



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 91 OF 1996

MESHACK MUTSUIRU INDECHE.....PLAINTIFF/RESPONDENT

VERSUS

NGOSIA MUSAMBAYI MUYUYI.....DEFENDANT

TOM MAKOKHA MUSAMBAL.....APPLICANT

R U L I N G

MESHACK MUTSUIRU INDECHE (the Respondent herein) filed this Originating Summons on 21st May 1992 seeking the main prayer that he has acquired by adverse possession the land parcel **NO NDIVISI/NDIVISI/217** (suit land) registered in the names of **NGOSIA MUSAMBAYI MUYUYI** (who has since donated a power of Attorney to **TOM MAKOKHA MUSAMBAL** (the Applicant herein). Upon hearing the parties, the late Justice **C.O. ONGUDI** dismissed the Respondent's claim with costs by a Judgment delivered on 29th April 1997.

Emboldened by that Judgment, **NGOSIA MUSAMBAYI MUYUYI** filed an application dated 8th March 2000 seeking orders to evict the Respondent from the suit land. That application was placed before **HON C. O. MOITUI** (Deputy Registrar) on 15th August 2002 who ordered the eviction of the Respondent from the suit land to be executed by the Officer Commanding Webuye Police Station. An eviction order was duly extracted. Aggrieved by that eviction order, the Respondent filed an application dated 17th September 2002 seeking to have it reviewed. That application was again placed before the Deputy Registrar on 20th March 2003 who, upon hearing the parties, was satisfied that he had been misled into granting the order of eviction dated 1st August 2002 and promptly set it aside.

The Applicant has now filed a Notice of Motion dated 30th October 2018 in which he seeks the following remedies:-

- 1. That this Court be pleased to reactivate this suit for purposes of enforcing an eviction order issued on 1st August 2002.**
- 2. Costs of this application be borne by the Respondent.**

The application is supported by his affidavit of even date in which he has deponed, inter alia, that having been granted the power of attorney by his late father **NGOSIA MUSAMBAYI MUYUYI**, he would like this suit reactivated so that he can apply for the eviction of the Respondent.

The application is contested and in a replying affidavit dated 3rd July 2019, the Respondent averred, inter alia, that his claim to the suit land was dismissed with costs but there was no order of eviction issued because there was no prayer for such order. That the parties are bound by their pleadings and in any event, the Applicant filed an application seeking to evict the Respondent which prayer was allowed but later set aside. Therefore, this application is misconceived and devoid of merit.

By consent of the parties, it was agreed that the application be determined on the basis of the pleadings filed.

I have considered the application and the rival affidavits.

When the judge dismissed the Respondent's Originating Summons on 29th April 1997, he did not order for his eviction from the suit land for the simple reason that there was no counter – claim by **NGOSIA MUSAMBAYI MUYUYI** seeking orders of eviction. And a Court of Law will only grant a party what has been pleaded. If an order for the eviction of the Respondent from the suit land had been sought, it may very well have been granted because by dismissing the Respondent's claim to the suit land, the obvious consequence of that dismissal was that the Respondent had no right to continue occupying the suit land. However, this Court cannot now read into a Judgment delivered some twenty two (22) years ago, what was not contained therein. The order of eviction issued by the Deputy Registrar on 1st August 2002 was issued in error, indeed without jurisdiction, and was properly reviewed and vacated on 20th March 2003 because it amounted to an amendment of the

Judgment delivered on 29th April 1997. In the circumstances, there is no order of eviction against the Respondent which the Applicant can now seek to execute. This was made clear to the Applicant by the Deputy Registrar **HON. E. N. MWENDA** on 19th June 2019. I reiterate that position and find this application devoid of any merit.

Even assuming that the Judge had ordered for the eviction of the Respondent from the suit land in 1997, this application is hopelessly out of time. This is because, **Section 4(4) of the Limitation of Actions Act** provides that:-

“An action may not be brought upon a Judgment after the end of twelve years from the date on which the Judgment was delivered, or (where the Judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a Judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

And even if the eviction order issued on 1st August 2002 had not been set aside, it cannot be executed sixteen (16) years later as that would be in contravention of the law.

The up – shot of the above is that the application dated 30th October 2018 is un – meritorious. It is accordingly dismissed and in view of the circumstances of this case, I make an order that each party meets their own costs.

Boaz N. Olao

J U D G E

9th October 2019

Ruling dated, delivered and signed in open Court this 9th day of October 2019 at Bungoma.

Applicant present

Plaintiff absent

Defendant absent

Joy/Okwaro – Court Assistants

Boaz N. Olao

J U D G E

9th October 2019