



Tonui v Wekesa & 5 others (Environment & Land Case 23 of 2018) [2025] KEELC 1326 (KLR) (19 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 23 OF 2018**

**CK NZILI, J
MARCH 19, 2025**

BETWEEN

RCHAEL WANJIKU TONUI PLAINTIFF

AND

ENES SITACHI WEKESA 1ST DEFENDANT

AGNES NAFULA WAFULA 2ND DEFENDANT

FRANKLINE WAFULA 3RD DEFENDANT

WILLIAM WEKESA MUCHELE 4TH DEFENDANT

MAURICE WANJALA WEKESA 5TH DEFENDANT

JOHN WEKESA WABUKE 6TH DEFENDANT

RULING

1. Before the court is the application dated 7/10/2024, where the plaintiff seeks:
 1. ...spent
 2. An order directing the OCS Kitale Police Station to provide police assistance in enforcing the judgment delivered on 8/3/2023 and the subsequent permanent injunction orders thereof.
 3. The respondents be restrained from interfering with the eviction process, returning or re-entering the suit premises after eviction, failing which the police be authorized to arrest and detain them for contempt of court.
 4. The respondents be compelled to remove any illegal structures or encroachment which they may have erected on the suit property, in default the applicant be at liberty to do so with the assistance of the police at the cost of the respondents.



5. In the event the respondents resist the eviction, the police be authorized to use reasonable force where necessary while maintaining law and order.
6. The respondents meet the costs of the application and eviction.
2. The application is supported by the ground on the face of it and in the supporting affidavit of Rachel Wanjiku Tonui sworn on 7/10/2024. It is deponed that though a judgment was delivered on 8/3/2023 and the respondents ordered to vacate the land, they have refused, neglected, and or failed to comply with the eviction orders, despite demand letters sent. The applicant deposed that a permanent injunction had been issued against the respondents but has been resisted by the named persons, who unlawfully continue to occupy the said property, causing her great prejudice and financial loss.
3. The applicant averred that she is apprehensive that the respondents will be violent in resisting any attempts to evict them, as they have already made threats of violence, hence the need for police assistance, due to the high risk of breach of peace and damage to her property during the eviction.
4. The application is opposed through a replying affidavit of William Wekesa Muchele, the 4th respondent, for non-disclosure of material facts. The 4th respondent deposed that they have an appeal at the Court of Appeal for hearing of a stay application as per annexures marked WW'1(a), (b) & (c)' and '2' which is an application for stay and the directions; hence the application is *lis pendens*. Again, the 4th respondent deposed that due to the pendency of the appeal, his application would render the appeal nugatory, if the eviction and forceful removal from the suit land he has been on since 1982 is allowed, which is likely to render him destitute.
5. The 4th respondent averred that if he loses the appeal, he will voluntarily leave the land so long as he has exhausted the said right of appeal. Further, he deposed that since delivery of the judgment, the applicant has never attempted to evict him from the land, either in writing or through any other action, as there is still a pending application and an appeal, where the applicant filed a replying affidavit. In paragraph 18 thereof, she conceded to the stay, on condition that he pays her the decretal sum. The replying affidavit was attached as annexure 'WW'3'.
6. Similarly, the 4th respondent deposed that the application offends Section 1A and B of the *Civil Procedure Act*; is unwarranted and did cause him unsurmountable prejudice and substantial loss given that there are over ten families on the land, with established matrimonial homes; the 1st respondent is elderly and that they have made huge investments on the land as per photos attached as annexure WW'5'.
7. The applicant relies on written submissions dated 28/11/2024. Reliance is placed on Kenya Shell Ltd -vs- Kibiru & Another [1986] KLR 410, Machira T/A Machira & Co. Advocates -vs- East African Standard No. 2 [2002] eKLR, Sammy Some Kosei -vs- Grace Jelel Boit [2013] eKLR, Shimmers Plaza Ltd -vs- National Bank of Kenya Ltd [2015] eKLR, Nyamogo & Nyamogo Advocates -vs- Moses Kiplolum Kogo [2001] eKLR, Section 152E of the *Land Act*, Section 63(e) of the *Civil Procedure Act*, Republic -vs- Commissioner of Police & Another; Exparte Michael Monari [2012] eKLR and Republic -vs- Inspector General of Police & Another; Exparte Julius Waweru Ngumi [2021] eKLR.
8. The 4th respondent relies on written submissions dated 29/1/2025. While appreciating that execution is a lawful process, he submits that he has an undoubted right of appeal, which has been triggered as per annexure WW '1(a) (b) and (c)', WM'2' and WW'3'. By granting the orders sought, the 4th respondent submits that the pending appeal and the application would be rendered nugatory. Further, the 4th respondent submits that the present application offends the doctrine of *lis pendens*. Reliance



is placed on Naftali Ruth Kinyua -vs- Patrick Thuita Gachure & Another [2015] eKLR, Bernadette Wangare Muriu -vs- National Social Security Fund & Others [2012] eKLR.

9. What is before the court is a post-judgment application for the execution of the decree. A stay of execution of the eviction order had been sought by the respondents through a notice of motion dated 17/3/2023. The court delivered a ruling on the application on 20/4/2023. So, the court is *functus officio* on issues touching on whether the respondents have an arguable appeal; they have an undoubted right of appeal; that they would suffer substantial loss and damage, if the stay is not granted, and that if it is in the interest of justice to stay the eviction process. After the ruling was delivered on 20/4/2023, the respondents have not attached anything to show that they appealed against the said ruling.
10. The doctrine of *lis pendens* has also been invoked in this application. *Lis pendens* refers to acts done during the pendency of a suit. In Ruth Kinyua (*supra*) the court cited Black's Law Dictionary 9th Edition, that *lis pendens* is a jurisdiction power or control acquired by a court over property while a legal action is pending. In Mawji -vs- U.S. International University & Another [1976], the court observed that the doctrine is based on the experience of the court, the final adjudication of matters before the court, and in the general interest of public policy and good effective administration of justice, which prohibits a party from giving to others, pending the litigation, right to the property in dispute so as to prejudice the other.
11. In view of the foregoing definition, the relevance of the invocation of the doctrine by the respondents to the instant application is not clear. The applicant is simply seeking eviction orders. There is no evidence that the decree-holder has given out any of her rights to a third party while the dispute is still pending, who are not parties to the suit, with a view of prejudicing the respondents.
12. A pendency of an appeal or an application for a stay does not amount to an automatic stay under Order 42 Rule 6(1) of the Civil Procedure Rules. Execution of a decree is a lawful process as held in James Wangalwa & 2 Others -vs- Agnes Naliaka Cheseto [2012] eKLR. In this matter, the decree-holder is the registered owner of Title No. Trans Nzoia/Gidea/71. The judgment dated 8/8/2023 and the subsequent decree is yet to be stayed, set aside, and or vacated.
13. Section 38 of the [Civil Procedure Act](#) empowers the court to enforce the execution of its decrees upon an application by a decree holder. Order 22 Rule 7 (2) of the Civil Procedure Rules provides for the mode of applying for execution of a decree.
14. The applicant has not annexed a copy of the extracted decree that was served upon the judgment debtors in line with Order 22 Rules 29, 30, and 80 of the Civil Procedure Rules. There is equally no evidence that the applicant served an eviction notice upon the judgment debtors in line with Section 152A-1 of the [Land Act](#), which the judgment debtors have refused to comply with. Order 49 Rules 1, 2, 3, 5 and 7 of the Civil Procedure Rules allow the Deputy Registrar to deal with execution proceedings under Order 22 of the Civil Procedure Rules other than under Rules 28 and 75 thereof.
15. Flowing from the cited law, any eviction to be sanctioned by the court has to comply with the law on execution of court decrees or orders as read together with Sections 152 B, C & F and 152(1) of the [Land Act](#). In Hillarione Kabuteni & Another -vs- George Kiruki Mwamba (2019) eKLR, the court declined to order for eviction since the defendants in their statement of defense had not sought for it.
16. An application for eviction must be based on a proper claim, pleadings, and judgment. An eviction order has far-reaching implications as it entails the forceful removal of a party from the land he has been in occupation or possession. Before such an order is issued, the court has to be satisfied of its merits.
17. Whereas the issue of ownership and occupation of the land by the defendant has been determined in this suit and a decree rendered to that effect, and as much as I agree with the applicant that she is entitled



to the land, I note that the relief for either eviction order or delivery of vacant possession had not been sought for in the primary plaint. Consequently, the two reliefs were not included in the decree.

18. For the foregoing reasons, the court directs that the decree be extracted and be served upon the judgment debtors in the usual way. The judgment debtors are at liberty once there is full compliance with Section 38 of the Civil Procedure Act, Order 22 of the Civil Procedure Rules, and Section 152A of the Land Act, to seek the court's assistance through the Deputy Registrar for armed security.
19. The application is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 19TH DAY OF MARCH 2025.

In the presence of:

Court Assistant - Chemutai

Keletyen for the Applicant present

Mukabane for the Respondents absent

HON. C.K. NZILI

JUDGE, ELC KITALE.

