



**Shah & another v Juma & 2 others; Chelogoi (Interested Party) (Environment and Land Case Civil Suit 312 of 2009) [2024] KEELC 3730 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3730 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 312 OF 2009**

**J OMANGE, J**

**APRIL 22, 2024**

**BETWEEN**

**ASHOK RUPSHI SHAH ..... 1<sup>ST</sup> PLAINTIFF**

**HITENKUMAR AMRITLAL RAJA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JACOB JUMA ..... 1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF TITLES ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**DAVIS NATHAN CHELOGOI ..... INTERESTED PARTY**

**RULING**

1. The Plaintiffs *vide* a plaint dated 26<sup>th</sup> June, 2009 sought for Judgement against the Defendants for an order of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Defendants their servants or agents from selling, transferring, charging, interfering or otherwise dealing with the suit property LR no 18485 (IR 64014) Loresho Kenya; an order of Permanent Injunction to restrain the First Defendants or his servant or agent from trespassing, interfering, alienating, constructing or in any other way dealing with LR no 18485 (IR 64014) pending the hearing and determination of the suit; an order of declaration that the Plaintiffs are the legal owners of LR no 18485 (IR64014) by virtue of transfer dated 21<sup>st</sup> March, 2007 and registered in the land registry Nairobi; hold the 2<sup>nd</sup> Defendant is a Trespasser; Damages for loss of bargain or profits. The Plaint was amended on 15<sup>th</sup> August, 2012.
2. The matter proceeded for hearing partly before Hon Lady Justice Nyamweya J as she then was and Hon Lady Justice Komingoi J All along, the parties in the suit were the Plaintiffs and the 3 Defendants; Miriam Juma sued on behalf of the late Jacob Juma, the Commissioner of Lands and the Registrar of



Titles. Before the Judgement was delivered, the Interested Party herein then Proposed Interested Party filed an application seeking to participate in the matter. The application was not heard and was later withdrawn.

3. By a Judgment dated and delivered on 28<sup>th</sup> July 2022, Hon Justice Komingoi inter alia restrained the 1<sup>st</sup> Defendants, their servants, agents, nominees from trespassing, selling, transferring, constructing, charging, interfering, or in any manner dealing with the suit property, granted a permanent injunction against the 1<sup>st</sup> Defendant, declared that the 1<sup>st</sup> Defendant's title was fake and fraudulent thus he had no claim over the suit property and that the Plaintiffs were the legal owners of the suit property. The Court further awarded ksh 50,000,000 as General damages for trespass and allowed costs and interest to the Plaintiffs.
4. The Proposed Interested Party withdrew the application dated 22<sup>nd</sup> June, 2022 and filed yet another application urging the court to review and set aside the Judgement. The court while allowing the Interested Party to participate in the post Judgement Proceedings which were pending declined to review and set aside the Judgement. It is this post Judgement application dated 31<sup>st</sup> January, 2023 which is before the court for determination.

The Court notes that before this application could be disposed of the court was called upon to hear and determine the Plaintiffs application dated 13.09.2023

5. The present application prays for the following orders;
  - a. Spent
  - b. That the 1<sup>st</sup> Defendant, her agents, servants and or employees and any person claiming and or retaining possession under the 1<sup>st</sup> Defendants title or name, and any person interfering in the Plaintiffs possession of the Plaintiffs property LR Number 18485 Lower Kabete be forcefully evicted and or removed therefrom.
  - c. That the Honourable Court be pleased to issue an order directing OCS Spring Valley Police Station to provide security and assistance to the Plaintiffs to enable them enforce this courts orders as contained in the amended decree in forcefully seizing back vacant possession if the property LR. Number 18485, Lower Kabete.
  - d. The 1<sup>st</sup> Plaintiff also sought for an order to demolish structures on the suit property and that the 1<sup>st</sup> Defendant be penalized to meet the costs.
6. In the affidavit dated 31<sup>st</sup> January, 2023 in support of the application, the 1<sup>st</sup> Plaintiffs aver there is a Judgement of this court which determined the issue of ownership. That the court should uphold the Rule of law and issue the eviction order so as to enable the Plaintiffs to enjoy the fruits of the Judgement.

In the Replying affidavit which was filed by the Interested Party who was allowed to participate in the application, the interested party avers that the Plaintiffs herein did serve his workers who reside on the suit property with an amended decree. He states that he was not party to the suit hence he has never been heard notwithstanding the fact that he has all along been in possession of the suit property through his workers. In addition, he contends that he was issued with an allotment letter 75707 /VII and thereafter with a title registered as IR no 232908. In summary, the interested party is before the court to confirm that the eviction orders that are sought by the Plaintiffs against the 1<sup>st</sup> Defendant will if granted by the court result in his eviction yet he was not a party to the suit between the Plaintiffs and the Defendants. He asserts that he has a rival claim to the suit property.



7. None of the Defendants opposed the application dated 31<sup>st</sup> January, 2023 or filed submissions. Indeed, counsel for the 1<sup>st</sup> Defendant against whose client the orders were sought categorically stated in court that the 1<sup>st</sup> Defendant would not oppose the application.
8. The 1<sup>st</sup> Plaintiffs' counsel filed submissions in which they submitted that the Plaintiffs have been obstructed from executing the Judgement of this court delivered on 28<sup>th</sup> July, 2022 as there are third parties on the suit property who have violently thwarted any efforts to put the Plaintiffs into possession of the suit property. That this is in spite of the fact that there is a Judgement and decree of the court.
9. That if this court does not come to the aid of the Plaintiffs in ensuring obedience to court orders the court would be setting a dangerous precedent that would result in the breakdown of law and order.
10. Counsel for the Plaintiff submitted at length on the question of the binding nature of a Judgement in rem. Counsel contended that it is settled law that a Judgement in rem binds not only the parties before the court, but also any other party. Counsel cited several authorities which the court has had occasion to consider.
11. In the same vein the court was referred to Section 44 of the Evidence Act. Counsel strongly submitted that whether or not the Interested Party participated in the suit, he was bound by the decision. Counsel was emphatic that the issue of whether the Interested Party has filed separate proceedings cannot be used to defeat execution of the Judgement that was delivered by Komingoi J
12. Lastly, counsel argued that the Plaintiffs are entitled to the fruits of their Judgement. This counsel argued, was notwithstanding any proceedings the interested party wished to pursue. In support of this argument counsel cited several authorities to wit *Republic v Council of Legal Education & Another Ex Parte Uganda Pentecostal University* [2015] eKLR, *Likizo Limited v Nasib Kasburu Limited & Others* (Civil Appeal E 005 of 2020, KECA 1314 (KLR), *Attorney General v Ndungo & 5 others* (Civil Appeal 158 of 2019 (KECA 979 (KLR) and *Ben v Independent Electoral and Boundaries Commission & 5 others*.
13. The Interested Party's counsel filed submissions in respect of the application. The first issue that he drew the courts attention to was that through the affidavit of the Process Server of the Plaintiffs Gibson Wamweya Mburu, the Plaintiffs acknowledge that they served the 1<sup>st</sup> Defendants counsel and also served the Decree at the suit property. This he insists is an acknowledgement of the fact that there are two distinct parties and not agents of the other. Counsel also draws the courts attention to the fact that none of the other parties oppose the eviction application which he submits lends credence to the Interested Parties claim of occupation.
14. Counsel identifies three issues for the court to determine namely; whether the Interested Party has proprietary rights over the suit property; whether the eviction orders should issue as prayed and who should bear the costs of the suit.
15. On the first issue, counsel submits that the Plaintiffs and the Defendants have not filed an affidavit to dispute that the Interested Party is in occupation of the suit property. Counsel submits at length on the proprietary rights of the Interested Party and urges the court not to issue the orders sought as they would amount to evicting the Interested Party who has a rival claim to the suit property and is not an agent of the 1<sup>st</sup> Defendant who was a party in the suit.
16. I have considered the submissions by counsel, the various affidavits filed in the case. From the outset it is clear that the interested party is in occupation of the suit property. He also has a rival claim which cannot be ventilated in this application hence the attempt by the counsel for the Interested Party to frame as an issue for determination, the proprietary rights of the Interested Party is misplaced. It is



also common ground that there is a Judgement which was delivered on 28<sup>th</sup> July, 2022 by the court in which the court declared the Plaintiffs the legal owner of the suit property and also declared that the 1<sup>st</sup> Defendant had trespassed on the suit property.

17. The issues that the court frames for determination are; Should the court grant orders to forcefully evict the 1<sup>st</sup> Defendant, her agents, servants and or employees and any person claiming and or retaining possession under the 1<sup>st</sup> Defendants title or name and interfering with the Plaintiffs possession of the Plaintiffs property LR Number 18485, Lower Kabete Nairobi? Should the court grant demolition orders as sought by the Plaintiffs?
18. It is not in dispute that the Plaintiffs have a Judgement in their favour in which they were awarded a raft of orders. The court in its Judgement did not grant an order for eviction. Indeed, an eviction order was not prayed for in the Plaint.
19. The Court of Appeal in *Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 Others (supra)* cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002* where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:
  20.

“..... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
  21. However, it is important for this court to consider this application in the context of the strong argument which has been argued that the eviction order will give effect to this courts decree in which a finding of Trespass was made against the 1<sup>st</sup> Defendant and the Plaintiff declared the legal owner enforceable against the world. This Judgement it has severally been stated is a Judgement in rem and hence enforceable against the whole world. This court is therefore urged to issue the eviction and demolition order. The Plaintiffs cited several authorities which I have considered on the importance of enforcing court orders. While the authorities were clear on the importance of obedience of court orders the context and circumstances were markedly different from the circumstances in this case.
  22. The Judgement declared the Plaintiffs the legal owner. Through the participation of the interested party in this application, it is now evident that the 1<sup>st</sup> Defendant in respect of whom the application for eviction has been made is not in possession of the suit property. Beyond any argument it is evident that it is the Interested Party who is in possession. There is no claim that the Interested Party is an agent of the 1<sup>st</sup> Defendant. It is not clear how the Plaintiffs lost possession or that any effort was made to confirm who was in occupation. The interested party has averred that he has a rival claim on the suit property. I will not in this application delve into the merits or otherwise of the claim as that is an issue to be determined separately. However, it is noted that even after the Judgement was issued the Land Registrar held other proceedings to determine issues which again is not for the court to delve into at this juncture.
  23. The simple question then is, should this court issue an eviction and a demolition order against the 1<sup>st</sup> Defendant which amounts to an eviction of the Interested Party who has filed separate proceedings which are yet to be determined? The Plaintiffs insist that in furtherance of the decree which binds the whole world including the interested party, the court should allow the application. On the other hand, the Interested Party insists that he has a right to be heard and has instituted proceedings in this regard.



24. In considering this question I have sought guidance from the Constitution of Kenya, various laws and case law herein below. Article 10 (2) of the Constitution outlines the national values and principles of governance which include; patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainability. These are the beliefs and ideals the Kenyan people declared that they wished to be governed by. Of relevance to this case is the Rule of Law and equality.
25. A key tenet of the Rule of Law is that all citizens are equal before the law. So important is the concept of equality that equality is on its own a value that Kenyans agreed that they would share as a nation. As the court grapples with the rights of the Plaintiffs to execute their Judgement the court is also conscious of the Rights of the Interested Party against whom the Judgement will be executed.
26. Article 47 of the Constitution provides that every person has the right to administrative action that is efficient, lawful, reasonable and procedurally fair. Would it be procedurally fair to evict the Interested Party herein in view of the circumstances of this case?
27. Article 48 of the Constitution places on the state the responsibility to ensure access to justice. This requires that all state agencies ensure that individuals are able to access justice. Black's Law Dictionary defines access to justice as the ability within a society to use the courts and other legal institutions effectively to protect one's rights and pursue claims.
28. Lastly the often quoted Article 50 of the Constitution guarantees every person the right to a fair hearing. The Right to fair hearing encompasses fair hearing rights and due process.
29. These constitutional safeguards have found expression in our statutory laws. A Registered Land Owner who wishes to evict a trespasser even one not claiming proprietary interest is required to issue a notice giving the trespasser three months to vacate. Once this notice is issued the Trespasser has a right to approach the court under Section 152 F of the Land Act to be heard on his claim. The court then has to hear him and determine the case. The Trespasser cannot be evicted without a hearing even by this title holder. The Civil Procedure Rules Order 22 Rule 86 provides that notwithstanding existence of a decree, (Emphasis mine) a party who is not a Judgement Debtor against whom an order for eviction is made may institute a suit to establish the right which he claims to the present possession of the property. Again the person affected by the eviction order will have to be heard and a determination made. The common thread that weaves through these two provisions is that the law protects the right to be heard of the person or persons to be evicted.
30. In the case of Standard Chartered Financial Services & A. D Gregory and Manchester Outfitters & others the Court of Appeal unequivocally stated.....  

“indeed the right to a fair trial is not just a fundamental right. It is one of inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Convention of Civil and Political Rights (ICCPR) among other conventions which this country has ratified. Article 25(C) of the Constitution of Kenya 2010 elevates it to an inderogable right which cannot be limited or taken away from a litigant. The Right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse...”
31. For the avoidance of doubt, I would like to state that the Right to be heard in the context of this case is not related to the merits of the case which the court has not considered as this would be prejudicial to other proceedings on the same issue.



32. In the circumstances of this case I am keenly aware that the Plaintiffs will no doubt feel the pain of further delay in enjoying the fruits of their Judgement but also note the importance of ensuring that both parties have equal protection of the law.
33. It is my finding that it would be unjust, absurd and against the Constitution for this court to issue an order evicting a party who is not on the suit property but which order will be used to evict a party who is yet to be heard on his claim in respect of which he has filed separate proceedings.
34. As I conclude, I am aware that Kenya is an adversarial system where the parties are required to prove their case. However, given the complex issues facing land justice in this country, it would be essential that the Rules Committee and Stakeholders in the Land Justice Sector consider the possibility of putting in place mechanisms that would ensure that in future before the hearing of a contentious land matter is commenced the issue of possession is independently ascertained. This would no doubt streamline some of the challenges that have besieged the Land Justice Sector and the parties of this case.
35. In the end, I find that the application is one which this court cannot allow and is dismissed. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2024.**

.....  
**JUDY OMANGE**

**JUDGE**

In the presence of: -

Mr. Mwangi for 1<sup>st</sup> Plaintiff and Applicant and holding brief for Mr. Moriasi for 2<sup>nd</sup> Plaintiff

Mr. Allan Kamau for 3<sup>rd</sup> Respondent

Mr. Orioki for the Interested Party

Ms. Museti appearing together with Mr. Orioki

