



**REPUBLIC OF KENYA**

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

**AT NYERI**

**ELC NO. 149 OF 2013**

**MARY WAMUYU MWANGI ..... PLAINTIFF**

**VERSUS**

**JOSEPH KAHARA THINWA ..... DEFENDANT**

**RULING**

**Introduction**

1. On 16th April, 2015 this court entered judgment in favour of the plaintiff herein in terms of prayer (1) of the plaint which instituted the suit. In that prayer the plaintiff sought judgment against the defendant for:-A declaration that the defendant is unlawfully entering and occupying part of her land to wit, Naromoru/Naromoru/Block1/51 and a permanent injunction to restrain the defendant from entering, occupying the said parcel of land and directing the defendant to vacate the suit property forthwith.
2. Following delivery of the said judgment, the defendant brought the Notice of Motion dated **6th May, 2015**, *inter alia*, praying that he be granted at least (3) years to vacate the suit property (LR NO. Naromoru/Naromoru/Block1/51).
3. The application is premised on the grounds that the defendant requires reasonable time to look for alternative land and that none of the parties to the dispute will be prejudiced if the application is allowed.
4. In the affidavit the defendant swore in support of the application, the defendant has *inter alia*, deposed that he entered the suit property in 1979 and that he has since effected massive development in the suit property including building a five (5) roomed house where he lives with his family; that he has buried his relatives thereon and that he needs to establish another home with all the amenities he has erected in the suit property before he vacates the same. Further that he needs to look for the right mechanism and procedures as to how to re-locate the remains of his relatives interred in the suit property.
5. In reply and opposition to the application, the plaintiff filed a replying affidavit in which she deposes that contrary to the defendant's allegation that he has no other land to relocate to, the defendant has land adjacent to the suit property; that the defendant has since January, 2014 been aware that he was wrongfully occupying her land but took no steps to move out of the suit property and that the defendant had informed the court that he was prepared to vacate the suit property.
6. With regard to the developments effected on the suit property, the plaintiff contends that they are semi permanent and as such do not require such a long time to remove.

7. Concerning the contention that she will not suffer any prejudice if the application is allowed, the plaintiff points out that she has been denied use of her parcel of land for over 36 years and for that reason she has already suffered prejudice and is still suffering prejudice.

8. Arguing that this court became functus officio upon delivery of the judgment hereto, the plaintiff terms the application misconceived.

9. When the matter came up for hearing, counsel for the applicant **Mr. Ombongi**, reiterated the averments contained in the affidavit sworn in support of the application and urged the court to allow the application as prayed.

10. Based on the provisions of **Order 21 Rule 3** of the Civil procedure rules which provides that “judgment once signed shall not be altered or added to save as provided by **Section 99** of the Act or review, counsel for the plaintiff **Mr. Wachira**, submitted that the defendant seeks to interfere with the judgment issued in favour of the plaintiff, something the court cannot do.

11. Concerning the contention that the defendant has no other parcel of land to go to, he pointed out that the applicant is the owner of LR. Naromoru/Naromoru/52, adjacent to the plaintiff’s parcel of land and submitted that given the fact that the defendant has land near the suit property, relocation is unlikely to be problematic. He further pointed out that the defendant was as early as 2014 notified that the parcel of land he was occupying was not his but did nothing to show his readiness to vacate the suit property.

12. As for the developments effected on the suit property, he pointed out that they are semi permanent and submitted that they do not require a lot of time to remove.

13. On whether the respondent will suffer prejudice if the orders sought are granted, he reiterated that the plaintiff has been kept out of use of the suit property for over 35 years and therefore to allow the defendant to continue using the suit property will be prejudicial to her.

14. In a rejoinder, Mr. Ombongi explained that the defendant is not asking the court to change or alter the judgment but to allow the applicant time to vacate. He pointed out that the judgment did not specify the time within which the applicant was to vacate the suit property. He conceded that the applicant has land adjacent to the the suit property but contended that it is not automatic that the defendant will settle there.

#### **Analysis and determination:-**

15. It is not in dispute that the defendant has effected some developments on the suit property and that some time is required for the plaintiff to remove the developments effected thereon. That fact is discernible from the plaintiff’s replying affidavit at paragraph 9 to 12. In those paragraphs the plaintiff has deposed as follows:-

***“9). That the structures exhibited in the applicant’s previous application are semi permanent houses and a barbed wire fence that do not require such a long period of time to remove.***

***10). That the graves too require a short period to remove as among our people we do not believe in taboos contrary to such allegations.***

***11). That removing electricity and piped water does not require more than a day.***

***12). That there are very few trees and no cultivation was going on in view of the recent drought.”***

16. Although the averments in paragraphs 4, 5, 6, 7, 8, 15, 16, 17 and 18 of the plaintiff’s replying affidavit appear to be not in support of the above finding, I entertain no doubt that the parties to this dispute are in agreement that some time is needed for the defendant to vacate the suit property. That fact is amplified by the averment in paragraph 13 and 14 of the plaintiff’s replying affidavit where the plaintiff

merely faults the procedure employed by the defendant in seeking extension of time. In this regard see paragraph 13 and 14 of the plaintiff's replying affidavit where the plaintiff deposes as follows:-

***“(13). That this application is misconceived because once the court has delivered its judgment, it became functus officio as the applicant is not taking any legal proceedings.***

***(14). That the applicant should be approaching me instead of filing this application.”***

17. Does the application seek to alter the judgment or decree obtained pursuant thereto?

My answer is negative. The judgment did not give a particular time within which the defendant was to vacate. All what it required the defendant to do is to vacate forthwith. Forthwith in the circumstances of the case may not mean instantly but within a reasonable time.

18. Under **Section 3A** of the Civil Procedure Act, this court has power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court process.

19. In view of the provisions of Section 3A of the Civil Procedure Act, the only issue for determination in this application is whether, in the circumstances of this case, the defendant has made up a case for extension of the time within which he ought to vacate the suit property.

20. As pointed out above, it is not in dispute or seriously contested that the defendant needs time to remove the developments effected on the suit property. The only issue is whether the defendant deserves the time requested that is three years.

21. In my view, given the peculiar circumstances of this case, to wit the fact that the defendant needs time to remove the developments he effected in the suit property over time, including relocation of his relatives graves, I am satisfied that the defendant has made up a case for extension of time within which he ought to vacate the suit properties. In my view, a period of six (6) months suffices to allow the defendant to vacate the suit property.

22. Consequently, I allow the application to the extent contemplated in this ruling.

**Dated, signed and delivered at Nyeri this 22nd day of September, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

MS Kainga h/b for Mr. Wachira for the respondent

Mr. Ombongi for the applicant

Court assistant - Lydia