



**Ochila v Mailu (Environment and Land Appeal E025 of 2022)  
[2024] KEELC 4436 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4436 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E025 OF 2022**

**CA OCHIENG, J**

**MAY 30, 2024**

**BETWEEN**

**RICHARD OCHILA ..... APPELLANT**

**AND**

**ERIC MUTUKU MAILU ..... RESPONDENT**

**RULING**

1. What is before court for determination is the Respondent's Notice of Motion Application dated the 6<sup>th</sup> February, 2024, brought pursuant to Sections 81, 1A, 1B, 3 and 3A of the [Civil Procedure Act](#). The Respondent seeks the following Orders:-
  - a. Spent
  - b. That an order of injunction be and is hereby issued restraining the Appellant/ Respondent or any other persons acting under the instructions of the Appellant/Respondent or any third party who may have purchased the suit property from the Appellant/ Respondent together with their employees, servants, and/or agents or any person acting under such third party from continuing with any developments whatsoever on the property known as Plot No. 686, Athi River.
  - c. That a Demolition Order be and is hereby issued allowing the Applicant/ Respondent to immediately demolish any structure and/or developments erected on the property known as Plot No. 686, Athi River by the Appellant/ Respondent or any third party who may have purchased the Suit Property from the Appellant/ Respondent together with their employees, servants, and/or agents or any person acting under such third party.



- d. That an Eviction Order be and is hereby issued allowing the Applicant to immediately evict the Appellant/Respondent or any other third party who may have purchased the Suit premises from the Appellant/Respondent, from the property known as Plot No. 686, Athi River.
  - e. That the OCS Athi River Police River shall supervise and provide all the necessary assistance to the Applicant and/or instructed Auctioneers, servants or agents in the enforcement of the Eviction Order.
  - f. That costs of this Application be borne by the Respondents.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the Respondent Eric Mutuku Mailu where he deposes that he is the legal owner of Plot No. 686, Athi River hereinafter referred to as the 'suit land', having been declared to be the said owner vide the Judgment delivered by Hon. E. Kimaiyo Suter (PM) on 13<sup>th</sup> June, 2022. He contends that he is entitled to immediate possession of the suit land. He claims that the Appellant has been in illegal occupation of the suit land since June, 2018 and continues to be in occupation thereon, even after delivery of the impugned Judgment. He confirms that the temporary orders of stay of execution for thirty (30) days which were granted, lapsed on 13<sup>th</sup> July, 2022.
  3. The Appellant opposed the Application by filing a Replying Affidavit sworn by the Appellant Richard Ochilla. He deposes that Judgment was delivered in the lower court on 13<sup>th</sup> June, 2022 declaring the Respondent to be the bona fide owner of the suit land. Further, he thereafter obtained an order of stay of execution for thirty (30) days. He confirms filing a Memorandum of Appeal dated the 12<sup>th</sup> July, 2022 against the impugned Judgment. He argues that the Appeal has high chances of success and will be rendered nugatory if eviction orders are issued.
  4. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits and submissions, the only issue for determination is whether the instant Application is merited.
6. The Respondent has sought for orders of temporary injunction including eviction and demolition orders against the Appellant or his agents, from the suit land. The Appellant has opposed the said Application insisting that he has been on the suit land for twenty seven (27) years and made massive developments thereon. Further, that the Appeal is merited and will be rendered nugatory if the orders sought are granted.
7. I note in Mavoko PMCC No. 28 of 2018, the Respondent who was the Plaintiff, sought to be declared as the bona fide owner of the suit and a permanent injunction restraining the Appellant from the said suit land. Hon. Suter (PM) in his Judgment delivered on 13<sup>th</sup> June, 2022 declared the Respondent to be the bona fide owner of the suit land and granted the orders as sought in the Plaint. The Appellant being aggrieved with the said Judgment filed a Memorandum of Appeal insisting that he had been on the suit land for a long time and made extensive developments thereon.
8. Upon perusal of the Court records including the impugned Judgment, I note the orders of stay of execution indeed lapsed. Further, I note the Respondent filed the instant Application whose prayers actually seek execution of the Decree which emanated from the Judgment delivered by Hon. Suter on 13<sup>th</sup> June, 2022 in the Lower Court.



9. On execution of a Decree, Order 22 Rule 6 of the Civil Procedure Rules stipulates that:-

“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof.”

10. Even if there are no orders of stay of execution in place, it is evident that orders of execution of the Decree can only be granted by the Court that passed the Judgment. Further, since this is an Appellate Court, the orders the Respondent is seeking cannot be granted by this Court as the Appeal is still pending. I opine that the Respondent should have applied for orders of eviction, demolition and injunction in the lower court and not the Appellate Court. Further, that the Respondent should have adhered to the legal provisions in the Land Act, governing eviction.

11. In the circumstances, I find the instant Notice of Motion Application premature and will strike it out, with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30<sup>TH</sup> DAY OF MAY, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Oloo for Appellant

Ms. Maina holding brief for Wandati for Respondent/Applicant

Court Assistant – Simon

