



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC NO. 700 OF 2014**

**NDWIGA WAINAINA & 11 OTHERS ..... PLAINTIFF/APPLICANT**

**VERSUS**

**EMBU COUNTY COUNCIL ..... DEFENDANT/RESPONDENT**

**RULING**

1. In a bid to execute the order of this court (ELC Nyeri) granted on 18th day of July, 2014 one of the plaintiffs, Ndwiga Wainaina, brought the notice of motion dated **9th December, 2014** seeking the following orders:-

a) **An order of eviction against the respondents and all persons in occupation of LRGaturi/Nembure/3072 (hereinafter referred to as the suit property) to facilitate the order issued on 18th July, 2014;**

b) **That the officer in charge of Manyatta Police Station to provide security and supervision at the time of execution of the eviction;**

c) **Cost of the application be met by the respondents.**

2. The application is premised on the ground that the respondents, their agents and/or servants though served with the order sought to be executed, have refused, failed and/or ignored to vacate the suit property.

3. The application is supported by the affidavit of the applicant in which the grounds thereon are reiterated. Maintaining that the respondents have refused, failed and/or ignored to obey the order hereto, the applicant argues that it is meet and just that the orders sought be granted in order to enable him take possession of the suit property.

4. In reply to the issues raised in the application, one of the parties to the suit, Victor Alloy Njagi, filed the grounds of opposition dated **16th April, 2015** opposing the application on the grounds that an eviction order cannot be issued in a summary procedure; that the order sought to be executed is vague as it does not disclose who are the so called "all persons in occupation"; that the order does not direct that the respondent, Victor Alloys Njagi, be evicted from the suit property and that no lawful order invoking the authority of the Kenya Police can be granted because neither the OCS Manyatta police station nor the Honourable Attorney General is a party to the suit. Further, that the suit property is the subject matter of ELC CC No.135 of 2014 where the respondent claims ownership of the suit property by adverse possession. It is argued that it would be greatly prejudicial to the respondent if the orders sought are

granted.

**Analysis and determination:-**

5. It is not in dispute that this court (read the Environment and Land Court Nyeri) issued an order in the following terms:-

**“a) the caution lodged against Land Reference Gaturi/Nembure/3072 by Victor Njagi and Njiru Wainaina be and is hereby removed.**

**b) Embu County Council do effect transfer to the Wainaina family as per the award dated April, 2013 and adopted as judgment in HC. OC No. 201 of 2001- Nyeri;**

**c) The persons utilizing Land Reference Gaturi/Nembure/3072 do give vacant possession to the plaintiff forth with;**

**d) The Land Registrar Embu be and is hereby estoped from registering any caution or restriction until the orders herein are effected.**

**e) Each party to bear its own costs.”**

6. The applicant’s contention that the application was served on the respondent’s and in particular the respondent herein is not denied.

7. From the grounds of opposition filed, it appears that the respondent (read Victor Alloys Njagi) was not satisfied with the order of the court. That fact can be inferred from his conduct of filing a fresh suit claiming that he is entitled to the suit property by adverse possession.

8. Based on the fact that there is a suit pending over ownership of the suit property, the respondent contends that he will be prejudiced if the orders sought are granted.

9. A review of the ruling on which the orders sought to be executed are premised, reveals that most of the issues raised in the respondent’s grounds of opposition were raised in the proceedings that led to issuance of the impugned orders and a determination in respect thereof made. Those issues include the contention that enforcement of the orders will be tantamount to condemning the respondents unheard. To that extent, such issues are *res judicata*. In this regard see the ruling of this court (Environment and Land Court) in ELC CC NO. 201 of 2000 where the judge observed:-

**“...Victor Alloy Njagi, was given an opportunity to be heard by this court at the hearing of the suit and the application but chose to rely on technicalities and therefore cannot argue that the matter can only be resolved through full hearing, where he can give evidence. He already did give evidence before tribunal and a decision made. I do not find substance in the submissions of Victor Alloys Njagi and hold that litigation in this matter must come to an end and do order that the caution lodged against Land Reference Gaturi/Nembure/3072 by Victor Njagi and Njiru Wainaina be and is hereby removed. The Embu County Government do effect transfer to the Wainaina family as per the award dated April, 2013 and adopted as judgment in Nyeri HC. OC No. 201 of 2001. The persons utilizing Land Reference Gaturi/Nembure/3072 do give vacant possession to the plaintiff forth with. The Land Registrar Embu is hereby restrained from registering any caution or restriction unless the court orders so.”**

10. With regard to the allegation that owing to the suit filed by the respondent the order sought cannot issue or will prejudice the respondent, my view of that matter and without prejudice to the respondent’s pending suit, is that by filing a fresh suit as opposed to appealing against the decision of the court, the respondent engaged in a process that is tantamount to abuse of the court process. That being the case and there being no order from that suit staying the execution of the orders issued in this suit, nothing prevents this court from issuing the orders sought if persuaded a case has been made up for doing so.

11. Concerning the contention that the order directed at the Police cannot issue because neither the Police nor the Attorney General is a party to the suit, I find that contention to have no basis in law because the order sought does not require representation from the Police or Attorney General before it can be granted. All what is required before the order is granted is that the court is satisfied that the order is necessary to ensure law and order during the execution proceedings.

12. Is the order sought to be enforced vague?

My answer to this question is in the negative. The order identifies the persons in favour of whom it was issued. Any person claiming interest in the suit property, unless covered in the award dated 23rd April, 2013 and adopted as judgment in HC. OC. NO. 201 of 2001-Nyeri, is to be evicted.

13. There being evidence that the order sought to be executed was served on the respondents, who refused to heed its terms and there being no evidence that the order was either stayed or appealed from, I find and hold that the applicant has made a case for being granted the orders sought.

14. Consequently, I allow the application as prayed.

**Dated, signed and delivered at Nyeri this 5th day of June, 2015.**

**L N WAITHAKA**

**JUDGE**

**Coram:**

Mr. Kingori h/b Ms. Wangari for plaintiffs/applicants

Mr. Ombongi h/b for Mr. Njeru for defendant/respondents

Court assistant - Lydia