



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
ENVIRONMENT AND LAND COURT
MISC. APPLICATION NO. 16 OF 2017

WAMBUI GIKWAAPPLICANT

VERSUS

PAUL KIMANI MURABA.....RESPONDENT

RULING

The application before this court is dated the 13th January, 2017 brought pursuant to Section, 3 and 3A of the Civil Procedure Act and all the enabling provisions of the law.

The Applicant is seeking for the following prayers:

1. That this application be certified urgent and the same be heard ex parte in the first instance.
2. That the eviction orders do issue against the respondent herein one Paul Kimani Muraba and all his agents from the applicant's land parcel LR. Ngong/Ngong/ 6138 registered in the name of the applicant as Wambui Gikwa.
3. That the OCS, OCPD and or County Commissioner Ngong be authorised to enforce compliance of the orders of this court and maintain peace upon eviction.
4. That costs of the applicant be borne by the respondent.
5. Any other further orders this honourable court may deem fit and just to grant.

The application is premised on the following grounds:

- a. That the land belongs to applicant Wambui Gikwa.
- b. That the respondent had filed a suit claiming adverse possession which suit upon appeal in appeal no. 161 of 2013 was dismissed with costs on the 2nd December, 2016.
- c. That the respondent lost his claim and his suit was dismissed with costs and the judgement is annexed.
- d. That the respondent despite being informed of the judgement has refused and or failed to move out of the applicants land

- e. That it is only fair and just that the eviction order be issued and the OCS and OCPD Ngong Police Station be authorized to enforce compliance and keep peace.
- f. That the respondent has violated the constitutional rights of the applicant to enjoy his property for a long period until this court gave judgement in favour of the applicant.
- g. That we pray for enforcement of the orders of this court by way of eviction.

The application is supported by the affidavit of WAMBUI GIKWA who is the applicant herein. She avers that she is the registered proprietor of LR. No. NGONG/NGONG/ 6138 and that the respondent trespassed on her land and filed a suit against her vide HCCC No. 223 of 2008 claiming adverse possession. The suit was heard in the High Court and judgment granted in the respondent's favour, but that the Court of Appeal overruled this. She states that the land belongs to her but the respondent and his family have refused to move out despite several requests for them to do so. She further states that she has a right to enjoy her property and that the respondent has violated her constitutional right to own property through his acts of continuous trespass. The respondent has declined to obey a court order and that is the reason she is seeking orders of eviction and praying that the OCS Ngong Police Station and Area Chief do supervise eviction of the respondent from the suit land.

The respondent opposed the application and filed a replying affidavit sworn by PAUL KIMANI MURABA where he averred that the application is bad in law, misconceived and an abuse of the court process. He claims that the applicant had already filed a suit Nairobi ELC No 713 of 2011 seeking same orders sought in the instant application. He avers that the suit is time barred and the same has been filed in contravention of the Limitations of Actions Act. Further that the Court has no jurisdiction to enforce the judgement of the Court of Appeal and to hear the dispute under the provisions under which the application is brought. He states that his family has resided on the suit land since 1982 and put up permanent structures, fences and planted trees and he hence has a right over ownership. He further stated that his father, mother, and sister were all buried on the suit land and he never sought the applicant's permission on anyone else to move into the suit land or carry developments on the same. Further that the defendant has never been in occupation of the land. He sought for the application to be dismissed with costs.

Both parties filed written submissions and highlighted the same.

Mr Kiambaa for the applicant argued that his application was merited and that the applicant has a right to seek orders to evict the respondent from the suit land as the said respondent is merely a trespasser. Further, that the Court of Appeal already granted orders stating that the respondent was not an adverse possessor over the suit parcel; and that the said suit land belonged to the applicant. He argued that his application sought to execute the judgement of the Court of Appeal. Further that the application has been filed and served without undue delay.

Mr. Odongo for the respondent opposed the application and stated that the application is bad in law, incompetent and misconceived because it has been brought before the court without a substantive suit. He averred that they had even filed a Notice of Preliminary Objection dated 2nd March 2017 and filed on 6th March, 2017 where they sought to raise a preliminary objection on the grounds that application is bad in law misconceived and incompetent. Further that the court did not have jurisdiction to enforce orders of the court of appeal. The application is an abuse of the court process. Further that section 19 of the Civil Procedure Rules was very clear on the procedure of institution of a suit. He stated that Section 2 of the Civil Procedure Rules defines rules and Order 3 rule 1 (1) states how suits should be instituted.

Issues and determination

Upon perusing the pleadings filed herein and hearing arguments from counsels for the Applicant and Respondent, the court finds that the key issue for determination is whether this suit, as it is filed is properly before the court.

Section 19 of the Civil Procedure Act provides the procedure on how suits should be instituted and states as follows:

' Every suit shall be instituted in such manner as may be prescribed by the rules'.

Order 3 Rule 1 (1) of the Civil Procedure Rules further stipulates that

' Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.'

Further, for an action for eviction to succeed, the Applicant should adhere to the provisions of Section 152 (A) to 152 (H) of the Land Act.

In the instant suit, the court notes that the suit was is a miscellaneous application. There is no plaint. Eviction orders sought are serious orders, and the suit should have been instituted properly as per the Civil Procedures Rules and the Land Act. Further, the court notes that there was already a suit filed by the applicant Nairobi HC ELC No. 713 of 2011 between the applicant and the respondent, in which the applicant was seeking eviction orders. However, the applicant did not divulge to court the status of the suit.

It is against the foregoing that the court finds that the current application seeking orders of eviction is not merited and is bad in law, misconceived and an abuse of the court process. The Court declines to grant the eviction orders sought and dismisses this miscellaneous cause with costs to the respondent.

DATED AND DELIVERED AT KAJIADO THIS 13TH DAY OF JUNE 2017

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

No attendance for defendants

Manu holding brief for Nyangau for applicant