



**Wanjiru v Njoroge (Environment & Land Case 62 of 2018)
[2024] KEELC 3827 (KLR) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 62 OF 2018**

AK BOR, J

MAY 13, 2024

BETWEEN

**ROSE WANJIRU NDIRANGU ALIAS ROSE WANJIRU
MUGWANJA PLAINTIFF**

AND

GRACE WANGARI NJOROGE DEFENDANT

RULING

1. Through the application dated 15/1/2024, the Plaintiff seeks to have the Defendant evicted from the land known as Nyandarua/Oljoro Orok Salient/2630 (“the suit land”) and for vacant possession of the land to be delivered to her. Further, she seeks to have the Oljoro Orok Police station supervise the eviction. The bringing of the application follows the court decree issued on 5/5/2022 to the effect that the Plaintiff had acquired the suit land through adverse possession and the land was to be registered in her name. The Plaintiff claimed that prior to filing suit, she was in occupation of the suit property until the Defendant trespassed onto the land and took over possession prompting the filing of suit. The court issued an order for the status quo to be maintained which meant that the Defendant remained in possession of the suit land.
2. The application was supported by the Plaintiff’s affidavit to which she annexed a copy of the decree and the title issued in her name on 8/6/2023. She added that there was nothing barring her from taking possession of the suit land.
3. The Defendant swore the replying affidavit in opposition to the application and annexed a copy of the title deed issued in her name on 3/12/1996. She claimed to have been in occupation of the suit land since she was allocated the land by the Settlement Fund Trustee. She averred that being dissatisfied with the judgment of the trial court, she filed an appeal in Nakuru. She annexed a copy of the ruling from the Court of Appeal granting her leave to file an appeal out of time. She stated that she had filed that the record of appeal at the Court of Appeal and served on the Plaintiff. She averred that if an



order for eviction were issued, her appeal before the Court of Appeal would be rendered nugatory, irrelevant and academic. She added that she had not refused to vacate the suit land but was awaiting the determination of the dispute by the Court of Appeal. She contended that if the orders sought by the Plaintiff were granted she would suffer prejudice as there was no need of continuing with the appeal which she had already filed.

4. The Plaintiff filed a supplementary affidavit in which she deponed that the Defendant was still in possession of the suit land because of her ruthless nature and use of force. She pointed out that while granting the Defendant leave to appeal out of time, the Court of Appeal declined to grant orders for stay of execution which means there is nothing barring the Plaintiff from taking possession of the suit land.
5. The Plaintiff reiterated that prior to the Defendant moving into the suit land in 2018, she had been in continuous, uninterrupted and quiet possession of the land since 1987. She added that she continued to suffer prejudice because of being deprived the use of the suit land which she used to rely on for farming and other activities.
6. The court directed parties to file submissions. The preliminary issue which the Plaintiff took up was that the Defendant's replying affidavit was filed by an advocate who took over conduct of the matter after delivery of judgment yet Order 9 Rule 7 of the Civil Procedure Rules required an advocate coming on record to file a notice of appointment and not a memorandum of appearance as happened in this case. She went on to argue that the orders issued to that advocate to come on record on behalf of the Defendant applied to the appeal and not the instant suit. The Defendant emphasized that Article 159 of the Constitution could not come to the aid of the Defendant, as she sought to have the affidavit expunged from the record.
7. The Plaintiff relied on Order 42 Rule 6 of the Civil Procedure Rules in urging that an appeal did not automatically operate as a stay of execution. Further, that there was nothing barring the Plaintiff from executing the decree.
8. The Defendant submitted that she had been in occupation of the suit property and emphasized that although execution was not stayed by the Court of Appeal, that court agreed that the appeal was merited. She reiterated that if an order for eviction were granted the appeal would be rendered nugatory. The Defendant went further to submit that the prayer for eviction through a miscellaneous application should be struck out because it ought to be instituted through a plaint pursuant to Order 3 Rule 1 of the Civil Procedure Rules. The Defendant urged that since the Plaintiff had not sought eviction in the main suit she could not do it through a miscellaneous application. The Defendant emphasised that eviction orders were serious and must be anchored in a suit.
9. The issue for determination is whether the court should grant an order for the eviction of the Defendant from the suit land. From the judgment delivered by Y. Angima J. on 5/5/2022, it is apparent that the Plaintiff stated in evidence was that she took possession of the suit land in 1997, constructed a house and put a caretaker in possession. That on 25/7/2018, the Deputy County Commissioner, Nyandarua West directed the Chief to evict the occupants of the suit land after which she took possession. As matters stand, the trial court found that the suit land belonged to the Plaintiff and that she had acquired it through adverse possession. The court directed the Defendant to transfer the suit land to the Plaintiff failing which the Deputy Registrar of the court was to execute the necessary documents to facilitate its transfer. It is clear that after the delivery of judgment, a title deed was issued in the Plaintiff's name and the Defendant lodged an appeal before the Court of Appeal challenging the findings of the trial court.



10. What falls for determination in this application is whether the court should issue an order for the Defendant to be evicted from the suit property at her own cost and for vacant position of the suit land to be delivered to the Plaintiff under the supervision of the Officer Commanding Oljoro Orok Police Station. The Defendant did not provide evidence of what else she is doing on the suit land which would assist the court in determining how her appeal would be rendered nugatory. The Plaintiff is well aware that the Defendant being dissatisfied with the decree vide which the Plaintiff was registered as the proprietor of the suit land had lodged an appeal and that if the appeal were to succeed, then the land would be given to the Defendant in which case she ought not to deal with the suit land in a manner that may defeat the outcome of the appeal. Mindful of this fact, the court is not persuaded that it would be just and equitable to stop the Plaintiff from enjoying the fruits of her judgment.
11. The court does not agree with the Defendant's argument that the Plaintiff needed to file a new suit to seek eviction orders as this would lead to a multiplicity of suits over the same suit property and would unnecessarily prolong the determination of disputes. None of the authorities cited support that line of argument. In the authorities cited by the Defendant including *Norah Ndunge Henry and Another v Abednego Mutisya and another* [2022] eKLR the court's observation that an application could only be filed within a properly instituted suit would not be applicable in this case this application having been made in a suit and not in a miscellaneous application as was the case in the Norah Ndunge case.
12. The effect of the judgment delivered in this matter on 5/5/2022 is that the court declared that the Plaintiff had acquired the suit land through adverse possession and the land was to be transferred to her by the Defendant, failing which the Land Registrar was to dispense with the production of the title deed. Once the land was registered in her name, the Plaintiff was entitled to enjoy all the rights and privileges appurtenant to the registration in accordance with Sections 25 and 26 of the *Land Registration Act* including taking possession of the land.
13. The court grants an order for the eviction of the Defendant from the suit property as sought in the application dated 15/1/2024.
14. The OCS Oljoro Orok will supervise the eviction if the Defendant fails to move out of the suit land within 30 days of the date of this ruling.

Each party will bear its costs for the application.

DELIVERED VIRTUALLY AT NANYUKI THIS 13TH DAY OF MAY 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Gakenia Gicheru for the Plaintiff

Mr. Martin Gathumbi for the Defendant

Ms. Stella Gakii- Court Assistant

