



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MAKUENI

ELC CASE NO. 11 OF 2017

MICHAEL MWANZIA KITAVI.....PLAINTIFF

-VERSUS-

LUKENYA UNIVERSITY TRUST

REGISTERED TRUSTEES.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

THE CABINET SECRETARY, MINISTRY OF LANDS

HOUSING & URBAN DEVELOPMENT.....3RD DEFENDANT

NATIONAL LAND COMMISSION.....4TH DEFENDANT

RULING

Introduction

1. The application for determination is dated 23/03/2018 and was filed by the 1st defendant. It is brought under Orders 22 Rule 29 (1) & 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A,1B & 3A of the Civil Procedure Act and all other enabling provisions of the Law. It seeks;

a) THAT the plaintiff/respondent do deliver vacant possession of suit parcel No. 118 Ngai Ndethya Settlement Scheme to the 1st defendant/applicant to whom it has been allotted and in default, the OCPD Mtito-Andei and the OCS Mtito-Andei police station do provide security for the forceful removal of the plaintiff/respondent, his servants, agents, employees and/or any other person claiming under him or through him there from so as to deliver vacant possession to the 1st defendant/applicant.

b) THAT the costs of this application be awarded to the 1st defendant/applicant.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Martha Mulwa, a trustee of the 1st defendant, sworn on 23/03/2018.

3. The principal grounds are that;

a) The honorable Court dismissed the plaintiff/respondent's claim for adverse possession *vide* it's ruling delivered on 12/02/2017.

b) Coupled with the aforesaid ruling, the plaintiff/respondent had long been served with an eviction Notice pursuant to Section 152E of the Land Act, Cap 280 Laws of Kenya and he has failed to deliver vacant possession of the suit land despite expiry of the statutory notice period.

c) There is no pending appeal or any other application before this honourable Court.

4. The application is opposed through the replying affidavit sworn by the plaintiff on 23/05/2018 where he contends *inter alia* that dismissal of the suit did not in any way give the 1st defendant a right of ownership. He also contends that the prayer sought is substantive and cannot be granted in an application. Further, he deposes that he has been in occupation of the suit land for over 30 years and had even lodged a complaint with the National Land Commission for historical injustice.

5. The application was canvassed orally.

6. Having considered the application, the supporting affidavit, the replying affidavit, the annexures as well as the oral submissions, it is my considered view that the following issues arise for determination;

a) Whether the firm of Muthoni G.M & Co. Advocates is properly on record for the plaintiff.

b) Whether the plaintiff should vacate the suit land.

Whether the firm of Muthoni G.M & Co. Advocates is properly on record for the plaintiff.

7. Mr. Kituku for the applicant submitted that Counsel for the plaintiff should have either sought the Court's leave to be record or file a consent executed by her and the outgoing Counsel. That according to Order 9 of the Civil Procedure Rules, one of the foregoing requirements should be complied with where a suit has been concluded by the Court.

8. In response, Ms. Muthoni for the plaintiff/respondent submitted that there was a letter filed by the plaintiff on 17/05/2018 and served on the former Counsel and therefore, the plaintiff had ceased using the services of that Counsel. Further, she submitted that there was an application filed by D.M Mutinda & Co. Advocates on 08/05/2018 expressing their willingness to cease acting for the plaintiff. That the application was served on the plaintiff and as such, there was express consent between the plaintiff and his former Counsel.

9. That she filed her notice of appointment on 24/05/2018, way after the plaintiff and his former Counsel had consented and there has never been an objection from the said Counsel.

10. Order 9 rule 9 provides as follows;

“Where there is change of advocate or where a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court-

a) Upon an application with notice to all the parties; or

b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

11. The application by Mr. Mutinda Advocate to cease representing the plaintiff was filed on 09/05/2018 and I have noted that it was never canvassed and as such, there is no order allowing or declining it. However, the plaintiff's letter dated 16/05/2018 and received by Mr. Mutinda's office on the same day unequivocally requests the said Counsel to stop acting for him. In my view, there was a meeting of the minds between the plaintiff and his former Counsel that an Advocate-client relationship should cease.

12. Further, it is my considered view that filing of the plaintiff's letter on 17/05/2018 constituted consent as envisaged in sub-rule (b) of Order 9 rule 9. The plaintiff was subsequently deemed to be acting in person and another Counsel could come on record for him by filing a notice of appointment. The upshot is that the firm of Muthoni G.M & Co. Advocates is properly on record.

Whether the plaintiff should vacate the suit land.

13. The Counsel for both parties basically reiterated the contents of their respective affidavits with regard to the issue of eviction.

14. It is clear from the material before Court that the applicant is an allottee of the suitland. Legally and as per the observations in several judicial pronouncements, a letter of allotment is not title to property. In **Stephen Mburu & 4 others –vs- Comat Merchants Ltd & Anor (2012) eKLR** Kimondo J. observed that an allotment letter is a transient and often conditional right or offer to take the property which has not been progressed to a formal title. [See *Wreck Motor Enterprises Vs. Commissioner of Lands and others* Nairobi Civil Appeal 71 of 1997 (unreported), *Jaj Super Power Cash & Carry Limited Vs Nairobi City Council and others* Nairobi, Civil Appeal 111 of 2002, Court of Appeal, (unreported).]

15. As rightly submitted by the plaintiff's Counsel, it is on record from the submissions of the Hon. Attorney General that the adjudication process of the suit land is not yet complete. As such, the suit land remains government land until titles are issued to individual land owners. In my view, this state of affairs is to be considered alongside the fact that the plaintiff has been living on the suit land. I am alive to the fact that the plaintiff's claim for adverse possession was not successful and it was largely because such a claim cannot lie against Government land. In my view, the longevity of the period that the plaintiff has been on the suit land cannot be wished away and I think it is only fair for parties to await the outcome of the adjudication process.

16. Arising from the above, my finding is that the application lacks merit and I hereby proceed to dismiss it with costs to the Plaintiff/Respondent.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 20TH DAY OF DECEMBER, 2018

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Mr. Hassan holding brief for Mr. DM Kiluku for the 1st Defendant

Mr. Ndolo holding brief for Mrs. Muthoni for the Plaintiff.

Mr. Kwemboi, Court Assistant.

MBOGO C.G, JUDGE

20/12/2018