



REPUBLIC OF KENYA



KENYA LAW
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**Wanyama v Mugeni & another (Environment and Land Appeal
11 of 2016) [2025] KEELC 243 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 243 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL 11 OF 2016**

**BN OLAO, J
JANUARY 30, 2025**

BETWEEN

DESTERIO NYONGESA WANYAMA APPELLANT

AND

GILBERT WESONGA MUGENI 1ST RESPONDENT

AHMED MOHAMED 2ND RESPONDENT

RULING

1. By a ruling delivered on 16th September 2024, I directed as follows after considering Desterio Nyongesa Wanyama (the Appellant's) Notice of Motion dated 17th August 2023 in which he had sought inter alia, the release to him of the sum of Kshs.1,255,000:
 1. Prayers No (a) and (b) are declined.
 2. The sum of Kshs.1,255,000 deposited in this Court as per the receipts annexed be refunded forthwith to the 1st Respondent.
 3. The Appellant is at liberty to forthwith execute the decree in terms of prayer No (a), (bb), (c) and (d) of his amended plaint and as affirmed by Kaniaru J in his judgment delivered on 30th July 2019 and which includes the eviction of the 1st Respondent and all the tenants from the suit property being plot No 318 in Busia Town.
 4. Thereafter, the Respondents and all those claiming under him shall be enjoined permanently from entering, trespassing, alienating, occupying, residing on leasing, selling, demolishing or in any other way dealing with the ships occupied by the 1st Respondent on the suit property being plot No 318 Busia Town.



5. The Officer Commanding Station (OCS) Busia Police Station be and is hereby directed, upon request, to provide security during the eviction exercise should there be resistance.
6. Costs of this application are awarded to the Appellant.

Gilbert Wesonga Mugeni (the 1st Respondent) was aggrieved by that ruling and promptly filed a Notice of Appeal dated 19th September 2024. He also filed a Notice of Motion of the same date which he however later withdrew on 15th October 2024.

2. That leaves for my consideration the Appellant's Notice of Motion dated 18th September 2024 in which he seeks the following orders:
 - a. Spent
 - b. Spent
 - c. This Honourable Court be pleased to review, vary or set aside the order made on 16th September 2024 directing the release of the sum of Kshs.1,255,000 deposited in Court to the 1st Respondent and instead order the release of the said sum to the Appellant in execution of the decree herein.
 - d. Costs be provided for.
3. The application is premised on the provisions of Sections 1A, 1B, 3A, 38(f) and 63(e) of the Civil Procedure Rules. It is based on the grounds set out therein and supported by the affidavit of Mr F. Omondi the Appellant's counsel also dated 18th September 2024.
4. The gravamen of the application is that the Appellant holds a Decree following the judgment of Omollo J dated 3rd December 2019 by which the judge directed that the rents due from the tenants in occupation of the suit property be deposited in Court pending the hearing and determination of the appeal. Execution of that Decree includes the recovery of the said sum of Kshs.1,255,000. That releasing the said sum to the 1st Respondent is contradictory and justice demands that the said sum be released to the Appellant in partial execution of the Decree herein.
5. When the application was placed before me on 19th September 2024, I directed that it be canvassed by way of written submissions and the Respondents were granted 14 days from date of service to file their responses and submissions. However what the Respondent did was to file his own Notice of Motion dated 19th September 2024 seeking a stay of my ruling dated 26th September 2024 (my ruling is actually dated 16th September 2024). The Respondent did not file any response to the notice of Motion dated 18th September 2024. Instead, on 15th October 2024, the Respondent withdrew his Notice of Motion dated 19th September 2024 but proceeded to file submissions on the Appellant's Notice of Motion dated 18th September 2024. Mr F. Omondi counsel for the Appellant and instructed by the firm of Omondi & Company Advocates filed his submissions dated 20th September 2024. The Notice of Motion dated 18th September 2024 is therefore not opposed.
6. I have considered the Notice of Motion dated 18th September 2024 as well as the submissions by Mr F. Omondi and those by MR IPAPU counsel for the 1st Respondent.
7. The Appellant seeks the order that this Court reviews, varies or set aside the orders issued on 16th September 2024 by which I had directed that the sum of Kshs.1,255,000 deposited herein by the 1st Respondent be released to him. That instead, I should direct that the said sum be released to the Appellant in execution of the Decree herein. It is the Appellant's view that it is contradictory for the Court to allow the Appellant recover rent due to him and at the same time hand the said sum to the



1st Respondent. This is how counsel for the Appellant has deposed in paragraph 11 of his supporting affidavit:

- 11: “That it is therefore a contradiction for the Court to allow the Appellant recover accrued rent and mesne profits and at the same time hand back the very rent and mesne profits held in Court to the 1st Respondent.”

And in paragraphs 9 and 10 of his submissions, Mr F. Omondi states that:

- 9: “The relief granted in the decree of Court is for recovery of mesne profits and unpaid rent from the 1st and 2nd Respondent respectively. The Court already holding part of the mesne profits due to the Appellant. It follows that the sum of Kshs.1,255,000 was the Appellant’s property. It was thus an error for the Court to order that the said sum be released to the 1st Respondent and at the same time grant the Appellant liberty to inter alia recovery (sic) mesne profits from the same Respondent.”
- 10: “The just order in the circumstances was for the release of the sum of Kshs.1,255,000 to the Appellant whereafter he could execute for the rest of reliefs in the amended plaint including recovery of any balance of the mesne profits.”

On the other hand, counsel for the 1st Respondent has made the following submissions in paragraphs 2 and 3 of his submissions:

- 2: “The said Judgment being sought to be enforced has since been appealed against through Appeal No 277 of 2019 which is at a very advanced stages, infact pending Judgment in Court.”
- 3: “In as much as the Applicant/Appellant prays that the said ruling be varied, reviewed and or be set aside, we would in the alternative pray that the status quo be maintained pending the determination of the Appeal aforementioned above.”

The Respondents having elected not to file any response to the Notice of Motion dated 18th September 2024 and having withdrawn their own Notice of Motion dated 19th September 2024, it is doubtful if they can purport to file any submissions raising issues of facts as their counsel has done. Perhaps they can only address this Court on issues of law. In any event, there is no evidence placed before me showing that the Court of Appeal Civil Appeal No 227 of 2019 is “infact pending judgment” in that Court. A letter from the Deputy Registrar of that Court would have sufficed.

8. Having said so, the orders by Omollo J vide her ruling dated 3rd December 2019 were as follows:
1. “All rents due from the tenants in occupation of the suit premises to be deposited in Court from December 2019 until the Appeal before the Court of Appeal is heard and determined and or if the stay lapses.” Emphasis mine.
 2. “In case of default by any of the tenants’ the Respondent is at liberty to levy distress to recover the arrears which once recovered to be deposited in Court less costs incurred for such distress.”



3. “The Applicant to refund the Respondent the sum of Kshs.266,900/= paid to him as party and party costs within 45 days of today.”
4. “In default/disobedience of any one condition the stay given herein shall lapse.”
5. “Costs of this motion abide the winner of the Appeal before the Court of Appeal.”

It is clear from paragraph (1) above that the rent due to the Appellant was “to be deposited in Court from December 2019 until the Appeal before the Court of Appeal is heard and determined and or if the stay lapses.” The Judge did not direct that the said rent, which is now the sum of Kshs.1,255,000 and which the Appellant seeks to be released to him, was to be released to the Appellant. And since the 1st Respondent had defaulted, this Court vide my ruling delivered on 16th September 2024 allowed the Appellant to execute the Decree in his favour. It is not clear to this Court what challenges the Appellant has in executing the Decree in his favour. If he has, he has not said so. The most prudent order in the circumstances will be for the said sum of Kshs.1,255,000 to remain deposited in this Court while allowing the Appellant to execute his Decree in full. That sum shall not be released to the Appellant nor to the 1st Respondent but shall await the outcome of the Judgment of the Court of Appeal. To that extent only, this Court shall vary the order issued on 16th September 2024. The Appellant shall nonetheless be at liberty to execute the Decree herein in full because there was a default of the orders issued by Omollo J on 3rd December 2019.

9. The up-shot of all the above is that having considered the Notice of Motion dated 18th September 2024, this Court shall vary the orders issued on 16th September 2024 and direct as follows:
 1. Order No 2 is hereby varied to the extent that the sum of Kshs.1,255,000 shall not be released to the 1st Respondent but shall remain deposited in this Court pending the outcome of the Appeal or further orders by that Court.
 2. The other orders shall remain as directed in the ruling delivered on 16th September 2024.
 3. No orders as to costs.

BOAZ N. OLAO

JUDGE

30TH JANUARY 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 30TH DAY OF JANUARY 2025.

BOAZ N. OLAO

JUDGE

30TH JANUARY 2025

