



**Malenya v Kiarie & 4 others (Environment & Land Case  
1453 of 2002) [2023] KEELC 17936 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17936 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1453 OF 2002**

**AA OMOLLO, J  
JUNE 15, 2023**

**BETWEEN**

**CHARLES ADAVACHI MALENYA ..... PLAINTIFF**

**AND**

**STEPHEN G. KIARIE ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH NDUATI NGUGI ..... 4<sup>TH</sup> DEFENDANT**

**NANCY GATHONI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff/Applicant has presented the application dated December 8, 2022 seeking to be granted the following orders.
  - a. Spent
  - b. That pending the hearing and determination of this application, this honourable court be pleased to issue an injunction restraining the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, their agents, servants, heirs or any person claiming through them or anybody acting on their behalf from destroying, excavating, quarrying, damaging, wasting and/or mining any buildings and/or land and/or committing any wrong to the parcel of land known as LR NoNairobi Block 63/316.
  - c. That this honourable court do issue an eviction order against the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, their agents, heirs, tenants, and dependants from the property parcel of land known as LR NoNairobi Block 63/316.
  - d. That a court bailiff do effect and execute the above eviction orders.



- e. That the OCS Kilimani Police Station to provide security for the court bailiff during the eviction.
2. The application is premised on the grounds listed on its face inter alia;
    - i. That the Plaintiff/Applicant sued the Defendants in Milimani Suit No 1453 of 2002 seeking a declaration that the purported registration of LR No Nairobi Block 63/316 in favour of the 1<sup>st</sup> Respondent was unlawful, null and void.
    - ii. That the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have since refused and/or failed to comply with the above express, clear and unambiguous court orders and have refused to vacate the suit premises.
    - iii. That despite a 3 month Notice to Vacate the suit premises having been duly served on the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants on March 15, 2022, the Defendants have refused to give vacant possession.
  3. The application is opposed by the Replying Affidavit of the 4<sup>th</sup> defendant sworn on March 2, 2023 wherein the 4<sup>th</sup> Respondent attached a copy of the judgment delivered on November 10, 2021 and copy of the record of appeal lodged before the court of Appeal. Mr Nduati Ngugi deposed that the application is devoid of merit because;
    - a. The judgment dated November 10, 2021 did not make any orders granting the Applicant the ownership of the property known as LR No Nairobi/Block 63/316.
    - b. The said Judgment did not make any orders for the eviction of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents
  4. The 4<sup>th</sup> Respondent deposed that he has filed an appeal to the Court of Appeal vide NBI ELC CA No E671 of 2022. He avers that he has an arguable appeal with high chances of success and if the orders sought herein are granted, his appeal will be rendered nugatory. He insisted that the judgment did not order for vacant possession over the suit property as the plaintiff did not prove ownership or possession. The Respondent also denied being served with a notice to vacate. He urged the court to exercise her discretion and strike out the application and or stay it.
  5. The parties orally submitted in favour and against the application. In brief, Mr Wasuna learned counsel for the Applicant submitted that by the judgment ordering the cancellation of the 1<sup>st</sup> defendant's title, the Applicant was declared the lawful owner. That the 90 days granted to the Defendants to make an offer to purchase the suit land from the Applicant already lapsed with no offer being made.
  6. Mr Wasuna submitted further that the Defendants' admit they are in possession and wants to remain in possession until their appeal is heard and determined. However, according to the Applicant, the Respondents are now trespassers and assert that the application should be allowed in terms of prayer 4 and 5.
  7. In response, Mr Akide Senior Counsel for the 4<sup>th</sup> Respondent submitted that the judgment of November 19, 2021 did not grant ownership to the Applicant nor eviction of the Respondents. He added that they filed an application dated November 4, 2022 for stay of execution before the Court of Appeal and they are awaiting directions from the said court. The 4<sup>th</sup> Respondent submits that they have extensively developed the suit property and have no intention of demolishing or destroying their own property.
  8. From the pleading and submissions rendered in relation to this application, there is no doubt that there are no stay order of execution of the decree in place. It is settled in law that the filing of an appeal per se does not operate as a stay of execution order. Order 42 rule 6 of [Civil Procedure Rules](#) provides thus;



1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside (Underline mine for emphasis)
9. Can the application be granted? In the decision rendered on November 10, 2021, Okong'o J. entered judgment for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. The judge particularised the orders issued inter alia under paragraph;
  1. That the purported registration of LR NoNBI Block 63/316 in the name of 1<sup>st</sup> Defendant was declared null and void.
  2. The 1<sup>st</sup> and 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were granted 90 days to pay the plaintiff the market value of LR Block 63/316 (the suit property) without the developments as at the date of the valuation under order No 5 the stay of order in No 3 automatically lapsed if no payment was made to the plaintiff in terms thereof.
10. The 4<sup>th</sup> Respondent argued that the judgment did not confer ownership of the suit property to the plaintiff. If this argument is true, why did the judge grant an order that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants jointly and severally pay the plaintiff the value of the land? Okong'o J went further to direct that once the plaintiff received payment as directed in No 3 & 4 of the orders issued, he would have no further claim or interest in the suit property. The judgment clearly conferred ownership to the plaintiff. Needless to state that ownership bestows other rights including possession.
11. Since the Respondents do not deny that they have not complied with part of the order which required them to pay the Applicant the value of the land and there being no order of stay of execution in place, there is no basis why the 1<sup>st</sup> and 4<sup>th</sup> and 5<sup>th</sup> Respondents should remain in and enjoy quite possession of the suit property. it is like having their cake and eating it.  
Consequently, I find and hold that the application dated December 8, 2022 is merited.
12. The application is allowed on the following terms;
  1. This honourable court does issue an order of vacant possession against the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, their servants, agents, heirs, tenants and dependants from the property LR No NBI Block 63/316 within 90 days hereof. In default, the Applicant is at liberty to evict them.
  2. That a court bailiff shall effect and execute the eviction order in (1) above in case of default.
  3. The O.CS Kilimani Police Station shall provide security to the court bailiff during the eviction exercise.
  4. Costs of the Application awarded to the Plaintiff/Applicant.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE, 2023**

**A. OMOLLO**

**JUDGE**



**In the presence of**

Mr Odhiambo adv for Plaintiff/Applicant

Mr Munene for the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Resp

