the two reliefs were not included in the Decree.

19) Given the foregoing, the Court directs that the Decree be extracted and be served upon the Judgment Debtor in the usual way. The Judgment Debtor is at liberty once there is full compliance with Section 38 of the Civil Procedure Act, Order 22 of the Civil Procedure Rules, and Section 152A of the Land Act, to seek the Court's assistance through the Deputy Registrar for armed security which she has prayed for in the Application and it is hereby granted subject to compliance as stated.

20) I thus do make the following orders:

i) The Notice of Motion Application dated

20/12/2024 is unmerited and is dismissed with costs to the Respondent.

ii) The Notice of Motion Application dated 25/04/2025 is merited and is allowed as prayed save that the Applicant to comply with Section 38 of the Civil Procedure Act, Order 22 of the Civil Procedure Rules, and Section 152A of the Land Act.

iii) The cost of the second application is awarded to the Appellant/Applicant.

Orders Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF NOVEMBER, 2025 VIA MICROSOFT TEAMS.

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**MOGENI J
JUDGE**

In the presence of:

Mr. Bulowa for Decree Holder/Applicant
Judgment Debtor/Respondent - Absent
Proposed Interested Party - Absent
Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**

ORIGINAL