



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 104 OF 1999

BEGI BOKURO.....1ST PLAINTIFF

MORACHA BOKURO.....1ST PLAINTIFF

ASKA MOGOI OBAGA.....1ST PLAINTIFF

VERSUS

MORANGA ONCHWERI.....DEFENDANT

RULING

1. On 14th November 2000 **Wambilyangah, J.** (as he then was) struck out the defence filed by the defendant and entered judgment for the plaintiff as prayed in the plaint and awarded the costs of the suit to the plaintiff. A decree issued by the court arising from the said judgment on 26th November 2000 was partially executed and the plaintiffs' decree/holders were registered as the proprietors of land parcel **Nyaribari Masaba/ Kiamokama/316** (the suit property) on 23rd January 2003 following the cancellation of the defendant's deceased father as the registered owner.

2. The plaintiffs application dated 2nd June 2005 seeking the following orders was allowed by the court on 23rd February 2010:-

(a) That this honourable court be pleased to order demolition of structures on land parcel No. Nyaribari Masaba/Kiamokama/316 to pave way for eviction of the defendant from the suit land.

(b) That this honourable court be pleased to dismiss application dated 29th August 2005 for want of prosecution.

(c) That costs of this application be provided for.

3. **Musinga, J.** (as he then was) on 23rd February 2010 allowed the application having been satisfied the same was served upon the defendant and was not opposed. The defendant on 24th February, 2010 applied to set aside the order made by the court on 23rd February 2010 against the defendant and/or to have the order varied. **Lady Justice Sitati** heard the defendant's application dated 24th February 2010 and by a considered ruling delivered on 24th March 2011 dismissed the application with costs to the plaintiffs. The record shows that the defendant filed a Notice of Appeal dated 5th April 2011 signifying his intention to appeal against the decision of **Sitati, J.** delivered on 24th March 2011 to the Court of Appeal but there is

no other indication that the appeal was pursued and/or progressed.

4. I have given the above background to contextualize the plaintiff's application dated 3rd November 2015 which is the subject of this ruling. The application is expressed to be brought under Order 50 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act. The application was made ex parte and seeks the following orders:

(a) This application be certified as urgent and be heard ex parte.

(b) The honourable court do issue an order directing the Keroka Officer in charge of station (OCS) to provide security to enforce decree issued on 20th November 2000

(c) The honourable court be pleased to certify the copy of the decree issued on 20th November 2000 as a true copy of the original.

(d) The costs of the application be in the cause.

5. When the application was listed before me for hearing on 29th June 2016 the 1st plaintiff/applicant was present as well as the defendant. The defendant stated he had not been served with the application and that he had only been served with a hearing notice. I directed that the defendant be served with the application and granted the defendant leave to file a response within 21 days. The application was refixed for hearing on 6th October, 2016 when again the 1st plaintiff and the defendant appeared before me. In spite of the defendant having been served with the application and being afforded an opportunity to respond, he had filed no response and hence the plaintiff's application remained unopposed.

6. The court record is clear that a judgment was entered in favour of the plaintiffs on 14th November 2000 and a decree issued on 26th November 2000. The defendant's application dated 29th August 2005 to set aside and/or vary the judgment was dismissed by **Musinga, J.** on 23rd February 2010 and the defendant's application dated 24th February 2010 seeking to set aside the orders granted by **Musinga, J.** as aforesaid was dismissed by **Sitati, J.** on 4th March, 2011.

7. At the present moment thereof the judgment and decree issued in this court in favour of the plaintiff remain valid and there has been partial execution of the same. An order of eviction was issued by the court on 24th February 2010 and it is this eviction order that the plaintiff seeks enforcement of. The order for the eviction of the defendant has not been set aside and/or varied by the court. The plaintiffs are entitled to enjoy the fruits of their judgment and there is no basis upon which this court can deny them a right that they have become entitled to through the process of the court. The defendant may feel that the judicial process may have been applied to his prejudice since the judgment that was entered against him was ex parte and his effort to have the same set aside was unsuccessful and hence essentially he has never been heard on the merits of the suit. That is what justice is all about such that once a determination is made by the court in exercise of its judicial function then the parties have to live and abide with the same notwithstanding the harsh reality to either of the parties.

8. In the premises I grant the plaintiff's application dated 3rd November, 2015. The costs of the application shall be in the cause.

Ruling dated, signed and delivered at Kisii this 28th day of October, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the 1st, 2nd and 3rd plaintiffs

..... for the defendant

..... Court Assistant

J. M. MUTUNGI

JUDGE