Waweru v School Committee Nyandundo Primary School & another; Tango Auctioneers & General Merchants (Court Bailiff) (Environment & Land Case 52 of 2022) [2023] KEELC 15749 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15749 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 52 OF 2022

FM NJOROGE, J

FEBRUARY 23, 2023

BETWEEN

PETER KIMUI WAWERU ..... APPLICANT

AND

SCHOOL COMMITTEE NYANDUNDO PRIMARY SCHOOL .... 1ST RESPONDENT

DIRECTOR OF SETTLEMENT ..... 2ND RESPONDENT

AND

TANGO AUCTIONEERS & GENERAL MERCHANTS ..... COURT BAILIFF

RULING

1. This is a ruling in respect of the applicant's notice of motion application dated September 20, 2022 seeking the following orders:

    1. Spent.

    2. Spent.

    3. That this honourable court be pleased to order that the 1st respondent do vacate the applicant's portion of land known as Nyandarua/Sabugo/122 within seven (7) days and to remove all the structures erected thereon.

    4. That in the event the 1st respondent fails to voluntarily vacate the applicant's portion of land known as Nyandarua/Sabugo/122 within seven (7) days, an order of eviction be issued against the respondent to vacate the applicant's land and to remove all the structures thereon

5. That Tango Auctioneers & General Merchants be given the mandate and authority to carry out the eviction of the 1st respondent from the portion of land known as Nyandarua/Sabugo/122.

6. That the officer commanding station Mirangine police station be ordered to enforce the eviction orders by provision of security and to ensure that there is no breach of peace.

7. That the costs of the application be borne by the 1st respondent.

2. The application is supported by the affidavit sworn by Peter Kimui Waweru the applicant herein sworn on September 20, 2022. He deposed that Stephen Waweru (deceased) is the decree holder in civil case No 232 of 2001; that title deeds of plots No LR Nya/Sabugo/122 and 151 were issued in favour of the decree holder in compliance with the court order; that in April 2010 the decree holder transferred plot No LR Nya/Sabugo/122 to him and a title deed issued; that according to prayer (c) of the decree dated December 17, 2003 the 1st respondent is restrained from trespassing into the said property; that the decree remains in force yet the 1st respondent has since trespassed into the said land and constructed a pit latrine; that he continues to do other construction and until this court stops such violation, he stands to suffer irreparable damages; that it is only proper that an order of eviction be issued against the 1st respondent; that it is in the interest of justice that he seeks the said orders.

Response

3. The 1st respondent in response to the application filed its grounds of opposition dated November 9, 2022 on the following grounds:

1. That the application as it is, does not meet the qualifications for the prayers sought.

2. That the application is incurably defective and ought to be dismissed at the first instance.

3. That the applicant has failed to sufficiently demonstrate proper service of the alleged court order against the 1st respondent.

4. That the application as it is does not disclose grounds upon which the said suit as it should be transferred.

5. That the applicant did not meet the provisions of section 13A of the *Government proceedings act*, which makes it a requirement to issue a notice of intention to sue the government.

6. That the application be struck out on the grounds that the suit is scandalous, frivolous and an abuse of the court process.

7. It is not in public interest that the orders sought in the application are granted and the same should be dismissed with costs henceforth.

Submissions

4. The 1st respondent filed its submissions dated January 23, 2023 on the same day while the applicant filed his submissions dated January 30, 2023 on the same day as well.

5. The applicant identified three issues for determination, one, whether the application is time barred by virtue of section 4(4) of the *Limitation of Actions Act* cap 22 Laws of Kenya, whether the applicant is entitled to the orders sought herein and who should bear the costs of the application.

6. On the first issue, the applicant submitted in the negative and relied on section 25 (1) and 26 (1) of the *Land Registration Act* as well as the case of *Alvin Mbae & 2 others v Edwin Nyaga Mukatha & 2*

others [2021] eKLR. He submitted that the fact that a decree order was issued 18 years ago does not warrant the 1st respondent any right whatsoever to encroach into the applicant's land. He added that the decree order issued remains valid and is binding to the 1st respondent to eternity unless set aside by a court. He submitted that the court made its final orders on the suit property and such orders should not be exposed to ridicule by the 1st respondent.

7. On the second issue, the applicant submitted that he proved that the decree order was executed in 2004 and that was how he got a valid title deed. He added that the respondents complied with the orders until 2022 when the 1st respondent encroached into the applicant's land and illegally erected structures. He submitted that the orders sought ought to be granted as prayed.

8. On the final issue, the applicant relied on section 27 (1) of the *Civil Procedure Act* and urged the court to award him the costs of the suit.

9. The 1st respondent on the other hand identified three issues for determination one, whether the application offends section 4(4) of the *Limitation of Actions Act*, whether the application is scandalous and an abuse of court process and who is to bear the costs of this suit.

10. On the first issue, the 1st respondent submitted that the applicant should not be heard to state that the decree dated December 17, 2003 was never appealed against or reviewed. That the applicant was granted 12 years from December 17, 2003 to serve and execute the decree 18 years and 9 months later through the instant application. It submitted that the filing of the instant application by the plaintiff 18 years later amounts to unreasonable delay and the same ought to be dismissed with costs to the respondents. It relied on the case of *Rawal v Rawal* (1990) eKLR 275 as cited by J Mutungi in *Dickson Ngungi v Consolidated Bank Ltd* (2020) eKLR and submitted that the applicant ought to have instituted execution proceedings on or before and not 18 years later.

11. Regarding the second issue, the 1st respondent submitted that the suit is an abuse of the court process since the applicant has been in possession of the decree for the last 18 years but has never taken any steps to execute the same. It relied on the case of *Katana Fondo Birya v Krystalline Salt Ltd & 2 others* [2018] eKLR and submitted that the instant application is an afterthought aimed at causing unnecessary tension and expense to the 1st respondent.

12. On the final issue, it argued that the court lacked jurisdiction to heat and determine the application and that the applicant ought to bear the costs of the suit.

Analysis And Determination

13. This court has considered the application and supporting affidavit and the only issue for determination is whether the application is statute-barred by dint of the provisions of section 4(4) of the *Limitation of Actions Act*, chapter 22 of the Laws of Kenya.

14. Section 4(4) of the *Limitation of Actions Act* provides that:

> " An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

15. It is not in dispute that the judgment which the applicant seeks to enforce was made on December 17, 2003 while the formal decree was issued on March 16, 2004. The applicant annexed a copy of the decree to his supporting affidavit in support of the application. The application seeks enforcement of the judgment and decree by way of issuance and execution of an eviction order.

16. It is also not in dispute that from the date the decree was issued, to the time of making this application, a period of about 18 years have since lapsed. It is clear that from the court record that no execution proceedings were taken by the decree holder for the last 18 years.

17. The Court of Appeal in the case of *M'Ikiara M'Rinkanya & another v Gilbert Kabeere M'Mbijiwe* (2007) eKLR held as follows:

> " From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period, stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So quite apart from the authority of *Lougher v Donovan*, which we consider as still good law in this country, and the previous decisions of this court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of "action" in section 4(4) of the Act would be inconsistent with the law of adverse possession.
>
> For the foregoing reasons, the notice of motion dated November 15, 2001 and filed in court on November 16, 2001 for warrant of eviction was, for all intents and purposes an "action" upon a judgment to recover possession of land. The proceedings to recover land having been filed nearly 18 years after the final judgment of the Court of Appeal were statute barred. [emphasis mine] Moreover since the respondent sought to execute the judgment over one year after it was delivered, a notice to show cause why judgment should not be executed should have been issued and the appellants given an opportunity to be heard."

18. Further in the Court of Appeal case of *Willis Onditi Odhiambo v Gateway Insurance Co Ltd* (2014) eKLR the court held that:

> " ...the saving framework in section 27 of the Act is not available to a litigant who fails to enforce a judgment within the time frame stipulated in section 4(4) of the Act."

19. It is not without much sympathy for the applicant that I find that the instant notice of motion must fail. This court can only recommend that the government ministry or departments for the time being dealing with land matters in conjunction with the ministry dealing or department dealing with education matters do put their heads together and consider the plight of the applicant and possibly obtain some alternative land for him elsewhere and in the alternative consider some form of compensation on the basis of compassion since they are still benefitting from the suit land.

20. In light of the above legal position, this court finds that the applicant's notice of motion dated September 20, 2022 seeking an eviction order against the respondents is statute-barred and it is hereby dismissed with no order as to costs.

DATED, SIGNED AND **DELIVERED** AT **NAKURU VIA ELECTRONIC MAIL ON THIS 23RD DAY OF FEBRUARY 2023.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU