



REPUBLIC OF KENYA



**Raibuni & 4 others v Karim & 4 others (Environment & Land Case
132 of 2007) [2023] KEELC 831 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 132 OF 2007
CK NZILI, J
FEBRUARY 15, 2023**

BETWEEN

REHEMA RAIBUNI APPLICANT

AND

JANE MPINDA PLAINTIFF

AND

MARY ALIMA RAIBUNI 1ST APPLICANT

ALI KITHINJI 2ND APPLICANT

ABDALLA MANYARA 3RD APPLICANT

AND

MOHAMED IQBAL ABDUL KARIM 1ST DEFENDANT

RAMJI DEVJI PATEL 2ND DEFENDANT

MEHBOOB SALE MOHAMED 3RD DEFENDANT

VALJI HIRJI SENGHANI 4TH DEFENDANT

SALPRO (K) LIMITED 5TH DEFENDANT

RULING

1. The court is asked by the plaintiff to issue an eviction order against the interested party, his agents, servants or whomsoever is claiming LR No Ntima/Igoki/7322 and for the lifting of the caution placed against the title by the interested party.



2. The reasons given as contained on the face of the application and in the affidavit in support by Jane Mpinda are that a consent judgment was entered on June 9, 2008 by the parties and which was implemented; that the interested party upon realizing this settlement trespassed into the land and chased away the decree holder; the applicants are now unable to enjoy the fruits of their judgment and lastly, that it was in the interest of maintenance of peace that the orders sought be issued.
3. Joshua Ngatu the interested party has sworn a replying affidavit which is undated but which was filed on December 5, 2022. The grounds of opposition are that the suit property was registered in the name of his mother, the 1st applicant who could not have consented to his son being evicted; that the 3rd, 4th and 5th applicants have passed on hence the 2nd applicant lacked authority to swear on behalf of the deceased applicants; that no finding was made by the court; the application was res judicata due to the ruling delivered on November 24, 2021; that he has been in occupation of the land for over 40 years together with his family; that there is a pending appeal which the applicants are aware of as per the annexed memorandum of appeal and should await the outcome so as to fully settle the issues in dispute otherwise no prejudice would be occasioned to the applicants.
4. Order 22 Rule 29 of the [Civil Procedure Rules](#) provides that where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged or to such a person as he may appoint to receive delivery on his behalf and if necessary, by removing any person bound by the decree who refuses to vacate the property. Sub Rule (2) thereof provides that where a decree is for the joint possession of immovable property such possession shall be delivered by affixing a copy of the warrant in some conspicuous place of the property and if free access is denied, the court through its officers may give a warning, remove, open any lock or break open any door so as to put the decree holder into possession.
5. In this application, the applicants claim that the suit was settled by a consent agreement which was fully implemented but the interested party chased them away hence have been unable to enjoy quiet possession and fruits of their judgment. They now seek for an eviction order.
6. In support of the application, the applicants have attached a copy of the agreement dated June 9, 2008 and an official search which indicates that Rehema M'Raubuni, Jane Mpinda and Mary Halima became the registered owners of the LR Ntima/Igoki/7322 on June 8, 2016 and acquired a title deed. Further, the official search indicates that the interested party lodged a caution on August 7, 2016 claiming a licensee's interest.
7. This court by a ruling delivered on November 24, 2021, made a finding that the suit herein relates to LR No Ntima/Igoki/3117 which parties herein compromised on November 28, 2010 and marked the file as closed.
8. The court also made a finding that no consent agreement was filed for the court's endorsement. Further, the court made a finding that the interested party and his advocates on record were improperly before court since the said alleged interested party was never a party to this suit. Additionally, the court also declined to issue any post judgment orders unless one was brought under Order 22 of the [Civil Procedure Rules](#) and under Sections 34, 38 & 40 of the [Civil Procedure Act](#).
9. There is no decree or order which the applicants have ever extracted after the suit was marked as settled for purposes of any execution. Similarly, there is no order by this court to join any party to bound by the decree or an order issued for the furtherance of any post consent judgment.
10. After the court marked the suit as closed, it became functus officio. The court can only grant execution orders against parties who are properly joined in the suit. The applicants have not sought for and



obtained leave to join the purported interested party to any order or decree. The court is also yet to come across an order or decree which has been extracted in this file worthy executing. Similarly, this court has already determined a similar application seeking for inter alia, an eviction against the defendants in the suit.

11. In *Bruce Joseph Boclale vs Coquero Ltd (2017) eKLR* the Court of Appeal held that in a plea for vacant possession, an enforcement of such an order can only occur through an order of eviction pursuant to Order 22 Rule 29 of the Civil Procedure Rules.
12. As to the prayer to lift the caution, Section 73 and 78 of the *Land Registration Act* 2012 provides that a land registrar on his own motion or by an application of an interested party after giving parties an opportunity of being heard, may order for the removal of a restriction. There is no indication in this application if the applicants herein sought for the intervention of the land registrar prior to coming to court.
13. In the case of *Mwangi Rukwaro & another vs Land Registrar Nyeri (2019) eKLR*, the court held that while it had powers to lift a restriction, it could not do so before the cautioner had been given an opportunity to be heard before the land registrar, unless there were special circumstances disclosed. In the instant application, the cautioner as held above is not party to this suit. The court cannot therefore act in vain
14. The upshot is I find the application lacking merits. The same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 15TH DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Mrs. Otieno for respondent

HON. C.K. NZILI

ELC JUDGE

