



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELCA NO. 58 OF 2014**

**(Formerly NYERI HCCA NO. 3 OF 2013)**

**GRACE WANJIKU NDIRANGU.....APPELLANT**

**-VERSUS-**

**NDIRANGU JUMA KERU.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By notice of motion dated **13th July, 2012** the respondent herein moved the lower court to wit Nyeri Resident Magistrate's court for an order to compel the respondent to vacate the portion of the parcel of land known as **L.R Aguthi/Gaki/603** (suit property) which she was occupying so that he could take possession of the entire of the suit property.
2. The application is premised on the grounds that the case was concluded on 14th October, 2004 when the land disputes Tribunal's award was adopted as judgment of the court. The respondent contended that the appellant who is the wife of the plaintiff/respondent had refused/failed to move out of the suit property hence denying the applicant an opportunity to take full possession of the suit property.
3. In support of the application the applicant filed the affidavit he swore on **13th July, 2013** reiterating the grounds on the face of the application.
4. The respondent opposed the application on the grounds that it was misconceived, incompetent, untenable, bad in law, frivolous, vexatious, fatally defective, without merit and an abuse of the process of the court.
5. When the application came up for hearing the trial magistrate directed that it be disposed of by way of written submissions.
6. Counsel for the applicant filed submissions but the respondent's advocate addressed the court verbally on the propriety or otherwise of the application. In this regard, he pointed out that the case against the appellant's husband abated after the appellant's husband passed on without being substituted as by law required. He further pointed out that the appellant was not a party to the case in which the orders sought to be executed were issued.
7. In a rejoinder, counsel for the applicant submitted that under sections of the law, the application as brought, the respondent did not need to be a party to the suit before the orders sought could issue against her.
8. In his ruling delivered on 18th January, 2013 the trial magistrate observed:

**“...when the matter came for mention on 14.12.12 to confirm if parties had filed their written submissions, the applicant had their submissions on record but counsel for the respondent sought to address the court and was allowed to do so. In his address to court, counsel for the respondent contended that he saw no point in filing written submissions on the application because as far as he knew, this suit had abated and the record, more specifically orders of 26.05.09 bore him out hence the current application is a non starter. He stated that the then Land Dispute Tribunal made an award against his client who is the husband of the respondent in this application. But since the husband to the respondent died in 2000 and was never substituted within the stipulated one year the matter abated. He added that the applicant's application dated 6.10.05 seeking to have the respondent added as a party to the suit was dismissed on 21.08.06.**

**In a reply which was essentially a recap of the issues set out on their filed written submissions, the applicant stated that the**

application is brought under order 22 rules 82 and 83 and what the applicant is seeking is to be put in possession of land which the respondent has refused to vacate. That the award which they seek to enforce was adopted as a judgment of the court and still subsists.

In a further reply, counsel for the respondent stated that the said judgment was entered in terms of the award on the 16.09.04 while the plaintiff passed on on 27.03.00 hence matter abated way back in 2001. He wondered what would happen to the orders of the court pronouncing the suit as having abated.

Having pored over the record and the positions of both parties, this court finds that the award of the tribunal was delivered in open court in the presence of both parties on 15.01.04. the demise of the plaintiff was first brought to the attention of the court at the hearing of the application dated 25.03.04 when the then counsel for the respondent who is still on record for the respondent in this application sought to block the adoption of the award as judgment of the court on the basis that the suit had abated. In its ruling on the said application, the court declined to declare the suit as having abated and proceeded to confirm the award as a judgment of the court. counsel for the respondent made reference to the orders of 21.08.06 and 26.05.09. In the ruling of 21.08.06 the court sustained a preliminary objection by the respondent to an application to have the respondent herein added in the suit as a defendant. In the ruling of the 26.09.09 it is not clear what the court was being called upon to rule on but what is clear is that the court was not called upon to determine whether there was a valid decree which could be executed on account of the suit having abated. The same obtains with regard to the ruling of 21.08.06 where the court was only called upon to consider if the respondent could be added as a party and was determined on the facts presented to court.

In view of the provisions of law under which the current application was brought under, this court is of the view that the award and decree in this matter has legal effect against the said Grace Wanjiku Ndirangu. The applicant became entitled to the land as at the time the award of the tribunal was confirmed as an order of the court. He has exhibited a lot of interest and determination to be put in possession while the respondent has sought to hang on a technicality to defeat the course of justice. In sum the court agrees with the applicant that it matters not whether the plaintiff is deceased. Actually Rule 10 of Order 24 exempts this kind of proceedings from the strictures of Rule 3 of Order 24. The respondent belongs to the category envisaged under Order 22 Rule 84 of the Civil Procedure Rules. The applicant's notice of motion dated 13.07.12 is allowed in terms of prayer one (1). The respondent, Grace Wanjiku Ndirangu is hereby ordered to hand over the portion she is using within 30 days from today's date, in default she is committed to prison for a period of 30 days."

9. Aggrieved by the above determination, the respondent appealed to this court on eight grounds which can be summarised into two (2) that is to say the learned trial magistrate denied her a hearing thus occasioning a miscarriage of justice; and that the learned trial magistrate erred by failing to find that the respondent was not a party to the suit.

10. Maintaining that the decision of the trial magistrate occasioned a miscarriage of justice, the respondent urges this court to set aside the decision of the lower court and substitute it with an order striking out the applicant's application with costs to her.

11. This being a first appeal, this court must reconsider the evidence adduced before the lower court, re-evaluate it and draw its own conclusions bearing in mind that it neither saw nor heard the witness testify and make due allowance in that respect. See **Selle V Associated Motor Boat Company Ltd. (1968) EA 123.**

12. As pointed herein above, the respondent participated in the proceedings that are the subject matter of the impugned orders by filing grounds of opposition. The advocates to the parties agreed to dispose off the application by way of written submissions.

13. The court record shows that when the matter was called for mention to confirm filing of submissions the respondent's counsel informed the court that he did not need to file submissions because firstly the suit on which the application was premised had abated and secondly the respondent was not a party to the suit.

14. Whereas the respondent's counsel argues that he had raised a preliminary objection to the application there is no evidence of that fact.

15. The court record shows that the trial magistrate in making its ruling, took into account the issues raised by the respondent and found them to be inapplicable to the application before him.

16. In view of the foregoing, I am unable to agree with the respondent's contention that she was condemned unheard.

17. On whether the order sought could issue when the suit on which they are premised had abated, being of the view that abatement of the suit had the effect of restoring the status which obtained before the suit was filed, I find and hold that the only remedy that the applicant could pursue under the abated suit is that of costs as provided under **Order 24 Rule 3(2)** of the Civil Procedure Rules (CPR).

18. My view of **Order 24 Rule 10** of the CPR which states that nothing in **Rule 3, 4, and 7** shall apply to proceedings in execution of a decree or order, presupposes that orders were obtained against the deceased before the suit abated and that the holder of the decree or order seeks to execute the order or decree against the estate of the deceased person.

19. In the circumstances of this case, the decree or order sought to be executed were issued long after the suit had abated.

20. Abatement of a suit being a matter of law, the trial court ought to have taken judicial notice of it. Since a suit abates by operation of law, the trial magistrate did not need evidence of an order declaring it as abated. All what was required is evidence of death of the plaintiff and evidence of the fact that the plaintiff was not substituted within the time stipulated in law.

21. Whilst in the circumstances of this case the order of the court adopting the award of the Tribunal had not been set aside, in view of the fact that the award was adopted in a suit that was none existent, I doubt whether the applicant could execute it against the appellant when she had not been made a party to the suit.

22. As pointed out above, **Order 24 Rule 10** cannot be relied on to execute orders that had been issued pursuant to an error of law (there was a mistake on the part of the court which issued the order. The court thought that the suit existed when in actual fact, the suit had by operation of law abated).

23. The trial court also premised its decision on **Order 22 Rule 82** of the CPR which allows an holder of a decree for possession of immovable property who is resisted or obstructed by any person in obtaining possession of the property to make an application to the court complaining of such resistance or obstruction.

24. The question to answer is whether the application that led to issuance of the impugned orders met the threshold set in **Order 22 Rule 82** of the CPR.

25. My answer to that question is that it did not. This is because an application under that rule can only be brought by a person with a decree for possession of immovable property or the purchaser of any such property sold in execution of a decree who is resisted or obstructed by any person in obtaining possession.

26. A review of the decree issued in this matter shows that it was not a decree for possession. In this regard see the order issued on 6th September, 2004 which is as follows:

**“Order**

**Prayer for**

**1. that the award read in court from D.O Gichira be made the judgment of the court.**

**2. that the costs of this application be provided for.**

**This application coming for judgment on 6/9/04 before the resident magistrate court M/S Otieno R.A.A in presence of counsel for the plaintiff and in presence of defendant in person, it is hereby ordered:**

**a). the award read in court from D.O Gichira be made the judgment of the court.**

**b). that the cost of the application be provided for.”**

27. The award that was adopted as a judgment of the court was as follows:

**“This tribunal, after considering all facts and information given by both parties decided that the shamba in dispute belongs to Kurii who is the registered owner. It also decides that Keru (defendant) compensates Mr. Kurii (defendant) for his coffee 100 plants. Mr. Keru has to pay the costs of the suit to Kurii.”**

28. Although the Tribunal found the applicant to have been the owner of the suit property, it clearly did not order that he be given possession. Although possession is a necessary incidence of ownership of immovable property, given the fact that possession of land belonging to another is an overriding interest to ownership, the trial court ought to have satisfied itself that the appellant had no legally recognisable interest in the suit property before issuing the orders against her.

29. Such a course is inescapable from a reading of **Order 22 Rule 82 Sub Rule 2** with **Rule 84** and **86** of the CPR. By dint of the said provisions of the law, the trial magistrate ought to have satisfied herself that the appellant had no justifiable claim to the suit property before issuing any adverse orders to her.

30. A review of the ruling of the court shows that the trial magistrate did not carry out the investigation contemplated under the said provisions of the law but merely proceeded on the basis that there existed a decree of the court that the applicant had been unable to execute because of what he termed legal technicalities.

31. In the absence of any evidence that the appellant had no *bona fide* claim to the suit property, I find and hold that the decision of the trial court was unjustified.

32. The upshot of the foregoing is that the appellant’s appeal has merit and is allowed as prayed.

**Dated, signed and delivered in open court at Nyeri this 9th day of March , 2017.**

**L. N. WAITHAKA**

**JUDGE**

In the presence of:

Mr. Muchiri wa Gathoni h/b for Mr. Wahome for the appellant

Ms Mwangi h/b for Mr. Kiminda for the respondent

Court clerk - Esther