



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

E.L.C SUIT NO. 64 OF 2017

GRACE MAUNDU KILUNGYA.....PLAINTIFF/APPLICANT

-VERSUS-

MATHEKA MAKUTHI.....1ST DEFENDANT/RESPONDENT

MUTISYA LONZA.....2ND DEFENDANT/RESPONDENT

RULING

1. What is before this Court for ruling is the Plaintiff's/Decree Holder's Notice of Motion application expressed to be brought under Order 51 Rule 1, Order 22 Rule 6 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Rules and all other enabling provisions of the law for orders that: -

1. Spent.

2. This honourable court be pleased to issue an order of eviction to have the Defendants/Respondents either by themselves, their agents and/or servants removed from land parcel No.Nzau/Kikumini/158 in enforcement of the courts' judgement and decree dated 10th April, 2018 and 28th May, 2018 respectively.

3. The OCS of Emali Police Station be directed to oversee the process of eviction.

4. The costs of this application be paid by the Defendants.

The application is dated 14th December, 2018 and was filed in court on 17th December, 2018. It is predicated on grounds 1, 2, 3, 4, 5 and is supported by the affidavit of Grace Maundu Kilungya, the Plaintiff/Applicant herein, sworn at Makindu on the 14th December, 2018.

2. The Defendants/Respondents have opposed the application vide the replying affidavit of Matheka Makuthi, the 1st Defendant/Respondent herein, sworn at Nairobi on the 23rd January, 2019 and filed in court on the 24th January, 2019.

3. Both parties have filed their respective submissions pursuant to the Court's direction of 28th January, 2019 to dispose off the application by way of written submissions.

4. The Plaintiff/Applicant has deposed in paragraphs 3, 4, 5, 6, 7, 13 and 14 of her supporting affidavit that on the 10th April, 2018 the Court delivered its judgment in which it granted her the prayers in her plaint (see GMK-1), that on 28th May, 2018 her advocates on record extracted a decree (GMK 2) which contained the orders as per the court judgment and served the decree upon the advocate for the Defendant, that she is advised by her advocates on record which advise she verily believes to be true that as a matter of practise, an advocate once served with an order of the court is supposed to advise his clients of what is required of them by the order, that she has reason to believe that the advocate for the Defendants advised them on the order but the Defendants chose to ignore the same, that she has nevertheless waited for the Defendants to comply with the order within a reasonable time to no avail, that she has been greatly prejudiced by the Defendants'/Respondents' continued stay on the suitland as they have prevented her from enjoying the fruits of her judgement which is against her legitimate expectation from working on her land which the Defendants/Respondents occupy and that in the greatest interest of justice, that the said orders should be granted to allow her an opportunity to enjoy the fruits of her judgment and for the proper enforcement of the court's judgment as the court cannot make orders in vain.

5. On his part, the 1st Defendant/Respondent has deposed in paragraphs 3, 4, 5, 6, 7 and 8 of his replying affidavit that neither he and the 2nd Defendant/Respondent nor their advocates on record have ever been served with any decree or an eviction order of the court requiring them

to vacate the disputed parcel of land, that he has been advised by his advocates on record which he verily believes to be true that an eviction order which is sought by the Applicant did not form part and parcel of the main suit and/or one of the prayers granted in the judgment of the court, that he has also been advised by his advocates which he verily believes to be true that an eviction order is sought through a substantive suit and not through an application as sought by the Applicant and as such, the application is misplaced, that the eviction orders sought by the Applicant does not specify what ought to happen to the Defendants'/Respondent's permanent structures on the land since it does not even seek for demolition orders of the court, that it will be unfair and unjust for the court to grant an eviction order which does not form part and parcel of the main suit, and/or was never sought in the main suit and that he is advised by his advocates and which he verily believes to be true that after delivery of the judgment, the court became *functus officio* and it cannot be invited to look at the same file through an application for review or called upon to make orders which did not form part and parcel of the main suit.

6. The Plaintiff/Applicant and the Defendants/Respondents have filed their submissions pursuant to the Court's directions to dispose off the application by way of written submissions.

7. The Counsel for the Plaintiff/Applicant framed the following issues for determination: -

- 1. Whether the Honourable Court is functus officio.**
- 2. Whether the present application is properly before the Honourable Court.**
- 3. Whether the Plaintiff/Applicant merits the grant of the orders sought in the Plaintiff/Applicant's application.**
- 4. Costs.**

On the other hand, the Counsel for the Defendants/Respondents framed the issues namely: -

- a. Whether a court of law can issue an Eviction Order not prayed for at the main Suit?**
- b. Whether a court of law can enforce an Order which it never granted?**

8. On the issue of whether or not the court is *functus officio*, the Plaintiff's/Applicant's Counsel submitted that the application does not seek to reopen up the case for merit based discussion and/or litigation but rather it seeks to enforce the court's judgment and subsequent decree. The Counsel added that the application is meant to safeguard and to ensure that the court's sanctity is not desecrated. The Counsel went on to submit that the Defendants/Respondents have remained on the suitland despite there being an order restraining them from being on the land in question.

9. The Counsel cited **Order 22 Rule 28(5) of the Civil Procedure Rules** which provides as follows: -

“where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder, or some other person appointed by the court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.”

The Counsel was of the view that in granting the orders sought herein by the Plaintiff/Applicant, the court will be acting according to the authority vested in it.

The Counsel added that the orders sought for eviction of the Defendants/Respondents are pursuant to the disobeyed judgement and subsequent decree of the court thus the court cannot be said to be *functus officio*.

10. On whether the application is properly before the court, the Plaintiff's/Applicant's Counsel submitted the Applicant seeks to enforce the court's judgment and subsequent decree which the Defendants/Respondents have willfully disobeyed.

11. On whether the Plaintiff/Applicant merits the orders sought, the Counsel submitted that the Applicant is in possession of a valid judgement and a subsequent decree. The Counsel pointed out that the Defendants/Respondents have neither given valid explanation nor excuse of their disobedience of the court's orders.

12. On the other hand, the Counsel for the Defendants/Respondents submitted that the Plaintiff/Applicant never made a prayer for eviction in her plaint. The Counsel pointed out that courts of law are under obligation to parties in a suit, in that the orders given are to be clear, precise and executable. The Counsel pointed out that the orders that were issued by the court restraining the Defendants/Respondents cannot be construed to mean eviction.

13. It was further submitted that the court cannot be called upon to enforce an order it never granted.

14. I have read the application as well as the replying affidavit. I have also read the submissions filed by the Counsel on record for the parties herein.

15. It is common ground that there was no prayer for eviction of the Defendants/Respondents from land parcel No.Nzaui/Kikumini/158. Prayer 2 in the Plaintiff's/Applicants' plaint sought, “a permanent injunction restraining the Defendants by themselves, their agents and/or

servants from entering onto and/or encroaching and/or remaining on and/or grazing on and/or in any other manner whatsoever interfering with the land parcel No.Nzaui/Kikumini/158". The above order is in effect a prohibitory and mandatory injunction for the eviction of the Defendants/Respondents from the suit premises. The two defendants ought to have complied with the order since they did not appeal against the judgement delivered on 10th April, 2018. On the 10th April, 2018 judgment was entered against the two Defendants/Respondents in terms of the aforementioned prayer 2 as well as prayers 1 and 2. The two Defendants/Respondents have neither appealed against the said judgment nor have they sought to set aside and/or have it reviewed. It is on the basis of the said judgement that the decree dated 10th April, 2018 was drawn. Whether or not the two Defendants/Respondents were aware of the decree is a matter between themselves and their Counsel on record as there is nothing to show that their advocate was not served with the said decree. Having been served with the said decree, the Defendants/Respondents ought to have complied with the orders thereon in the said decree. Whereas I agree with the Defendants'/Respondents' Counsel that there was no prayer for eviction of the Defendants/Respondents from the suit premises, prayer 2 of the judgement dated 10th April, 2018 and the subsequent decree can only be effected through the eviction of the Defendants/Respondents from the suit premises. This court cannot therefore be said to be *functus officio*. In the circumstances, therefore, my finding is that the application has merits and I proceed to allow it in terms of prayers 2, 3 and 4.

Signed, Dated and Delivered at Makueni this 14th day of October, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Muthiani for the Respondent

Ms. Ongong'a for the Applicant

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

14/10/2019.