



**Kenya Industrial Estates Limited v Mwali (Environment & Land Case 364 of 2017) [2023] KEELC 20152 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20152 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 364 OF 2017  
TW MURIGI, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**KENYA INDUSTRIAL ESTATES LIMITED ..... APPLICANT**

**AND**

**FELIX MUTUNGA MWALI ..... RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 28<sup>th</sup> September, 2022 brought under Order 51 rule 1, 2 & 3 of the Civil Procedure Rules, Sections 1A, 1B & 63 (e) of the Civil Procedure Act and all other enabling provisions of the law in which the Applicant seeks the following orders:-
  1. Spent.
  2. That the Officer in Charge of Kibwezi Police Station do provide security during enforcement and compliance of the decree granted by this Court on 29<sup>th</sup> July, 2019.
  3. That the costs of this application be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Charity Ndeke, the Legal Services Manager of the Applicant sworn on even date.

**The Applicant's Case**

3. The deponent averred that vide the judgment delivered on 29<sup>th</sup> July 2019, the Applicant was declared the bona fide owner of the suit property. She further averred that the Defendant has refused to hand over vacant possession of the suit property thus denying the Applicant the fruits of its judgement.
4. She averred that the Applicant has continued to suffer unmitigated loss of income and quiet possession due to the Respondent's continued occupation of the suit property. She further averred that the Defendant has threatened to violently resist any forceful eviction from the suit property hence



the instant application. She contended that the Applicant has instructed the firm of Cash Crop Auctioneers to enforce the decree and urged the court to grant the orders sought.

### **The Respondent's Case**

5. Opposing the application, the Respondent vide his replying affidavit argued that the application is an abuse of the court process. He further averred that the appeal against the judgment delivered on 29<sup>th</sup> July, 2019 is pending before the Court of Appeal for hearing and determination.
6. He denied that he had threatened to violently resist any eviction from the suit property and asserted that the Applicant has continued to threaten him with violent eviction. He averred that he is apprehensive that if he renders vacant possession of the suit property, the Applicant will take possession thereof and deal with it in a manner that will be adverse to his interest.
7. He further averred that the Applicant has not demonstrated how he has suffered unmitigated loss of income and quiet possession due to his occupation of the suit property. He argued that if the Auctioneer is allowed to proceed with the execution of the decree, his appeal will be rendered nugatory.
8. Finally, he averred that he has instructed his Advocate to file an application for stay of execution of the decree issued on 19<sup>th</sup> November, 2019.
9. The parties were directed to canvass the application by way of written submissions.

### **The Applicant's Submissions**

10. The Applicant's submissions were filed on 3<sup>rd</sup> February, 2023.
11. On its behalf, Counsel submitted that the only issue for determination is whether the Applicant is entitled to the orders sought.
12. Counsel submitted that the Plaintiff's suit against the Defendant was successful and that a judgment was delivered in its favour. That on 19<sup>th</sup> November, 2019 the court issued a decree directing the Defendant to vacate from the suit property.
13. Counsel argued that an Appeal or second Appeal does not operate as an automatic stay of a decree in the absence of an order of stay of execution.
14. Counsel contended that this court has jurisdiction to grant the orders sought notwithstanding the filing of the appeal since the Respondent did not file an application to stay the judgment pending the appeal. To buttress this point Counsel relied on the case of *Mary Wangui Karanja & Another v Rhoda Wairimu Karanja & Another* [2021] eKLR.
15. Counsel argued that in the absence of an order staying execution of the decree, the Defendant's argument that his appeal will be rendered nugatory if execution is permitted cannot hold. He referred the Court to the case of *Coquero Limited v Bruce Joseph Bockle* [2015] eKLR and the case of *African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 Others* [2014] eKLR.
16. Counsel submitted that the use of police officers to provide security to maintain law and order during enforcement of the decree is justified because the Defendant has refused to hand over vacant possession in compliance with the decree of this court.
17. Counsel further submitted that Section 152E of the *Land Act* is not applicable in the present suit since the court in its judgment directed the Defendant to give the Plaintiff vacant possession of the suit property. To buttress this argument, Counsel relied on the case of *Mary Wangui Karanja & Another Vs Rhoda Wairimu Karanja & Another* (supra).



18. Counsel contended that the application is merited and urged the court to grant the orders sought. To buttress his submissions, Counsel relied on the authorities attached to his submissions.

### **The Respondent's Submissions**

19. The Respondent's submissions were filed on 5<sup>th</sup> May, 2023.
20. On his behalf, Counsel admitted that they inadvertently failed to make an application for stay of execution of the decree.
21. Counsel further submitted that the Applicant should comply with the procedure set out in Section 152E of the Land Act because the court in its judgment did not issue an order of eviction against the Respondent. It was submitted that in line with the case of Mary Wangui Karanja & Another Vs Rhoda Wairimu Karanja supra, the Applicant ought to have applied for an order of eviction within 14 days of the grant of the order which was not done in this case. To buttress this point Counsel relied on the case of Salome Naliaka Wabwire Vs Alfred Okumu Musinaka (2022) eKLR and the case of Morris Kiruja Mpungu & Another v Margaret Ngiri Muchiri & Another [2021]eKLR.
22. Counsel maintains that where a judgment is entered in favour of the Plaintiff for a mandatory or permanent injunction, the Plaintiff cannot evict the Defendant without making a formal application for eviction before a court of law. Counsel argued that an order for security to enforce a decree is untenable in the absence of an express order of eviction emanating from a court of law. For those reasons Counsel urged the court to dismiss the application with costs. To buttress his submissions, Counsel relied on the authorities attached to his submissions.

### **Analysis And Determination**

23. Having considered the application in light of pleadings, the respective affidavits and the rival submissions, the only issue for determination is whether the Applicant is entitled to the orders sought.
24. It is not in dispute that judgment in this matter was delivered on 29<sup>th</sup> July, 2018 in favour of the Plaintiff/Applicant. Subsequently, the Applicant commenced the process of execution and was issued with a decree on 19<sup>th</sup> November, 2019.
25. The Respondent argued that he is justified to occupy the suit property because he has filed an appeal against the judgment delivered on 29<sup>th</sup> July, 2019. He argued that if the orders sought are granted, his appeal will be rendered nugatory. Although the Applicant admitted that he did not file an application for stay of execution of the decree, he contended that he had instructed his Advocate to file the same alongside the replying affidavit.
26. The Applicant on the other hand argued that in the absence of an order staying execution of the decree, this court has jurisdiction to grant the orders sought.
27. This court is called upon to determine whether the appeal as filed by the Respondent can operate as an automatic stay of execution of a decree.
28. Order 42 Rule 6(1) of the Civil Procedure Rules provides as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

29. It is clear from the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules that an appeal or second appeal does not operate as an automatic stay of execution of a decree. The Appellant has to specifically move the court for an order for stay of execution. This position was reiterated by the Court of Appeal in the case of Equity Bank Limited v West Link Mbo Limited [2013] eKLR where it was stated thus;

“As a general principle of law an appeal being a totally distinct proceeding from the original or appellate proceedings appealed from, the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree, in civil matters unless otherwise expressly so provided.”

30. As rightly submitted by the Applicant, it is crystal clear that in the absence of an order of stay of execution, an Appeal that has been filed in the Court of Appeal does not divest this court of its jurisdiction with regard to execution of the decree. In so finding I am persuaded by the holding in the case of Adiel Muriithi Philip v Thomas Maingi [2017] eKLR where the Court of Appeal held as follows;

“The fact that the respondent had filed a notice of appeal in the High Court did not change this position as jurisdiction still remained with the High Court to deal with issues concerning the satisfaction of the decree... Therefore, without an order of stay of execution, either from the High Court or the Court of Appeal, the High Court remained seized of jurisdiction to deal with matters concerning the execution of the decree even where an appeal is pending in the Court of Appeal against the decree. The issue of the High court being *functus officio* does not therefore arise.”

31. The decree at the heart of this application was issued pursuant to the judgment delivered on 29<sup>th</sup> July, 2019 in the following terms:-

- a. That a mandatory injunction do issue against the Defendant directing the Defendant to demolish all constructions and or premises erected on the Plaintiff’s L.R. No. 30010-Kibwezi and hand over vacant possession to the Plaintiff within fourteen(14) days of the grant of this order failure to which the Plaintiff be at liberty to demolish all those Defendant’s constructions and or premises erected on L.R. No 30010-Kibwezi but at the Defendant’s costs and expenses.
- b. That a permanent injunction do issue restraining the Defendant by himself, his agents, servants and or any other persons whosoever from encroaching upon, trespass onto, remaining on, developing upon or in any way howsoever interfering with all that plot known as L.R. No. 30010-Kibwezi situated at Kibwezi within Makeni County.
- c. That the Defendant shall pay to the Plaintiff General Damages of Kshs. 200,000/=.
- d. That the Defendant shall also pay to the Plaintiff costs of the suit.

32. The Applicant seeks police assistance to enforce and ensure compliance of the decree issued by the court on 19<sup>th</sup> November, 2019.



33. The Respondent on the other hand argued that the Applicant should comply with the procedure set out in Section 152E of the Land Act since the court did not issue an order of eviction against the Defendant. The reading of the provisions of Sections 152A to 152G of the Land Act are applicable in respect to evictions of persons occupying public, community or private land that may be carried without a court order.
34. In those instances, it is a requirement that notices be issued by the National Land Commission or the County Executive Committee member responsible for land or the owner of private land as the case may be. Section 152E of the Land Act provides for the issuance of an eviction Notice to unlawful occupiers of private land.
35. Where the court specifically provides in its final orders that the provisions of Section 152E of the Land Act should be complied with during eviction, then the said procedure has to be complied with.
36. In the instant case, the court directed the Defendant to give vacant possession of the suit property without mentioning the applicability of Section 152E of the Land Act. It is clear from the judgment that the court issued a mandatory injunction directing the Defendant to demolish all constructions erected on the Plaintiff's premises and to hand over vacant possession to the Plaintiff within 14 days, failure to which the Plaintiff was at liberty to do so at the Defendant's costs.
37. The Defendant having failed to hand over vacant possession of the suit property, it follows that the Plaintiff is at liberty to demolish all the constructions erected on the premises at the Defendant's expense without having to seek for an order of eviction.
38. The Respondent contended that he has instructed his Advocate to file an application for stay of execution alongside the replying affidavit. There is no stay of execution in force and none has been sought. There is nothing to bar this court from granting the orders sought.
39. In the end, this court finds that the application dated 28<sup>th</sup> September, 2022 is merited and the same is allowed as prayed. The Applicant is awarded costs of the application.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

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**HON. T. MURIGI**

**JUDGE**

In The Presence Of:-

Court assistant - Mr. Kwemboi.

Kimathi holding brief for Ambali for the Defendant/Respondent.

