



**Ngure v Ndegwa & 2 others (Environment and Land Appeal
33 of 2016) [2023] KEELC 788 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 33 OF 2016
SM KIBUNJA, J
FEBRUARY 15, 2023
[NOTICE OF MOTION DATED THE 26TH SEPTEMBER 2022**

BETWEEN

GEORGE MWACHALA NGURE APPELLANT

AND

HAMISI NDEGWA 1ST RESPONDENT

KUZIKA HAMISI 2ND RESPONDENT

SIMON MUTIA 3RD RESPONDENT

RULING

1. The respondents moved the court through the notice of motion dated September 26, 2022 seeking for an order of eviction to have the appellant either by himself, agents, servants or anyone claiming under him removed from plot No Voi/Ndara 'A'/82 in enforcement of the ruling of the lower court delivered on April 20, 2015 and the Environment and Land Court judgement and decree dated June 22, 2022. The respondents also seek for an order that the OCS Voi Police Station be directed to supervise the process of eviction and demolition of the semi-permanent structures and costs. The application is premised on the seven (7) grounds on its surface and supported by the affidavit sworn by Hamisi Ndegwa, the 1st respondent, summarized as follows; that after the appellant filed the appeal on the lower court ruling of April 20, 2015, the court dismissed that appeal and struck out the lower court's suit by its judgement of June 22, 2022; that the respondents then served the appellant with notice to vacate on the June 27, 2022, but has illegally and without justifiable cause remained on the suit property, causing the respondents suffering and prejudice; that this court has discretionary powers to issue the eviction order sought for the ends of justice to be met and to ensure court orders are not made in vain; that the order sought should issue for the preservation of the dignity of the court and enforcement of this court's judgement and decree issued herein.



2. The application was served on counsel for the appellant on October 23, 2022 and affidavit of service sworn on December 22, 2022 by George Odhiambo Otero, process server, filed on January 17, 2023. That by the time the application came up for hearing on January 18, 2023, no replying papers had been filed by the appellant. The court heard counsel for the respondents, who erroneously introduced herself as holding brief for Muthami for the appellant instead of respondents, and that Ms Shariff advocate, who was absent was for the respondents, instead of for appellant.
3. The issues for the determinations of the court are as follows;
 - a. Whether there are existing orders or judgement upon which the order of eviction and demolition sought may be based on.
 - b. Whether the respondents have made out a reasonable case for the orders sought to be issued.
 - c. Who pays the costs.
4. The court has carefully considered the grounds on the notice of motion, affidavit evidence, the record, learned counsel's oral submissions and come to the following findings;
 - a. The judgement of this court delivered on June 22, 2022 clearly shows at page 1 that the court was dealing with an appeal from the Lower Court in which the Senior Principal Magistrate, Hon S M Wahome in Voi CMCC No 151 of 2006, struck out the appellant's suit in his ruling of April 20, 2015. The appellant then filed the appeal herein that was dismissed with costs. In dismissing the appeal the court also ordered that the appellant's suit in Voi Senior Principal Magistrate's Civil Suit No 151 of 2006 be struck out. There has been no further appeal to the Court of Appeal on the judgement of this court. It is noted that neither the Lower Court in its ruling of April 20, 2015, nor this court in the judgement of June 22, 2022 issued any eviction and or demolition orders against any of the parties herein.
 - b. That prayer 2 of the respondents notice of motion appear to imply that the eviction order sought herein is "in enforcement of the ruling of the lower court delivered on April 20, 2015 and the Environment and Land Court's judgement and decree dated June 22, 2022." That in view of the finding in (a) above, what is implied in prayer 2 that the order sought is in furtherance of the enforcement or execution of the orders issued by the Lower Court and this court is not borne out of the facts that are apparent in the edicts of both courts.
 - c. That at paragraph 4 of the supporting affidavit of Hamisi Ndegwa, he deposed that "...the appellant during the pendency of the suit/appeal the appellant constructed some semi-permanent structures." He further deposed at paragraph 7 of the same affidavit that "...the structures are abandoned there with no one living in them." The respondents do not appear to have raised the issue of the appellant's occupation of the suit land and construction of the structure before the trial court or this court and therefore no specific order was issued on eviction and demolition.
 - d. That what the respondents appear to do through their application is to give effect to their eviction notice dated June 27, 2022, that was obviously issued after the litigation between the parties herein had ended. That as the issue of the appellant's eviction and demolition of his structure was never an issue for determination before the Lower Court and this Court, then the respondents' notice of motion dated September 26, 2022, has no relationship to this appeal and cannot be grounded on it.
 - e. That as the appellant did not participate in the application, the respondents will bear their own costs.



5. That the above conclusions lead the court to find that the Respondents' notice of motion dated September 26, 2022 is without merit and is hereby struck out. The Respondents to bear their own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15th DAY OF FEBRUARY 2023

S M KIBUNJA, J

ELC MOMBASA.

IN THE PRESENCE OF;

APPELLANT : Absent

RESPONDENTS : Absent

COUNSEL : Mr. Nchere for Muthami for Respondents/Applicants

WILSON .. COURT ASSISTANT.

S M Kibunja, J

ELC MOMBASA.

