



Kariuki & another (Suing as the Legal Representative of the Estate of Esther Wangari Kariuki- Deceased) v Kanuthu (Environment & Land Case E015 of 2022) [2023] KEELC 841 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E015 OF 2022
A OMBWAYO, J
FEBRUARY 16, 2023**

BETWEEN

JOHN WAIGANJO KARIUKI 1ST PLAINTIFF

MARY WAMBUI KARIUKI 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ESTHER
WANGARI KARIUKI- DECEASED**

AND

JANE NYAMBURA KANUTHU DEFENDANT

JUDGMENT

1. John Waiganjo Kariuki & Mary Wambui Kariuki Suing as the Legal Representative of the Estate of Esther Wangari Kariuki- Deceased (hereinafter referred to as the plaintiffs) has come to court seeking orders that the honorable court be pleased to declare the defendant either in person, his agents, servants or any other persons claiming under him as trespassers in all that property known as Mau Summit/ Molo Block 1/1118 Mutirithia and subsequently an order of eviction requiring the defendant to give vacant possession of all that property known as Mau Summit/MoloBlock1/1118 Mutitithia. That the honorable court do order the (OCS) Molo Police Station to provide security to the plaintiff while evicting the defendant.
2. That there be an order for the defendant to cede vacant possession of all that property known as Mau Summit/Molo Block1/1118 Mutirithia to the plaintiff herein and the immediate ejection and/ or eviction therefrom of the defendant and any other person claiming under him;
3. The Originating Summons is supported by the affidavit sworn by plaintiff wherein he states that the property in question was the suit property in HCCC No 425 of 1994 which was fully heard and



determined by this honorable court on February 22, 2001 and the plaintiff's claim was dismissed with costs to the defendant

4. That on or about November 2016, the defendant herein without any color of right and lawful justification invaded the plaintiff's parcel of land No Mau Summit/Molo Block 1/1118 Murithia and has since been constructing houses therein.
5. That the plaintiff had been completely unable to trace the primary suit file i.e HCCC No 425 of 1994. That it is only after they filed a complaint with the Ombudsman's office that the file was traced. The plaintiff/applicant herein is the absolute registered owner of the subject property having lawfully purchased and procedurally acquired the same in her name.
6. That being the registered proprietor with an indefeasible title of Mau Summit/Molo Block 1/1118 Mutirithia, the estate has issued several demand notices upon the defendant who has nevertheless declined to give vacant possession of the suit property.
7. That the estate has also made numerous attempts to access the suit property which actions have been met with violence from the defendant, his agents/servants who stand guard on the properties to ensure that the plaintiff does not gain access. That estate stands to suffer irreparable loss and damage if the eviction orders sought are not granted. That is only mete and just that the order sought be granted
8. I have considered the Originating Summons though it is not opposed, I do find that is misconceived in law as order 37 of the [Civil Procedure Rules 2010](#) does not envisage a cause of action of eviction. Moreover, already there is a judgment of the court hence technically the suit is res-judicata as the issue of ownership has been determined between the parties.
9. The plaintiff or the person through whom he ought to have claimed ought to have filed a counter-claim in Nakuru HCCC No 425 of 1994 but failed to do so and now has chosen to come late in the day for an order of eviction.
10. The plaintiff appears to be executing the judgment in Nakuru HCCC NO 425 OF 1994 by filing another suit. Judgment expires after 12 years.
11. Section 4(4) of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya provides:-

4.(4)

'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, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.'

12. In the case of [Willis Onditi Odhiambo –vs- Gateway Insurance Co Ltd \(2014\) eKLR](#) it was made clear that Section 4(4) of the [Limitation of Actions Act](#) covers execution of Judgments. In the case they stated as follows:-

In other words the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the [Limitation of Actions Act](#) which is in the following terms-

4(4) 'An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered'.



13. The judgment which the appellant sought to execute was passed on August 26, 1996. The judgment should therefore have been executed on or before August 27, 2008'.
14. In the case of *ELC NO 5704 of 1992 (OS) Hudson Moffat Mbue -vs- Settlement Fund Trustees & 3 others (unreported)* Mutungi J while considering the application of Section 4(4) of the [Limitation of Actions Act](#) where an application for execution of judgment had been brought before the expiry of the 12 years had lapsed but was determined until after the period had expired observed thus;

'What I understand the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within the 12 year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the [Limitation of Actions Act](#) will bar you from carrying on with such execution'.

15. I do find the suit is either an attempt to execute a judgment of this court delivered on the February 22, 2001, where the court determined the issue of ownership, or start a new action on an already determined matter between same parties which is res judicata, or commencement of a suit un-procedurally and therefore has no basis and is dismissed with no orders as to the costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF FEBRUARY 2023.

A O OMBWAYO

JUDGE

