



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 82 OF 2011

SAMUEL GIKUNDA.....PLAINTIFF/APPLICANT

VERSUS

BEATRICE MARIAM ISMAIL (sued as the administratrix of the estate of

MUNYUA MIGUARI- deceased).....1STDEFENDANT/RESPONDENT

ABDUL MWIRIGI MUNYUA.....2ND DEFENDANT/RESPONDENT

PETER MEME.....3RD DEFENDANT/RESPONDENT

JACKLINE NKATHA JOHN.....4TH DEFENDANT/RESPONDENT

FLORENCE KANJA MWITI.....5TH DEFENDANT/RESPONDENT

SAMUEL MIRITI MUNYUA.....6TH DEFENDANT/RESPONDENT

TITUS NKUNJA ISMAEL.....7TH DEFENDANT/RESPONDENT

SERIBA KANGA.....8TH DEFENDANT/RESPONDENT

RULING

1. Vide a judgement dated 23rd February 2018 the Court held that the Plaintiff/ Applicant is entitled to two (2) acres by way of adverse possession. It was also held that the subdivision of the original title be nullified and a fresh subdivision of the land be conducted to facilitate registration and issuance of title to the plaintiff as proprietor in respect of two (2) acres that the plaintiff has been in occupation of and which he has developed during his occupation.

2. The applicant has since filed an application dated 24th May 2019 praying for the following Orders;

a. That this Honourable court be pleased to issue an Order of eviction of the defendants, their agents' servants or anyone claiming under the defendants from the plaintiff's portion of land measuring 2 acres in Timau Settlement Scheme/128, now subdivided and registered as Timau/Timau Settlement Scheme/1831.

b. That an order be issued directing the OCS Timau Police Station to enforce the decree and Order of the Court herein.

3. In support of the application the applicant alleged that the land Timau Settlement Scheme/128 was subdivided excising 2 acres thereof now referred to as Timau/Timau Settlement Scheme/1831. However, the Defendants especially the 4th and 9th, are adamantly obstructing his possession and use of the land.

4. The 1st Defendant, and on behalf of the 2nd to 8th Defendants swore a Replying affidavit dated 11th July 2019 stating that the Originating summons never sought an eviction Order. She contends that they have since filed Nyeri Civil Appeal no. 168 of 2018 and that they also reside with other Defendants on Parcel No. Timau/Timau Settlement/1831. She further stated that in the event that the Order is granted and they are evicted, they stand to suffer irreparable harm in the event the appeal succeeds. She added that upon the delivery of the judgement,

this Court cannot act on the matter further.

5. The 9th Defendant filed grounds of opposition on 11th July 2019 contending that the application herein lacks merits and is an abuse of the court process and that the application offends the rules of joinder of parties to a suit in respect to the 9th Defendant.

Analysis and Determination

6. The main issue for determination is whether this court has jurisdiction to issue the Orders sought and whether the plaintiff/applicant warrants the said order.

7. A claim for adverse possession connotes use and occupation. During the hearing of the Originating summons it became clear to this Court that the plaintiff had been in occupation of 2 acres in the suit premises where he had lived since 1987 and constructed a house measuring 24x11 and planted trees and miraa. During cross examination the plaintiff also alluded to the fact that he had been evicted from the suit premises and restricted from farming on the land when the same was subdivided. It therefore appears that the respondents herein took advantage of the subdivision exercise to remove the applicant from the suit land. However, the applicant's claim on adverse possession had already matured going by the judgment of this court.

8. The application herein is clearly meant to implement the Judgment of the court. The proceedings reveals that the applicant had been evicted from the suit premises. It was the applicant's evidence that he had been denied use of the land and restricted from farming on the land.

9. With the court holding that the applicant is entitled to two (2) acres out of the land, it then follows that he should be allowed to enjoy the fruits of his judgement. A prayer for eviction against the respondents is therefore well within the purview and jurisdiction of this court.

10. The 2nd to 8th Defendants have not denied that they are in occupation of the suit premises. They however opine that they have filed an appeal with the likelihood of success. The annexed pleadings of the appeal do not contain the Memorandum of appeal or a draft thereof but contains an index filed in the Court of Appeal.

11. The Respondents have not also filed an application for stay of execution of the judgement and decree of this Court. There is therefore nothing substantial that limits this court from granting the prayers sought against the Defendants / Respondents.

12. As pertains to the 9th Respondent, he contends that the application offends the rules on joinder. However, the provisions of **Order 1 Rule 10 of the civil procedure Rules** do empower the court to order for joinder of a party at any stage of the suit.

13. In **J M K v M W M & another [2015] eKLR** the Court of Appeal while explaining the provisions of Order 1 Rule 10 of the Civil Procedure Rules held as follows;

*“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party (emphasize added).……We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in **TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448**, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”*

14. I therefore find that the plaintiff's application dated 24.5.2019 has merits and the same is allowed with costs to the applicant, to be paid by defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kimaita holding brief for Thangicia for plaintiffs

Plaintiff

1st, 3rd, 4th, 6th and 9th defendants

HON. LUCY. N. MBUGUA

ELC JUDGE