



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 91 OF 2005

NTHUSI MWONEWA (Deceased).....APPELLANT

VERSUS

MAKAU MWONEWA.....RESPONDENT/APPLICANT

RULING

1. In the Notice of Motion dated 10th February, 2014, the Respondent/Applicant is seeking for the following orders:

a. That the personal representatives of the Deceased Appellant, namely Rose Ndunge Nthusi, Maweu Nthusi and Alex Wambua Nthusi be declared executors de son tort and/or be made parties to this Appeal for the purpose of execution of the decree herein.

b. That the said Rose Ndunge Nthusi, Maweu Nthusi and Alex Wambua Nthusi having refused to vacate the property adjudged to the Respondent be removed therefrom.

c. That the possession by the Respondent and the order of the removal of any person who refuses to vacate the property be enforced by the O.C.S Machakos Police Station.

d. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Respondent/Applicant who has deponed that vide the Minister's Appeal number 29 of 1997, he was adjudged the rightful owner of parcel of land known as 2598 Ngiini Adjudication Section; that the Appellant is now deceased and that this Appeal was struck out on 3rd December, 2003.

3. According to the Respondent/Applicant, after the Appellant's death, his widow and sons have continued to deny him access to the suit land; that the said widow and sons are the personal representatives and successors of the deceased Appellant and that he is not able to get possession of his land without the eviction of the said executors *de son tort* who are in actual occupation of the suit land.

4. In response, the Appellant/Respondent filed a Notice of Preliminary Objection in which they averred that the Appeal was struck out by the court on 3rd December, 2009 for being incompetent and as such, there is no suit on the basis of which the Application can be made. According to the Respondent, they are not the late Nthusi Mwonewa's legal representatives and cannot therefore be made parties to the struck off Appeal.

5. The Respondent's/Applicant's advocate submitted that the filing of a new suit would prolong the current suit; that the Respondent herein had to await the outcome of the Appeal after the Minister's decision and that the Respondent should be joined in the suit to take part in the finalization of the suit.

6. The Appellant's/Respondent's advocate submitted that the Respondent are not the legal representatives of the Estate of the deceased (*Appellant*); that it is only a legal representative to the deceased who can be made a party to the suit and that the named persons have not intermeddled with the Estate of the deceased to be made executors *de son tort*.

7. The Appellant's counsel submitted that the Appeal having been struck off, the proceedings herein came to an end, and as such, there are no proceedings on the basis of which execution can be made.

8. This Appeal was in respect of the Judgment and findings of the Minister in Land Dispute Appeal No. 29 of 1997. In the said Appeal, the Minister declared parcel number 2598 Ngiini, as belonging to the Respondent/Applicant. The Appellant, now deceased, filed a Memorandum of Appeal in this court dated 28th November, 2005 challenging the findings of the Minister.

9. The record shows that on 3rd December, 2009, Lenaola J. (as he was then) struck off the Appeal *suo moto* because “The Memorandum of Appeal dated 28th November, 2005 is incompetent.” While striking out the Appeal *suo moto*, the Judge observed as follows:

“I have seen the Judgment of the District Commissioner Machakos in Minister Appeal No. 29/1997. Under Section 29 of the Land Adjudication Act, that decision is final and there cannot be an Appeal to this or any other court or legal authority.”

10. That being the case, and the court having struck out the Appeal for being incompetent, the Respondent/Applicant cannot purport to have the orders of the Minister executed in a non-existent suit. Indeed, the issue of substituting the Appellant by his legal representative cannot arise in a situation where the suit has been struck out. The only issue that the Respondent/Applicant can pursue is costs for the suit that was struck out and nothing else. The Appeal having been struck out, the Respondent has to execute the order of the Minister by filing an independent suit, subject to limitation of time.

11. For those reasons, the Application dated 10th February, 2014 is dismissed with no order as to costs. For avoidance of doubt, this Appeal stands struck out as ordered by the court on 3rd December, 2009.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE