



Mbaru (Suing on behalf of the Estate of Stephen Mbaru Gitara) v Hirani (Environment & Land Case E409 of 2024) [2024] KEELC 7269 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E409 OF 2024**

**JO MBOYA, J
OCTOBER 23, 2024**

BETWEEN

SUSAN MBARU (SUING ON BEHALF OF THE ESTATE OF STEPHEN MBARU GITARA) PLAINTIFF

AND

LALJI HIRANI DEFENDANT

RULING

1. The Plaintiff/Applicant herein has approached the court vide application dated the 3rd October 2024, brought pursuant to Sections 1A, 1B, 3A of the *Civil Procedure Act*, Article 40 of *the Constitution*, Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and in respect of which same has sought for the following reliefs;
 - i. That this Application be certified urgent and be heard Ex-Parte in the first instance.
 - ii. That this Honourable Court does order the Defendant to grant vacant possession of property known as LR. No. 209/14479, Grant LR 89160 pending hearing and determination of this application inter-parties.
 - iii. That this Honourable Court does order the Defendant to grant vacant possession of property known as L.R. No. 209/14479, Grant 1R 89160 pending hearing and determination of this suit.
 - iv. That this Honourable Court does order eviction of the Defendant from property known as L.R. No. 209/14479, Grant I.R 89160.
 - v. That this Honourable Court be pleased to direct the OCS Lang'ata police station or any other officer in the rank of an inspector under his command to provide assistance, supervise the execution of this Honourable Court's orders and maintain law and order during the exercise.



- vi. That costs of this Application be provided for.
2. The instant application is anchored on the numerous grounds which have been highlighted at the foot thereof. Furthermore, the application is supported by the affidavit of Susan Mbaru, who is the Plaintiff/Applicant. In addition, the deponent has exhibited three [3] sets of documents including a copy of the grant of letters of administration in respect of the Estate of Stephen Mbaru Gitara, now deceased.
3. Upon being served with the application beforehand, the Defendant/Respondent filed grounds of opposition and wherein the Defendant/Respondent essentially denied the claim that same [Defendant/Respondent] have illegally entered upon and taken possession of the suit property.
4. The instant application came up for hearing on the 23rd October 2024 whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of oral submissions. In this regard, the court adopted the agreement by the parties and thereafter allowed the parties to canvass the application.

Parties' Submissions:

Applicant's Submissions:

5. The Applicant herein adopted the grounds contained at the foot of the Application and thereafter reiterated the averments in the body of the supporting affidavit. In addition, the Applicant highlighted and canvassed two [2] salient issues for consideration by the court.
6. Firstly, learned counsel for the Applicant has submitted that the Applicant herein is the duly appointed and constituted legal administratrix of the Estate of Stephen Mbaru [now deceased]. In this regard, learned counsel posited that by virtue of being the legal administratrix of the estate of the deceased, the Applicant is vested with the requisite locus standi to commence the suit on behalf of the estate of the deceased.
7. Secondly, learned counsel for the Applicant has submitted that even though the suit property lawfully belongs to and is registered in the name of the deceased, the Defendant/Respondent herein has since entered upon and taken possession of the suit property, albeit without any lawful cause/basis. In this regard, learned counsel for the Applicant has posited that the entry upon and occupation of the suit property by the Defendant/Respondent constitutes trespass.
8. Arising from the foregoing, learned counsel for the Applicant has submitted that insofar as the Defendant/Respondent has no lawful rights to and in respect of the suit property, it behooves the court to grant an order of eviction so as to remove the Defendant/Respondent from the suit property. In any event, it has been contended that the grant of an order of eviction shall go along way in vindicating the Applicant's rights to and in respect of the suit property.
9. Premised on the foregoing submissions, learned counsel for the Applicant has implored the court to find and hold that the Applicant has established and demonstrated the requisite conditions to warrant the grant of orders of eviction. In short, learned counsel has implored the court to evict the Defendant/Respondent from the suit property.

Respondent's Submissions:

10. The Respondent herein adopted and reiterated the grounds of opposition and thereafter highlighted two [2] pertinent issues. Firstly, learned counsel for the Respondent has submitted that the Applicant has neither established nor demonstrated that the Defendant/Respondent has trespassed onto and



occupied the suit property. In this regard, it has been contended that in the absence of evidence of trespass and occupation by the Defendant/Respondent, the orders sought cannot issue.

11. Secondly, learned counsel for the Respondent has submitted that the Application by the Applicant is not only misconceived and legally untenable, but same constitutes an abuse of the due process of the court. In particular, it has been contended that an order of eviction cannot issue and/or be granted on the basis of interlocutory application or at all.
12. At any rate, it has been submitted that an order of eviction is a substantive order and hence same [order of eviction] can only issue after a plenary hearing and not otherwise. In this regard, it has been contended that the Application beforehand constitutes a calculated scheme to defraud the cause of justice.
13. Arising from the foregoing submissions, learned counsel for the Respondent has therefore implored the court to find and hold that the application beforehand constitutes an abuse of the due process of the court and thus same ought to be dismissed with costs.

Issues For Determination:

14. Having reviewed the application and the response thereto and upon consideration of the submissions on behalf of the respective parties, the following issues do emerge [crystalize] and are thus worthy of determination;
 - i. Whether orders of eviction can issue and/or be granted on the basis of interlocutory application, either in the manner sought or at all.
 - ii. Whether the application constitutes an abuse of the due process of the court.

Analysis And Determination:

Issue Number 1

Whether orders of eviction can issue and/or be granted on the basis of interlocutory application, either in the manner sought or at all.

15. The Plaintiff/Applicant filed the instant suit vide Plaint dated the 3rd October 2024 and in respect of which same [Plaintiff] has sought for inter-alia orders of eviction and vacant possession. Furthermore, the Plaintiff has also sought for an order for mesne profits from the date of filing of the suit to the date vacant possession.
16. Contemporaneous with the filing of the suit [details in terms of the preceding paragraph] the Plaintiff filed the application dated the 3rd October 2024 and wherein the Plaintiff has substantially reproduced the same reliefs being sought at the foot of the Plaint. However, the only difference is that at the foot of the application, the Plaintiff now seeks to procure the impugned orders at an interlocutory stage.
17. From the foregoing, the question that does arise and which the court must grapple with is whether an order for vacant possession and eviction can issue and/or be granted at an interlocutory stage. To start with, there is no gainsaying that an eviction order is a substantive and precipitate order and hence same [eviction order] can only issue after a plenary hearing. In this respect, the disputants shall be called upon to tender and produce evidence in the conventional manner and thereafter the court shall be at liberty to render a judgment.
18. Suffice it to underscore that an eviction order cannot issue on the basis of an interlocutory application. In this regard, the reliefs sought by and on behalf of the Applicant herein are not only unthinkable, but constitutes an endeavour to defraud the cause of justice.



19. Quite clearly, it is evident that the learned counsel for the Plaintiff/Applicant is seeking to hijack the rule of law and circumvent the due process. Instructively, it matters not whether the suit property belongs to and constitutes part of the estate of the deceased. Suffice it to posit, that it behooves the estate of the deceased to comply with the law and at the opportune time, procure the requisite order of eviction.
20. Without belabouring the point, I beg to underscore that a court of law, this court not excepted, is called upon to remain steadfast and to ensure that litigants and counsel, like the one in the instant matter, are not allowed to steal a match and wreak havoc by procuring illegal orders. In addition, courts of law must also remain watchful so that final orders are not procured on the basis of interlocutory application.
21. To buttress the foregoing exposition of the Law, I beg to adopt and reiterate the holding in the case of *The Headmaster Kiembeni Primary School vs Baptist Church* [2005] eKLR where Hon Justice D.K Maraga, Judge [as he then was] stated as hereunder;

I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also *Shah _v – Shah* (1981) KLR 374.

22. Flowing from the foregoing analysis, it is my finding and holding that the application beforehand, which essentially seeks orders of eviction is misconceived. Furthermore, the orders of eviction which are highlighted in the application cannot be issued and/or be granted at an interlocutory stage.

Issue Number 2

Whether the application constitutes an abuse of the due process of the court.

23. The Plaintiff/Applicant herein is alive to the fact that same [Plaintiff/Applicant] has sought for the orders of vacant possession and eviction in the body of the Plaint. Having sought for the said precipitate orders at the foot of the Plaint, there is no gainsaying that the Plaintiff and her counsel, are knowledgeable of the fact that the said orders can only be issued after plenary hearing.
24. Nevertheless, despite being aware of the hackneyed position, namely, that eviction orders can only issue after hearing of the claim at the foot of the Plaint, the Plaintiff/Applicant has hatched a plot to sneak and obtain the same orders through an application.
25. Quite clearly, it is parties like the current Applicant who have created instances where courts have unknowingly granted drastic, nay final orders at an interlocutory stage. Nevertheless, it must be underscored that the conduct like the one displayed at the foot of the current application must not be countenanced.
26. To the contrary, courts of law ought to take a stern position, to pre-empt and prevent mischievous litigants and their counsel from defrauding the cause of justice. In any event, the endeavour displayed at the foot of the current application demonstrates lack of respect for the rule of law and constitutes an abuse of the due process of the court. Surely, it cannot be said that the Applicant's advocate does not appreciate the gravity of an eviction order.
27. Be that as it may, I beg to posit, that the filing of the application herein which seeks eviction orders, similar to the ones highlighted at the foot of the Plaint, amounts to and constitutes abuse of the due process of the court



28. In this regard, I beg to take cognizance of the holding of the Supreme Court of Kenya in *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016)* [2018] KESC 27 (KLR) (19 September 2018) (Ruling), where the court stated and observed thus;

27. In *Kenya Section of the International Commission of Jurists v Attorney General & 2 Others Criminal Appeal No. 1 of 2012*; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia:

“The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...”Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”

29. Without belabouring the point, the filing of the application by the Applicant and her counsel constituted a deliberate endeavour to steal a match and in particular, to abuse the due process of the court.

30. To my mind, such conduct [like the one beforehand] ought not only to be frowned upon, but to be condemned by all conscientious justice actors. Furthermore, Advocates in their capacities as Officers of the Court, need to assist the Courts to administer Justice. Same [Advocates] should not degenerate to be the propagator[s] of mischief. In this regard, I beg to remind all Practioners of their obligations in terms of Sections 55 and 56 of the *Advocates Act*, Chapter 16, Laws of Kenya.

Final Disposition:

31. Arising from the analysis, [details in terms of the preceding paragraphs], it must have become crystal clear that the orders of vacant possession and eviction, which were highlighted at the foot of the application cannot issue and/or be granted on the basis of an interlocutory application. Indeed, any attempt to grant same would constitute an abuse of the due process of the court and amount to a mockery of Justice.

32. Consequently, and in the premises, the Final orders of the court are as hereunder;

- i. The Application dated the 3rd October 2024 be and is hereby Dismissed.
- ii. Costs of the Application be and are hereby awarded to the Defendant/Respondent.

33. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF OCTOBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Ms. Mugure h/b for Mr. Mureithi for the Plaintiff/Applicant.

Mr. Kassam for the Defendant/Respondent.

