



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1270 OF 2002(OS)

ANNE WANJIRU MUOHO.....1ST PLAINTIFF

MARTIN KINYANJUI MUOHO.....2ND PLAINTIFF

PETER GATURA MUOHO.....3RD PLAINTIFF

(as administrators of the estate of the late Muoho Kinyanjui Muoho, deceased)

VERSUS

FRANCIS NDUMBI GATURA.....DEFENDANT/APPLICANT

RULING

What is before me for determination is the defendant's Notice of Motion application dated 18th September, 2015 in which the defendant has sought an order for the eviction of the plaintiffs from L.R No. Chania/Mataara/1584 (hereinafter referred to as "the suit property") pursuant to a decree that was issued herein on 16th March, 2015. In the alternative, the defendant has sought an order directing the OCPD Ngorongo, Chania Division to assist the sub-chief of Mataara sub-location in evicting the plaintiffs from the suit property. The defendant has also sought an order that all proceeds and bonuses from the tea leaves on the suit property under number MT32 Center 026 Ndunduini buying center be paid to him directly by the Kenya Tea Development Authority.

The grounds upon which the application is premised are set out in the defendant's supporting affidavit sworn on 18th September, 2015. The defendant's case is that the plaintiffs' claim over the suit property by adverse possession was dismissed by the court on 26th September, 2014 and that the plaintiffs have refused to vacate the suit property.

On 19th January, 2017, the court directed that the plaintiffs be served with the application directly. This was after the court was informed that the plaintiffs' advocate had passed on. The defendant filed affidavit of service sworn by Boniface Kyalo on 7th April, 2017 showing that the plaintiffs were duly served with the application. The plaintiffs did not file any response to the application.

The defendant filed written submissions dated 28th April, 2017 in support of the application. The defendant averred that the plaintiffs continued to occupy the suit property after the judgement that was delivered on 26th September, 2014 dismissing their claim over the property and attempts to evict them through the sub-chief Mataara sub-location and the chief Gatuamba location had been met with resistance and hostility. The defendant submitted that the plaintiffs had not appealed against the judgment of the court and that their occupation of the suit property was without any right. The defendant submitted that he had been denied the fruits of his judgment and that he was suffering financial loss since the plaintiffs continued to receive the proceeds of and bonuses from the tea planted on the suit property. The defendant cited Order 22 Rules 29(1), 82 and 83 of the Civil Procedure Rules and submitted that the plaintiffs' refusal to vacate the suit property and obstruction of attempts to evict them from the property was not justified and amounted to gross disobedience, arrogance and disregard of the court's judgment.

I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the written submissions and the provisions of law cited in support thereof. The issue arising for determination in the application before me is whether the court should order the eviction of the plaintiffs from the suit property in satisfaction of the courts decree issued herein on 16th March, 2015. The plaintiffs brought this suit against the defendant seeking to be registered as the owners of the suit property on the ground that they had acquired the same by way of adverse possession. The defendant did not file a counter-claim against the plaintiffs for their eviction from the suit property. The plaintiffs' suit was dismissed by the court on 26th September, 2014. At the trial of the suit, the issue of eviction of the plaintiffs from the suit property was not before the court and was therefore not considered by the court in its judgment. The decree of this court which forms the basis of the defendant's application does not provide for the eviction of the plaintiffs from the suit property.

I am of the view that the defendant's application has no basis. This court rendered its decision on all the issues that were raised before it. The

court is *functus officio* and cannot be called upon to reopen the proceedings for the purposes of granting orders that were not sought by either party. My brother Angote J. faced with similar application in the case of Raphael Mlewa Mkare & 515 others v Agricultural Development Corporation [2016] eKLR stated as follows:

“...Other than appealing against the decision of this court, the Defendant's only other option is to file a suit seeking for orders of eviction. This court cannot grant to the Applicant the orders of eviction by way of an Application, which is a mandatory injunction in nature, without a suit.”

I am entirely in agreement with this decision. All is not lost for the defendant. He can still bring a suit for the eviction of the plaintiffs from the suit property. As for the application dated 18th September, 2015, I find the same to be without merit. The application is dismissed with no order as to costs.

Delivered and Dated at Nairobi this 29th day of November 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiffs

Ms. Nyabenge h/b for Mr. Mureithi for the Defendants

Catherine Court Assistant