



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC MISC APPLICATION NO.17 OF 2021

JULIUS L. MARTEN.....APPLICANT

VERSUS

CALEB ARAP ROTICH.....RESPONDENT

RULING

1. Before me for determination is the applicant's Notice of Motion dated 8th June, 2021 brought under Section 152 A, 152B, 152E and 152F of the Land Act, 2012 seeking the following orders:

1. Spent

2. That this honourable court be pleased to confirm the Notice of Motion dated 7th July, 2020 and order the plaintiff to remove himself and/or any other person that he may have placed on PLOT NO. 35 (NEW NO. 831) OLJORAI PHASE II forthwith and in default the plaintiff and or such person/s be forcibly evicted and vacant possession be given to the defendant.

3. THAT JOHN MUTHEE NGUNJIRI T/A Tango Auctioneers do effect and execute the above eviction orders.

4. THAT the OCS Elementaita Police Station, Elementaita Division, do offer security in ensuring compliance of prayers 2 and 3 above.

5. THAT the costs of this application be provided for.

2. The application is supported on the affidavit sworn by Julius L. Marten dated 8th July, 2021 where he deposes that sometime in 2007 he bought the suit property and later in 2013 he settled on the suit property with his family. That the respondent begun threatening him that he only bought two and a half (2 ½) acres as opposed to the whole five (5) acres. He further stated that in February 2014 the respondent invaded the suit land and forcibly occupied 2 ½ acres of the property.

3. The applicant further deposed that the respondent instituted Nakuru ELC Civil Suit No. 18 of 2014 seeking injunctive orders against him, a declaration that the sale agreement was a nullity; and, that he be evicted from the land. The applicant deposed that he filed a defence in the suit and the court ordered for the status quo to be maintained pending the hearing and determination of the suit which he understood to mean that each party was to continue to occupy 2 ½ acres of the suit property until the determination of the case. Judgment was ultimately delivered in the suit on 30th April 2020 and the respondent's suit was dismissed with costs.

4. The applicant deposed that as per the judgment the respondent was not entitled to the reliefs he sought in the suit with regard to the 2 ½ acres he was occupying. The applicant further stated that he served the respondent with an eviction notice which prompted the respondent to file an application seeking stay of execution of the said judgment pending the hearing of their intended appeal and a conditional ruling was delivered. The condition was to the effect that stay would be granted as long as party and party costs were deposited in court failure to which the application was to stand dismissed. The applicant further stated that the bill of costs was

served upon the respondent and upon taxation the respondent was served with a certificate of costs in the sum of Kshs.221,082.

5. The applicant averred that the respondent did not deposit the assessed costs within 21 days as ordered and hence the conditional stay granted lapsed on 28th February 2021. The applicant deposed that despite the notice of eviction given to the Respondent lapsing, the respondent did not vacate the suit property. The applicant averred that by virtue of the judgment delivered on 30th April, 2020 in Nakuru ELC No. 18 of 2014 the court validated his (the applicant's) ownership of the suit property.

6. The applicant stated that the continued occupation of the suit land by the respondent denied him his right of occupation and use of the property. He averred that the respondent would not suffer any prejudice if the orders are granted and urged the court to grant the orders sought.

7. The respondent on his part in opposing the application filed a replying affidavit dated 15th July, 2021 wherein he deposed that the applicant was misleading the court by not being frank with the facts. He deposed that on 30th April, 2020 the court gave its determination with regard to the suit property and being aggrieved with the said decision, he (respondent) filed an appeal and an application for stay which was granted on condition that he was to deposit party and party costs with the court. He further stated that he was never personally served with any taxation notice and that his advocate never informed him that the costs had been taxed despite him visiting the advocates office severally.

8. The respondent averred that the court became *functus officio* upon delivering judgment and that the instant application is misconceived and was an abuse of the court process.

9. The application was argued by the parties by way of written submissions as directed by the court. The applicant's submissions were filed on 24th August 2021 and those of the respondent were filed on 4th October 2021. The thrust of the applicant's submissions was to the effect that the issue of ownership of the suit property being plot No 35 (New No.831) Olojorai phase 11 was determined by the court in **Nakuru ELC No.18 of 2014 (Caleb Chelimo Arap Rotich -vs- Julius L Marten)**. In the suit the plaintiff (now respondent in the present application) prayed for judgment against the applicant for:-

(a) *An injunction to restrain the defendant by himself, his agents servants, employees and others whatsoever from alienating, transferring, selling, leasing out, charging, developing or in any other manner dealing with property plot No. 35 (new number 831 Olojorai phase 11).*

(b) *A declaration that the agreement signed between the parties on 30th August 2009 is a nullity and therefore unenforceable.*

(c) *An order of eviction of the defendant from Oljorai Phase 11 plot No.35 (New No.831).*

(d) *Cost of the suit plus interest at court rates.*

10. The defendant (now applicant) filed a defence in the suit denying the plaintiff's allegations and averred that the plaintiff sold to him the entire 5 acres and handed to him the original letter of allotment. The defendant added he was ready to receive a refund of the purchase price but at the current market value of the suit property. He urged the court to dismiss the plaintiff's case with costs. It is evident therefore the defendant/applicant never pleaded a counterclaim.

11. In the judgment delivered by the court on 30th April 2020 the court found no merit in the plaintiff's case and dismissed the same with costs to the defendant. The court never made a declaration that the defendant was the owner of the suit property. The defendant had not sought such an order which could only have been made if the defendant had pleaded a counter claim. It is a cardinal rule of law that parties are bound by their pleadings and a court of law cannot grant that which is not pleaded and/or prayed for.

12. The applicant's position is that since the plaintiff's /respondent's suit against him was dismissed, he was by implication deemed the owner of the suit property. Unfortunately, the law does not operate that way, it cannot be presumed that since the plaintiff lost his plea for injunction and eviction, then it must be the defendant was the owner of the property. There must be a positive order declaring the defendant as the owner that is capable of being executed. The applicant in his submissions referred to several court decisions where eviction was granted in similar applications as the present application. In the case of **Margaret Karwira Mwangera -vs- Francis Kofo (2019) eKLR** Munyao, J allowed eviction but in the case, the applicant was the registered proprietor and held title to the land.

13. That was the same case in the case of *James Mathura Makewa -vs- Nzari Nguli (2021) eKLR* where Mbogo, J allowed eviction to issue. In the case of *Lucy Ghati -vs- Alex Wambura John & another (2019) eKLR* Ong'ondo, J sitting at Migori had in a judgment rendered on 30th May 2018 ordered the eviction of the respondents but directed the eviction to be in compliance with section 152B, 152E and 152 (1) of the Land Act 2012. There was therefore no difficult in allowing the application for eviction once presented.

14. In the case of *Hillarione Kabuteni & Another -vs- George Kiruki Mwamba (2019) eKLR* Lady Justice Mbugua declined to order the eviction of a plaintiff whose claim for adverse possession had been dismissed for non-attendance. The defendant vide an application had sought an order for the eviction of the plaintiffs as their claim for adverse possession was dismissed. The judge held that as the defendants had not pleaded a counterclaim in the dismissed suit there was no basis upon which eviction could be ordered. She held the application was bad in law as it was not based on any proper claim, pleadings or judgment.

15. From a reading of sections 152C, 152D and 152E of the Land Act, 2012 it is not clear how a party ought to approach the court for relief under section 152F. Is it by way of a formal suit and/or miscellaneous application as in the instant suit" Any eviction order has far reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/possession of for some time. Before such an order is given the court must be satisfied on its merits which means any person who stands to be affected by any order the court may make is entitled to be heard. Section 152E relating to private land envisages that there is no dispute on ownership and the occupation is unlawful. What is the situation where there is no dispute on ownership and the occupation is unlawful" What is the situation where there is disputed ownership of the property" In my view where the ownership is disputed the summary procedure that section 152F appears to contemplate would not be suitable and a formal suit would be advisable.

16. In the instant matter the defendant does not hold title to the suit property. The court in ELC No.18 of 2014 (Nakuru) did not declare him the owner of the suit property. The court's final orders in the judgment are that the plaintiff is not entitled to the reliefs sought in regard to the eviction of the defendant (now applicant) from the suit property. The defendant had not raised a counterclaim in the suit and no declaration of ownership was issued in his favour. There was no order capable of execution made in his favour. The applicant save for the sale agreement holds no title to the land. He requires to have a declaration of ownership of the suit property and a decree for him to be entitled to an order of eviction against the respondent.

17. The upshot is I find and hold the applicant's application dated 8th June 2021 not merited. I order the same dismissed with costs to the respondent.

18. Orders accordingly.

RULING DATED SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF DECEMBER 2021.

J M MUTUNGI

JUDGE



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