



Mwaniki ((Deceased) Substituted with Jane Wanjiru Kibe) v Kahiga & 2 others (Environment & Land Case 116 of 2013) [2023] KEELC 20137 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 116 OF 2013
JO OLOLA, J
SEPTEMBER 28, 2023**

BETWEEN

**PAUL KINYANJUI MWANIKI PLAINTIFF
(DECEASED) SUBSTITUTED WITH JANE WANJIRU KIBE**

AND

**SIMON MUTHUI KAHIGA 1ST DEFENDANT
PAUL KIRERU KAHIGA 2ND DEFENDANT
THE HON. ATTORNEY GENERAL 3RD DEFENDANT**

RULING

1. By the notice of motion dated September 10, 2021 Jane Wanjiru Kibe (the plaintiff) prays for orders:
 1. That the Deputy Registrar of this honourable court does sign the relevant transfer forms in place of the 2nd defendant Paul Kireru Kahiga to effect transfer of Nyeri/Uasonyiro/673 into the name of the plaintiff Jane Wanjiru Kibe;
 2. That an order do issue that the land registrar Nyeri to dispense with the necessary documents to (transfer) which are the Kenya Revenue Authority PIN and passport size photographs for the 2nd defendant Paul Kireru Kahiga while effecting the registration of Nyeri/Uasonyiro/673 into the name of the plaintiff as per the decree given on July 31, 2018;
 3. That an order does issue that the Land Registrar Nyeri do dispense with the original title deed that is necessary while effecting transfer of Nyeri/Uasonyiro/673 into the name of the plaintiff Jane Wanjiru Kibe; and
 4. That costs be provided for.
2. The application is supported by a brief 5-paragraph affidavit wherein the plaintiff deposes as follows:



1. That I am the plaintiff in the suit herein duly conversant with the matters at hand and as such competent to swear this affidavit;
 2. That the honourable court did on July 31, 2018 issue a decree in this matter in which it was ordered that the 2nd defendant's title over Nyeri/Uasonyiro/673 be cancelled and registration of the same be in the plaintiff's name. Annexed hereto is a copy of the decree marked JWK 1;
 3. That following the judgment leading to the decree herein the 2nd defendant filed a notice of appeal against the judgment which means the 2nd defendant will not voluntarily execute the documents necessary to give effect to the decree;
 4. That the foregoing (being) the case, it is mete and just that (the) orders sought be granted to give effect to the decree and judgment of this honourable court; and
 5. That what is deponed to herein is true to the best of my knowledge, information and belief.
3. Paul Kireru Kahiga (the 2nd defendant) is opposed to the application. In his replying affidavit sworn on January 6, 2022 as filed herein on January 10, 2022, the 2nd defendant responds in the relevant paragraphs 3 to 13 thereof as follows:
- “3. That the application is brought in bad faith and prematurely;
 4. That I was dissatisfied with the judgment of this court and filed an appeal being Nyeri Court of Appeal case No 178 of 2018;
 5. That my appeal is still pending for hearing and I pray that the suit land be preserved as it is the subject matter of the appeal;
 6. That the respondents do not stand to suffer any prejudice if the status quo is maintained as she is the one in occupation of the suit land;
 7. That if the land is transferred to the plaintiff when my appeal is still pending, she could transfer the same to third parties who will be affected by the appeal and I stand to suffer great prejudice if this court executes the judgment when my appeal has not been determined;
 8. That I had filed an application for stay of execution of the judgment and my application was dismissed;
 9. That I am in the process of applying for stay in the Court of Appeal;
 10. That I urge this court to stay the hearing of this application pending determination of the appeal.
 11. That (it) will save precious judicial time if proceedings are stayed pending the outcome of my appeal and it could if successful overturn the judgment herein;
 12. That I have paid the plaintiff the costs of the suit in full; and
 13. That I urge this court to exercise its discretion and stay proceedings herein awaiting (the) outcome (of) the appeal and dismiss the application dated September 10, 2021.”



4. I have carefully perused both the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the learned advocates representing the parties herein.
5. By this application dated September 10, 2021, the plaintiff prays that the Deputy Registrar of this court does execute the relevant transfer forms in place of the 2nd defendant to effect the transfer of land parcel No Nyeri/Uasonyiro/673 to the plaintiff's name. The plaintiff also prays for an order that the Land Registrar do dispense with the production of the original title deed and other documents within the 2nd defendant's possession when effecting the transfer.
6. It is the plaintiff's case that since a decree was issued against the 2nd defendant on July 31, 2018, he has failed to co-operate in ensuring that the decree is effected and that since he has filed a notice of appeal against the judgment of the court, it was clear that the 2nd defendant will not voluntarily execute the document necessary to give effect to the decree.
7. As would be expected, the 2nd defendant is opposed to the grant of the orders sought by the plaintiff. While conceding that judgment was entered herein in favour of the plaintiff and against himself on July 31, 2018, the 2nd defendant avers that he had since preferred an appeal against the said judgment to the Court of Appeal.
8. The 2nd defendant asserts that granting the prayers sought by the plaintiff will render the appeal nugatory as the subject matter being land parcel No Nyeri/Uasonyiro/673 could be alienated to third parties. The 2nd defendant further asserts that given the fact that there is a pending appeal, there was need to preserve the subject matter in dispute so that the rights of the 2nd defendant, who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.
9. As it were, other than the averment at paragraph 5 of the replying affidavit that the 2nd defendant's appeal is still pending for hearing at the Court of Appeal, the 2nd defendant does not explain what steps have been taken to prosecute the said appeal since he filed the notice of appeal on August 6, 2018. While it was apparent that the 2nd defendant was concerned with the preservation of the suit property, it was noteworthy from his replying affidavit reproduced above that there was no averment that he is voluntarily willing to execute the necessary transfer documents in obedience to the decree issued herein on July 31, 2013.
10. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 rule 6 of the *Civil Procedure Rules* stipulates that:

“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 orders set aside...”
11. While the said order 42 rule 6 of the *Civil Procedure Rules* may not apply to the Court of Appeal, it was clear that in the matter herein, the 2nd defendant had some two (2) years after the decree was issued herein, taken advantage of the provision when he filed a notice of motion application dated May 4, 2020 seeking a stay of execution of the decree among other orders.



12. That application was placed before the honourable justice Y. M Angima who, in a ruling dated and delivered at Nyeri on March 24, 2021 had found no merit in the application and had proceeded to dismiss the same. That being the case, it was further clear to me that the 2nd defendant's request for stay of execution had already been considered and that the court having declined to issue the same, the plaintiff was now entitled to execute the decree.
13. While the 2nd defendant contends at paragraphs 9 of his replying affidavit aforesaid that he is now in the process of applying for a stay of execution in the Court of Appeal, it was not clear what had stopped him from doing so some nine (9) months after his application for stay was dismissed by the court. What was clear to me from a reading of order 42 rule 6 of the Civil Procedure Rules as cited hereinabove, was that the pendency of an appeal does not of itself act as a bar to a successful litigant from reaping the fruits of his judgment.
14. It follows that I am satisfied that there is merit in the plaintiff's motion dated September 10, 2021. I allow the same as prayed with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 28TH DAY OF SEPTEMBER, 2023.**

In the presence of:

Mr. Ombongi holding brief for Muhoho for the Plaintiff

Mr. Muchomba holding brief for A. Thungu for the 1st and 2nd Defendants

No appearance for the 3rd Defendant

J. O. OLOLA

JUDGE

