



REPUBLIC OF KENYA



KENYA LAW
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**Kangethe & another v Mwaura (Environment & Land Case
134 of 2018) [2024] KEELC 1102 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1102 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 134 OF 2018**

JG KEMEI, J

FEBRUARY 28, 2024

BETWEEN

DUNCAN MUKABI KANGETHE 1ST PLAINTIFF

FRASHIAH WANGUI MUIRURI 2ND PLAINTIFF

AND

JOSEPH NDUNGU MWAURA DEFENDANT

RULING

1. The subject of this Ruling is the Defendant/Applicant's Notice of Motion dated 1/9/2022 expressed under Sections 3 Trespass Act, Section 155 Land Act and Order 51 Rule 1 Civil Procedure Rules for Orders THAT;
 - a. Spent.
 - b. This Honorable Court be pleased to grant orders compelling the Respondent, by themselves, employees, agents and/other persons acting under their instigation or on his behalf to forthwith stop and further physical occupation and use.
 - c. The Respondent be ordered to forthwith give a vacant possession of land parcel Title No. Lari/ township/56 forthwith.
 - d. In default this Honorable Court to grant orders for a forceful eviction with police implementation.
 - e. Costs of this Application be met by the Respondents.
2. The Application is based on the grounds thereat as read with the Supporting Affidavit of even date of Joseph Ndungu Mwaura, the Applicant. The gist of the Application is that the Respondents have disregarded the Court Judgment delivered on 29/4/2021 and refused to vacate land Title No. Lari/



Township/56 hereinafter referred to as the suit land. In the Supporting Affidavit, copies of the suit land title deed, copy of Judgment delivered herein and demand letter to the Respondents are annexed as JNM1, JNM2 and JNM3 respectively. The Applicant urges the Court to allow the Application as drawn.

3. The Plaintiffs/Respondents filed their Grounds of Opposition dated 19/10/2022 on grounds; the Court is functus officio having dismissed their suit and the Defendant's counterclaim on 29/4/2021; the Defendant is raising a new cause of action distinct from what was litigated; the eviction orders sought cannot ensue as their no Judgment to that effect in favor of the Defendant and that the Application is an abuse of Court process and defective for want of Court leave for the Applicant to act in person.
4. On 5/9/2022 directions were taken and parties agreed to canvass the Application by way of written submissions. At the time of writing this Ruling, only the Applicant's submissions were on record.
5. The Applicant filed two sets of submissions dated 16/9/2022 and 10/7/2023. He submitted that it is not disputed that he owns the suit land as confirmed by this Court on 1/9/2022 (sic). That the respondents are trespassers negatively affecting his proprietorship rights hence the need for this Court to intervene and restore his ownership. That as a result of this Court Judgment dismissing the Plaintiffs' suit the Applicant automatically regained his ownership and as such the Application for eviction is primarily execution of the said Judgment. That the said Judgment is valid there being no appeal against it or stay of execution.
6. The germane issue for determination is whether the Application is merited.
7. It is not contested that Judgment in this case was delivered on 29/4/2021 by this Court (Hon. Gacheru J). At that time, the record shows that the Applicant was ably represented by Ms Mwaura Shairi & Co. Advocates who are no longer representing him. The Plaintiffs objected to the Defendant's move to act in person without leave of this Court.
8. The legal provisions for leave to act in person post judgment is enshrined in Order 9 Rule 9 Civil Procedure Rules that;

“9. Change to be effected by order of Court or consent of parties [Order 9, rule 9.]

When there is a change of advocate, or when 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 a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

9. There is no evidence of compliance with the above mandatory provision by the Applicant to act in person. This Court has had occasion to pronounce itself on this issue notably in the case of Gitau Vs. Githinji & [2022] KEELC 152 (KLR). The Respondents' objection is therefore valid and is enough to dispose the instant Application. However, the Court will consider the merits of the Application.
10. The Application in the main seeks eviction of the Respondents from the suit land on the strength of the Judgment delivered herein. According to the Applicant, the Court having dismissed the respondents' suit, it confirmed his ownership of the suit land prompting the filing the instant Application. This



position is not correct if the findings in the Judgment especially at pages 12 - 13 are anything to go by. The Court held;

“While the Court has held that the Plaintiffs cannot claim adverse possession, the Court has not made a finding on ownership of the suit property and therefore it cannot hold that the Plaintiffs are in wrongful possession and thereby grant mesne profits. This is further reinforced by the submissions by the Defendant/Respondent who submitted that the facts in dispute are that the suit property was allocated to one Peter Waweru on 5th August, 1993, who is the party that sold to the Plaintiffs and further that on 2nd June 2010, Rose Waithira Makimei who sold the suit property to was registered as a Lessee. In essence the Defendant is acknowledging that there is need to probe the root of both parties’ titles which was an issue that was not before this Court.

Consequently, the Court finds and holds that at this juncture, the Defendant is not entitled to the orders sought in his CC as the issue of ownership of the suit property as between the parties herein was not an issue before this Court and the Court having made no finding in the same, then it cannot grant the Orders sought.” [Emphasis added]

11. The findings of the Court are self-explanatory and need no repetition. The instant Application is contrary to the determinations made above and the Judgment having not been appealed or reviewed or vacated by a Court of competent jurisdiction, the Application is bereft of merit.
12. The Application is dismissed with costs to the Respondents.
13. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 29TH DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Wachira for 1st and 2nd Plaintiffs

Defendant – Acting in person

Court Assistants – Phyllis/Oliver

