



**Njoroge & another v Mulei; Land Registrar Machakos County & another  
(Interested Parties); Kimuyu & another (Objector) (Environment & Land  
Case 372 of 1994) [2024] KEELC 6058 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6058 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 372 OF 1994  
A NYUKURI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**BERNARD NG;'ANG'A NJOROGE ..... 1<sup>ST</sup> PLAINTIFF**

**GABRIEL MBUGUA NJAGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**GRACE JOHN MULEI ..... DEFENDANT**

**AND**

**LAND REGISTRAR MACHAKOS COUNTY ..... INTERESTED PARTY**

**AND**

**PROFESSOR PETER KIMUYU ..... OBJECTOR**

**MARGARET KIMUYU ..... OBJECTOR**

**AND**

**DISTRICT LAND SURVEYOR ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. This ruling is in respect of two applications; namely, the application dated 20<sup>th</sup> September 2022 and the one dated 21<sup>st</sup> March 2023.

**Application dated 20<sup>th</sup> September 2022**

2. In the application dated 20<sup>th</sup> September 2022, the plaintiff sought the following orders;



- a. Spent.
  - b. That this Honourable Court be pleased to issue an order for eviction against the defendant/respondent from suit land known as plot Number 26 Kitanga Settlement Scheme measuring 5 acres or thereabouts.
  - c. That the officer in charge Machakos Police Station do provide security during the process to maintain law and order in effecting the order above.
  - d. That this Honourable Court be pleased to grant leave to the firm of R. K. Mutua & Company Advocates to come on record for the applicant in the place of F. M. Mulwa Advocates (deceased).
  - e. That the cost of eviction and demolition be borne by the defendant/respondent in the first instance.
  - f. That costs of this application be borne by the defendant/respondent.
3. The application is supported by the affidavit of Bernard Ng'ang'a Njoroge, the 1<sup>st</sup> plaintiff sworn on 20<sup>th</sup> September 2022. The applicant's case is that they are the registered proprietors of the suit property and that this court heard the suit herein and delivered its judgment on 4<sup>th</sup> May 2022 allowing the plaintiffs' claim. He stated that despite numerous demands, the respondent has adamantly refused to vacate the suit property and denied them access and quiet possession thereto. He also stated that he was entitled to the fruits of the judgment.
  4. The application was opposed. Grace John Mulei, the respondent filed a replying affidavit on 19<sup>th</sup> July 2023 opposing the application. She stated that as the Plot Number 26 Kitanga Settlement Scheme measures approximately 70 acres, the 5 acres which is the suit property is not defined with Plot No. 26 and that the plaintiff must adduce proof of the location and existence of 5 acres within plot 26. She maintained that if the judgment is executed, it will lead to wrongful eviction in Plot No. 26 Kitanga Settlement Scheme.

### **Application dated 21<sup>st</sup> March 2023**

5. The application dated 21<sup>st</sup> March 2023 was filed by Professor Peter Kimuyu and Margaret Kimuyu as objectors herein, objecting to the execution of the judgment delivered in this matter. They sought the following orders;
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That the Honourable Court be pleased to vacate, lift, raise and or wholly set aside any attachment of the objector's property, as more particularized in the decree dated 4<sup>th</sup> May 2022.
  - e. That costs of this objection proceedings be provided for.
6. The application is supported by the affidavit of Professor Peter Kimuyu sworn on 21<sup>st</sup> March 2023. It was his case that upon delivery of judgment, the decree holder filed application dated 20<sup>th</sup> September 2022 seeking to execute the same. He stated that the decree holder sought to abuse the blanket and vague orders by attaching the objector's property which is also situated on the larger parcel Plot No. 26 Kitanga Settlement Scheme.



7. The objectors further stated that they are beneficial and actual owners of the property described in the decree herein dated 4<sup>th</sup> May 2023. Further that they have a legal and equitable right over 6.5 acres within Plot No. 26 Kitanga Settlement Scheme. They asserted that the decree holders were wrongfully interfering with their use and enjoyment of the property described in the judgment and that they had threatened to evict them. They alleged that they purchased the land measuring 6.5 acres in Plot No. 26 and constructed a matrimonial home thereon and have lived in that property since 2006. They stated that they were not parties to this suit. They attached a copy of authority to act, decree herein, sale agreement and 30<sup>th</sup> September 2006, and plaintiffs' application dated 20<sup>th</sup> September 2022.
8. The application was opposed. Bernard Ng'ang'a Njoroge, the 1<sup>st</sup> respondent filed a replying affidavit dated 24<sup>th</sup> April 2023 opposing the application. He stated that the application was misconceived and an abuse of the court process as issues raised were dealt with during the trial of this case. He stated that the objectors were given a fair opportunity to participate in the proceedings but failed to use the same. He stated that the court had conclusively determined the merits of this case and cannot entertain the application at this stage as the objectors were claiming under the defendant and their case had been determined hence they should also vacate the suit property. Further that the application was an afterthought and meant to frustrate the course of justice.
9. In a rejoinder, Professor Peter Kimuyu filed further affidavit dated 11<sup>th</sup> May 2023, reiterating the averments in his earlier affidavit and conceded filing an application on 14<sup>th</sup> October 2019 seeking to be joined in these proceedings as interested parties, which application was allowed on 15<sup>th</sup> October 2019. He stated that he was advised by his advocate that the land in dispute was the one in possession of one Mr. Mwarabu measuring 5 acres and did not affect the objector's land. He insisted that from the affidavit of Robert Munyua Ng'ang'a, the plaintiffs' brother, he believed that the property related to a separate subdivision.
10. He also stated that his land had consents which were issued by the Land Control Board on 31<sup>st</sup> March 1991 and 28<sup>th</sup> August 1991 respectively. That he did not file pleadings due to the advice received from his advocate that the land in issue was not theirs. He stated that the plaintiff should have provided a survey report. He attached his supporting affidavit, a witness statement of Robert Ng'ang'a and consents from Land Control Board dated 31<sup>st</sup> March 1991 and 28<sup>th</sup> August 1991.
11. Grace John Mulei the defendant filed undated replying affidavit on 7<sup>th</sup> August 2023 in support of the objectors' application. She stated that Plot No. 26 Kitanga Settlement Scheme is occupied by 6 individuals including the objectors. She stated that the plaintiffs did not show existence of 5 acres in Plot No. 26 and that all the parties were aware that the alleged 5 acres were sold to one Mr. Mwarabu by the plaintiffs' late father Samuel Njoroge Ng'ang'a and that the orders of eviction are likely to cause mayhem and breach of the peace.
12. She stated that she has never occupied the "perceived 5 acres" because the plaintiffs' father had deposited Kshs. 100,000/- in court for her refund. She said she had purchased other 24 acres from Robert Munyua Ng'ang'a and Benjamin N. I hate who are brothers and father of the late Samuel Njoroge Ng'ang'a and which was transferred to her and is part of the land occupied by the objectors. She stated that the plaintiffs' father sold the 5 acres subject of the judgment and that the same is now occupied by one Mr. Mwarabu. She attached consent dated 28<sup>th</sup> August 1991 and 31<sup>st</sup> March 1993.
13. Parties filed submissions in support of their positions in respect of the two applications. On record are the plaintiffs' submissions dated 26<sup>th</sup> June 2023 which the court has duly considered.



## Analysis and determination

14. The court has carefully considered the two applications, responses thereto and the filed submissions. The issues that arise for determination are;
  - a. Whether the firm of R. K. Mutua & Company Advocates should be granted leave to represent the plaintiff in this case.
  - b. Whether the objectors have presented sufficient material before court to set aside and vacate the execution of the judgment; and
  - c. Whether orders of eviction should be issued in favour of the plaintiffs as sought.
15. Order 9 Rule 9 of the Civil Procedure Rules allows the court to grant leave to a party to change their advocate or act in person in a matter where they were presented by another advocate up until the entry of judgment. In this case, the plaintiffs' advocate F. M. Mulwa passed on and therefore the plaintiffs sought to be presented by the firm of R. K. Mutua & Company Advocates. One of the tenets of fair hearing is to allow a party to be represented by counsel of their choice. As the plaintiffs' counsel passed on, the plaintiffs deserve representation by another advocate. In the premises, I am satisfied that the plaintiffs deserve leave to be represented by R. K. Mutua & Company Advocates and therefore the prayer for leave for the said advocates to come on record for the plaintiffs is hereby granted.
16. On the objector's application dated 21<sup>st</sup> March 2023, the objectors argue that they are proprietors, beneficial, actual, legal and equitable owners of 6.5 acres within Plot No. 26 Kitanga Settlement Scheme, where they have their matrimonial home and have lived thereon since 2006. They stated that they acquired the same by purchase from the defendant. According to them, the land on which eviction should occur is the one occupied by a Mr. Mwarabu. They insist that they are not parties to this suit and judgment should not be executed against them.
17. On whether the objectors were party to this suit, it is not disputed that on 14<sup>th</sup> October 2019, Professor Peter Kimuyu and Mrs. Margaret Kimuyu filed a notice of motion of even date and sought to be joined to these proceedings as interested parties. That application was allowed on 15<sup>th</sup> October 2019. The court further granted them leave to file pleadings and witness statements and documents however, they did not comply. Therefore the allegation that the objectors are not parties in this suit is misleading and incorrect. The joinder of Professor Peter Kimuyu and Mrs. Margaret Kimuyu to these proceedings as interested parties was allowed and that order was never appealed against, set aside, reviewed or varied and therefore they remain interested parties in this suit to date and cannot transform themselves into objectors.
18. I have looked at the notice of motion dated 14<sup>th</sup> October 2019 upon which joinder was issued. It is clear in that motion that the interested parties stated that they were innocent purchasers for value of the suit property and alleged in the supporting affidavit that "it took us by surprise to hear that the suit property was the subject of the litigation herein". He insisted in the supporting affidavit that the proceedings herein "affect us" as not only purchasers, but also the fact that we have possession. They also stated that the outcome of the case will affect them. In addition, both the interested parties and defendant confirm that the property described in the judgment is the one occupied by the interested parties.
19. In view of the above, the allegation that the suit property is different from the property in possession of the interested parties does not hold water, and the same is merely an afterthought meant to circumvent the judgment; which the interested parties have not sought to set aside. It is therefore clear that the suit property is the one which is occupied by the interested parties herein on the basis of a sale agreement



with the defendant. Therefore their claim and the objection is unjustified without any basis as the defendant through whom they claim has no right over the suit property.

20. The judgment herein granted the plaintiff possession of the suit property and the eviction of the defendant and all persons claiming under the defendant's perceived title. The interested parties' claim which is based on a sale of land agreement with the defendant, is therefore a claim under the defendants' perceived title which was not upheld by the court. Therefore the import of the judgment is to have the defendant and those claiming under her and through her, including the interested parties evicted from the suit property. For those reasons therefore, there is no legal or equitable basis for those on the suit property not to be evicted. I therefore find no merit in the interested parties application dated 21<sup>st</sup> March 2023 which I dismiss with costs to the plaintiff. As the plaintiff has a decree for eviction against the defendant and persons claiming under the defendant's perceived title, I find that the plaintiffs are entitled to the orders sought in their application dated 20<sup>th</sup> September 2022.
21. The upshot is that the interested parties' application dated 21<sup>st</sup> March 2023 is hereby dismissed with costs to the plaintiff. In addition, the plaintiffs' application dated 20<sup>th</sup> September 2022 is allowed in the following terms;
  - a. An order for eviction against the defendant from Plot No. 26 Kitanga Settlement Scheme measuring 5 acres is hereby granted.
  - b. That the officer in charge Machakos Police Station is directed to provide security during the eviction process to maintain law and order.
  - c. The firm of R. K. Mutua & Company is granted leave to come on record for the plaintiffs in the place of F. M. Mulwa Advocate (deceased).
  - d. The costs of the application shall be borne by the defendant and interested parties jointly and severally.
22. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms. Waikwa holding brief for Mr. Ondieki for objectors/applicants

Mr. Musau for defendant

No appearance for the plaintiff

Court assistant – Josephine

