



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KISII**  
**CASE NO. 1211 OF 2016**  
**(FORMERLY HCC NO. 106 OF 2008)**

**ANDRONICO OTIENO AMINDO.....PLAINTIFF**

**VERSUS**

**MOSES ODERO OWUOR.....1<sup>ST</sup> DEFENDANT**

**LAZARUS OTIENO OWUOR.....2<sup>ND</sup> DEFENDANT**

**WALTER OGARA OWUOR.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. In this matter the court after full hearing of the suit delivered a judgment prepared and signed by D. Musinga, J. (as he then was) on 30<sup>th</sup> September 2011. A decree was extracted and issued on 1<sup>st</sup> November, 2011 in the following terms:

**(a) It is hereby declared that the plaintiff is the registered and/or lawful owner of LR No. South Sakwa/Waware/1017.**

**(b) There be and is hereby granted an order of permanent injunction restraining the defendants by themselves, agents, servants, and/or anyone claiming under the defendant from re-entering, trespassing onto, cultivating, interfering with and/or in any other manner, whatsoever, dealing with the suit land that is, LR No. South Sakwa/Waware/1017.**

**(a) The plaintiff be and is hereby awarded the sum of kshs. 180,000/= only, as mense profits and/or general damages for trespass.**

**(d) Costs of this suit be taxed and same be borne by the defendants.**

2. Apparently the defendants did not comply and/or honour the terms of the judgment and the plaintiff decree-holder by a Notice of Motion dated 22<sup>nd</sup> February 2016 ad filed in court on 3<sup>rd</sup> March 2016 expressed to be brought under Order 40 Rule 3 **Civil Procedure Rules** and sections 1A, B, 3A and 63(e) of the **Civil Procedure Act**, *interalia* sought the following orders:-

**1. The honourable court be pleased to cite and punish the defendants/respondents for disobeying and/or disregarding the lawful court orders issued and/or granted on 30<sup>th</sup>**

September 2011 and served upon the defendants/ respondents on the 2<sup>nd</sup> October 2011.

**2. That the court be pleased to order for committal of the defendants to jail for disobedience for a during not exceeding six (6) months and/or such shorter period as the court may deem fit and expedient.**

**3. In the alternative, the court be pleased to grant an order of sequestration to attach the properties of the defendants/ respondents, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the lawful court orders of permanent injunction dated 30<sup>th</sup> September 2011.**

3. The application was supported on the grounds set out on the body of the application and the affidavit sworn in support of the plaintiff/deed holder dated 22<sup>nd</sup> February 2016. Following service of the application on the defendants, the 1<sup>st</sup> defendant filed a replying affidavit dated 26<sup>th</sup> July 2016 where he requested that the defendants be permitted to engage in discussions with the plaintiff with a view of resolving the matter/dispute amicably out of court. The court on 27<sup>th</sup> July 2017 granted the defendants a period of 60 days within which to negotiate and agree with the plaintiff failing which they were to vacate from the disputed suit premises or be committed to serve a prison term of 3 months immediately after the expiry of the period of 60 days aforesaid.

4. On 27<sup>th</sup> October 2016, the parties appeared before the court and stated they needed more time to firm up and record a consent. The court directed the parties counsel to draw the formal consent and have the same filed in court within 21 days. The court fixed the matter for further mention on 14<sup>th</sup> March 2017 to confirm compliance with the terms of the consent. On 14<sup>th</sup> March 2017 no consent had been filed and the defendants counsel and his clients were absent and upon the plaintiff's counsel confirming no consent had been filed the court allowed the plaintiff/deed holder to proceed with execution against the defendants in terms of the court order granted by the court on 27<sup>th</sup> July 2016.

5. On 16<sup>th</sup> March 2017 the defendants filed a Notice of Motion of even date made under Section 3A **Civil Procedure Act** and Order 22 Rule 22 of the **Civil Procedure Rules** and Article 159(2)(c) of the Constitution and sought inter alia orders:-

**1. That the court do stay execution of the ex parte orders issued on 14<sup>th</sup> March 2017 pending hearing and determination of the application.**

**2. That the orders issued on 14<sup>th</sup> March 2017 be varied or set aside to allow parties apply the provisions of Article 159 (2)(c) of the Constitution which they had earlier agreed.**

**3. That the court adopts the agreement made by the parties herein dated 23<sup>rd</sup> October 2016 where the issue of payment was agreed at kshs. 200,000/= and subdivision of the plaintiff's parcel LR No. South Sakwa/Waware/1017 into two portions measuring 1.5Ha and 0.5Ha was agreed and the applicants undertook to pay surveyor's fees.**

6. In a supporting affidavit by the defendants/respondents Advocate, **Cephas Agure Odera** the advocate deposed that he erroneously misdiarised the date of the mention as 16<sup>th</sup> March 2017 instead of 14<sup>th</sup> March 2017 and appeared in court on 16<sup>th</sup> March 2017 only to find the matter had been mentioned on 14<sup>th</sup> March 2017 when adverse orders against his clients were made. He explained that the parties had indeed engaged in negotiations and an agreement had been reached and he was tasked to draft the consent that was to be filed in court. He deposed that he infact drew the consent in line with the agreement of the parties but on submission to the plaintiff's advocates they did not endorse the same but instead wrote a letter dated 12<sup>th</sup> November 2016 which contained new terms and was contradicting the agreement the parties had reached. Owing to the variance he states they opted to wait for the mention of the case when inadvertently neither he and/or his clients attended owing to the miscommunication emanating from his office.

7. The 1<sup>st</sup> defendant in a further supporting affidavit reiterated the contents of their advocate's affidavit as relates to the reason for their non attendance in court on 14<sup>th</sup> March 2017 when the matter was mentioned. He deposed that they attended court on 16<sup>th</sup> March 2017 as advised by their advocate only to find their case was dealt with on 14<sup>th</sup> March 2017 and adverse orders made against them. The 1<sup>st</sup> defendant further deposed that they had agreed with the plaintiff to pay to him kshs. 200,000/= in exchange for subdivision and transfer of a portion of 0.5Ha out of the suit land and that consent was to be filed in this regard but the plaintiff's advocate declined to sign the consent. The plaintiff apparently brought up new issues of mesne profits and interest which were not subject of the agreement.

8. The plaintiff in a replying affidavit sworn on 22<sup>nd</sup> March 2017 in opposition to the defendants application admitted that the defendants had infact approached him to have the matter discussed with a view of having an amicable settlement by consent. The plaintiff deposed that indeed following negotiations he agreed to surrender ½ acre portion of land to the defendants for the consideration of kshs. 200,000/=. The plaintiff averred that the consent drawn by the defendants advocate was not in conformity with the agreement as it had purportedly indicated that the payment of kshs. 200,000/= was inclusive of all the costs of the suit and the mesne profits awarded by the court which was not the case. The matter was consequently left in abeyance until 14<sup>th</sup> March 2017 when it was to be mentioned by the court when the defendants and their counsel failed to attend and the court made orders allowing for the execution to proceed. The plaintiff sought for dismissal of the defendants' application to pave the way for the execution of the judgment of 30<sup>th</sup> September 2011.

9. There is no dispute that at the core of both the plaintiff and the defendants' application in this matter is the manner of executing or giving effect to the judgment of this court delivered on 30<sup>th</sup> September 2011.

10. The parties argued the defendants application by way of written submissions. The plaintiff/respondent filed his submissions on 17<sup>th</sup> August 2017 while the defendants/applicants filed their submissions on 18<sup>th</sup> October 2017. The gist of the defendants/applicants application is that they were prevented from attending court on 14<sup>th</sup> March 2017 by a genuine mistake or error on the part of their advocate who erroneously diarised the date for mention on 16<sup>th</sup> March 2017 instead of 14<sup>th</sup> March 2017. I am indeed persuaded that the defendants were prevented from attending the court for mention of their case on 14<sup>th</sup> March 2017 because of a genuine mistake and that their failure to attend was not deliberate. I have considered the defendants conduct both before the mention date and after the mention date and noted that the defendants and their counsel have consistently attended court on the dates scheduled. Their failure to attend court on 14<sup>th</sup> March 2017 in my view could not have been deliberate. The fact that counsel moved with speed to file the instant application on 17<sup>th</sup> March 2017 (as per the court fees receipt No. 7998287) is sufficient proof that their absence from court on 14<sup>th</sup> March 2017 would not have been intentional. In the premises, I would therefore in exercise of court's discretion set aside the ex parte orders made by the court on that date to the extent that the same allowed the execution of the order of the court made on 27<sup>th</sup> July 2016.

11. The defendants in the same application wishes the court to order the adoption of the agreement that the parties had reached for payment of kshs.200,000/= for ½ acre portion of **LR No. South Sakwa/Waware/1017** but which the plaintiff declined to endorse as he claimed it had not factored in all the issues. The plaintiff has argued that the defendants are bound by the judgment delivered on 30<sup>th</sup> September 2011 and there is no basis upon which to stay its execution. The issue does arise whether the court has any basis to invoke the provisions of Article 159(2)(c) of the Constitution to promote alternative dispute resolution as the defendants invite the court to do. The simple answer is that in a suit such as the present one where judgment has been given, the court has no latitude to enjoin the parties to explore ADR as the rights of the parties have finally been determined by the court. In such scenario it is only the parties who can agree on how to implement and/or execute the decree arising from the judgment. The parties in this case have engaged with a view to reach agreement in the implementation of the judgment. They have failed to agree which means the judgment remains as issued on 30<sup>th</sup> September 2011. The court cannot force a consent upon the parties and in as far as the court has entered judgment it has become *functus*

*officio*. The court can only properly entertain an application respecting the judgment if it relates either to review/variation or to set aside and/or execution of the judgment.

12. Having set aside my order of 14<sup>th</sup> March 2017 which had allowed for the execution of the default order in regard to the directions I had given on 27<sup>th</sup> July 2016, the issue remains what becomes of that order. The directions of 27<sup>th</sup> July 2016 were made on the basis of the plaintiff/decreed holder's Notice of Motion dated 22<sup>nd</sup> February 2016. That application, which for all practical purposes was in the nature of an application for execution as it sought to enforce the judgment, provoked the discussions between the parties aimed at having the matter amicably settled. Was the plaintiff's application dated 22<sup>nd</sup> February 2016 one for execution of the judgment of 30<sup>th</sup> September 2011 or one for punishment of the defendants for disobedience of a court order?

13. The plaintiff's application was predicated on Order 40 Rule 3 of the Civil Procedure Rules which envisages an injunction made either under the provisions of Order 40 Rule 1(a) or (b) and/or under Order 40 Rule 2(1). Under Order 40 Rule 1 it is envisaged that the order of injunction would be a temporary order pending the determination of the suit while under Order 40 Rule (2) the injunction would relate to restraining breach of contract or injury which may be any time from the commencement of the suit and either before or after judgment. It appears to me that Order 40 Rule 3 cannot be applied in execution proceedings after judgment has been entered and certainly not in circumstances such as in the present case where the defendants had been in active possession such that for injunction to issue their eviction would have been a pre-requisite. Where judgment has been entered a party ought to apply for execution of the judgment under Order 22 of the Civil Procedure Rules which provide for the execution of decrees and orders.

14. In the present suit, although the court in its judgment made a declaration that the plaintiff was the lawful owner of the suit property and held that the defendants had trespassed onto the suit land and further issued a permanent injunction against the defendants, there was no order for the defendants to vacate the suit premises, since the defendants were already in trespass. The court by its order of 27<sup>th</sup> July 2016 directed the defendants to vacate the suit land within 60 days failing which they were to be arrested and committed to civil jail for a period of 3 months.

15. Considering the plaintiff's application was essentially for execution after judgment, I am persuaded to review my order of 27<sup>th</sup> July 2016 and substitute with an order requiring the defendants to vacate and deliver vacant possession of land parcel **LR No. South Sakwa/Waware/ 1017** within 30 days from the date of this ruling and failing which an order for their forcible removal from the said land by way of eviction to issue on application by the plaintiff and thereafter the defendants be permanently restrained from reentering and/or trespassing on the suit land. The plaintiff consequent to the defendants' vacation and/or eviction would be well advised to secure his land by fencing. In that manner, the order for permanent injunction issued in the plaintiff's favour would have meaning since any further intrusion onto his land by the defendants would constitute criminal trespass and in such eventuality the law would take its course.

16. Taking into account the circumstances of this matter, I will make no order for costs of the applications by the plaintiff dated 22<sup>nd</sup> February 2016 and by the defendants dated 16<sup>th</sup> March 2017 which I have disposed by this ruling. The parties will bear their own costs.

**RULING DATED, SIGNED and DELIVERED at KISII this 26<sup>TH</sup> DAY of JANUARY, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Ayienda for Ochwangi for the plaintiff

N/A for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**