



REPUBLIC OF KENYA



KENYA LAW
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**Chesterton Properties Limited v Mutoria & 137 others (Environment & Land
Case 226 of 2010) [2024] KEELC 6143 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 226 OF 2010
NA MATHEKA, J
SEPTEMBER 25, 2024**

BETWEEN

CHESTERTON PROPERTIES LIMITED PLAINTIFF

AND

SAMSON MUTURIA & 137 OTHERS & 137 OTHERS DEFENDANT

RULING

1. The application is dated 15th May 2024 and is brought under Section 1A, 3A and 34 of the [Civil Procedure Act](#) (Cap 21) and Order 51 Rule 1 Civil Procedure Rules, 2010 seeking the following orders;
 1. Spent.
 2. That this Honourable Court be pleased to issue an order for survey of the Plot Number 7 / Section V/Mainland North-Kibarani;
 - a. To complete execution of the Decree herein.
 - b. To further order for construction of a perimeter wall around the Plot Number 7 / Section V/Mainland North-Kibarani.
 3. That due to the security situation within and around the suit property, the National Police Service through the Regional Coordinator Coast, the County Commander, Mombasa County and the Officer Commanding Police Division Chagamwe, do provide the plaintiff with sufficient armed police officers to ensure peace and order in the implementation of the court order.
 4. That costs of this application be provided for.
2. The facts are in the ruling by my brother C.K Yano J. dated 21st July 2021 which I will reiterate for clarity purposes. This suit was initially filed against 100 defendants as a result of the plaintiff



having entered into a sale agreement with Savitri Vashdev Gidoomal, Vijay Vashdev Gidomal, Ashwin Vashdev Gidoomal and Manisha Gidoomal; the previous registered owners of the suit property afore mentioned. The plaintiff had filed a further amended plaint dated 27th June 2011 increasing the number to 138 defendants with totally different defendants from the 6th to 138th defendant. However, in a consent filed on 28th June 2011 and consequently a decree dated 22nd August 2011, the plaintiffs agreed to pay out 91 out of the 138 defendants for their structures in exchange for their peaceful vacation and thereafter the suit is marked as settled. The firm of Jengo & Associates came on record to represent 46 defendants. The said firm opposed the afore mentioned consent but interestingly the plaintiff had already withdrawn the suit against the defendants vide a notice of withdrawal filed on 28th July 2011 effectively ending the suit in toto. The afore mentioned ruling dismissed the 46 defendants attempt at moving the court to declare their eviction unlawful as their prayer did not fall under the ambit of section 34 and the court is already functus officio.

3. In support of the instant application, Bob Eduard Lisa Weyn; a Managing Director of the plaintiff averred that the firm of Jengo & Associates were paid Kshs. 500,000 as costs after they raised a request for judgment on costs dated 6th August 2011. He claims that they evicted the defendants but when they began demolishing the structures left behind the said firm of Jengo & Associates on behalf of the 46 defendants filed the aforementioned application dated 16th April 2012 trying to stop the eviction of which there is a ruling afore mentioned. He therefore requests for permission to survey the suit property and also requests for police assistance in conducting the survey and when erecting a perimeter wall.
4. In reply the 46 defendants filed grounds of opposition dated 4th June 2024 stating that there is no judgment against the 46 defendants and that the consent judgment of 2011 is time barred and also that the court is functus officio. The court has considered the application and the submissions filed therein. The issue for consideration is whether the application has merit or not?
5. On the issue of whether there is a judgment against the 46 defendants it behooves the court to go back to its record where there was a consent dated 16th March 2012 where the plaintiff acknowledges that the 46 defendants are not affected by the eviction. However, this consent was declared a nullity by the ruling of C.K Yano J. as the suit had already been withdrawn against the 46 defendants. I therefore agree with the 46 defendants that there is no judgement or decree against them and on this point alone I can dismiss this application.
6. The instant application appears to be straight forward as the orders sought are recognized by section 34 of the [Civil Procedure Act](#) which states as follows:
 - (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
 - (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
 - (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.”



7. The plaintiff seeks to complete execution of the decree dated 22nd August 2011 but is apprehensive that the said defendants may disrupt the exercise. However, it is also mentioned in the certificate of urgency that there are still squatters on the land. These are squatters which the deponent Mr. Weyn has failed to mention and the court is left in the dark as to whether the squatters are the same 46 defendants or other ones. The court reminds itself that Mr. Weyn had stated that all the squatters had been evicted and what is left is only the structures. If indeed the squatters on the suit property are the 46 defendants, then the plaintiff has no alternative but to either reinstate the suit withdrawn or file a fresh suit against all the squatters on the suit property. In obiter, the plaintiff remains the legal and beneficial owner until they are sufficiently and legally dispossessed of title if any. I therefore find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

