



Chege v Njoroge & 4 others; Kamau (Interested Party) (Environment & Land Case 867A of 2017) [2023] KEELC 21310 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 867A OF 2017
BM EBOSO, J
OCTOBER 25, 2023**

BETWEEN

CYRUS KOMO CHEGE PLAINTIFF

AND

PETER NDAIWA NJOROGE 1ST DEFENDANT

MARY WAIRIMU KUNG’U 2ND DEFENDANT

KABUCO GACHOHI 3RD DEFENDANT

GEORGE NJUGUNA GACHOHI 4TH DEFENDANT

MICHAEL NJUGUNA NJOROGE 5TH DEFENDANT

AND

RUTH WANJIKU KAMAU INTERESTED PARTY

RULING

1. Judgment in this suit was rendered by Gacheru J on 29/7/2021, and a decree was issued in the following verbatim terms:

1. That the plaintiff has proved his case on the required standard of balance of probabilities and therefore his claim *vide* the plaint dated 13/12/2017 is partially merited and the same is allowed in the following terms:
 - a. A permanent injunction be and is hereby issued restraining the defendants, their agents and or servants, from trespassing or dealing in any way with L.R Nos Githunguri/ Gathangari/ 3106; 3107; 3108; 3109; 3110; 3111; 3112 and 3113.



- b. The defendants be and are hereby evicted from the suit properties herein.
 - c. Costs of this suit is awarded to the plaintiff.
- 2. That the defendants failed to prove their counter claims and the said counterclaims are dismissed entirely with costs to the plaintiff.
- 2. Subsequent to that, the plaintiff/decree-holder filed a bill of costs dated 21/10/2021. The taxing officer of the court “dismissed” the bill of costs on 16/8/2022 on the ground that it was fatally defective, in that the dates when the itemized services were rendered and the dates when the expenses were incurred had not been captured in the bill of costs.
- 3. On or about 12/1/2023, the decree holder/plaintiff filed a notice of motion dated 11/1/2023 seeking: (i) an order directing eviction of the defendant from land parcel numbers Githunguri/ Gachangari/ 3106; 3107; 3108; 3109; 3110; 3111; 3112; and 3113; (ii) an order directing execution of the eviction order by a court bailiff with the assistance of the Officer Commanding Githiga Police Station; (iii) an order directing the defendants to pay costs of the application.
- 4. Subsequent to that, the defendants brought an application dated 24/2/2023, seeking: (i) leave to effect a change of advocates post-judgment; (ii) an order of stay of execution pending the hearing and determination of Civil Appeal No 512 of 2021 pending in the Court of Appeal at Nairobi.
- 5. The above two applications are the subjects of this ruling. On 27/2/2023, the court directed that the two applications be disposed simultaneously. The court further directed parties to canvass the two applications through brief written submissions. I will dispose the two applications in the same ruling in the order in which they were filed.

Application dated 11/1/2023

- 6. The application dated 11/1/2023 seeks an eviction order and an order directing execution of the eviction order by a court bailiff with the assistance of the OCS of Githiga Police Station. The application was supported with an affidavit sworn on 11/1/2023 by Cyrus Komo Chege. It was canvassed through brief written submissions dated 25/5/2023, filed by M/s Kamau Kinga & Company Advocates. The defendants opposed the application through a replying affidavit sworn on 24/2/2023 by Michael Njuguna Njoroge and written submissions dated 5/7/2023, filed by M/s E. W Kamuyu & Co Advocates.
- 7. The gist of the case of the plaintiff/decree-holder is that the defendants have refused to vacate the parcels of land despite having been served with the decree of the court. They contend that the defendants have elected to disregard the Judgment and Decree of the court.
- 8. On their part, the defendants oppose the application and urge the court not to grant the orders sought in the application dated 11/1/2023, contending that they lodged an appeal against the Judgment of Gacheru J. They further contend that they have filed submissions before the Court of Appeal, adding that all that is awaited is a hearing date and a determination by the Court of Appeal. They add that they have no where else to call home, stating that execution will render them destitutes.
- 9. I have considered the application. At this point of writing this ruling, there is no order staying the Judgment and Decree of the court. Parties to this suit were heard and a determination was made on the question of ownership of the suit properties. The court decreed eviction of the defendants. The defendants elected not to promptly seek an order of stay of execution in either this Court or in the



Court of Appeal. The plaintiff holds a Judgment and a decree obtained on merits. There is therefore absolutely no reason why the decree-holder should be prevented from enforcing the decree.

10. There is, however, one disturbing aspect of the application dated 11/1/2023 which this court is constrained to comment on. The court is constrained to comment on the issue because it is gaining notoriety in our courts. The issue relates to post-judgment applications in which decree-holders seek fresh or duplicate reliefs. In the decree dated 29/7/2021, Gacheru J directed eviction of the defendants from the suit properties. While holding the decree issued by Gacheru J, the plaintiff seeks exactly the same relief under prayer 1 of the application dated 11/1/2023. This is clearly an abuse of the process of the court. This emerging practice cannot be countenanced by the courts. The time spent on considering the plea for the above duplicate relief is time that the court should spend substantively disposing other suits.
11. Looking at the notice of motion dated 11/1/2023 in its entirety, it is clear that all that the decree holder needed to do was to make an application for police assistance. The Deputy Registrar of the court would ordinarily dispose applications of this nature under Order 49 rule 8 of the [Civil Procedure Rules](#).
12. For the above reasons, the only relief that is merited as part of the enforcement proceedings in the notice of motion 11/1/2023 is an order directing the Officer in Charge of Githiga Police Station to provide security during the enforcement of the Judgment and decree of the court. I will grant the decree-holder that one relief subject to the court's determination on the application dated 24/2/2023. I now turn to the application dated 24/2/2023.

Application dated 24/2/2023

13. Through the application dated 24/2/2023, the defendants seek an order of stay of execution of the judgment and decree of this court. The application is supported with the affidavit of Michael Njuguna Njoroge sworn on 24/2/2023. It was canvassed through written submissions dated 25/3/2023, filed by E W Kamuyu & Company Advocate.
14. The case of the defendants/applicants is that they lodged an appeal against the Judgment of Gacheru J and they are waiting for the directions of the Court of Appeal on disposal of the appeal. They contend that the suit land is the only place they call home, hence execution of the decree during the pendency of the appeal would render them destitute.
15. The plaintiff/decree holder's case is that the defendants have not satisfied the requirements of the law on jurisdiction to grant an order of stay of execution. The plaintiff contend that the application dated 24/2/2023 is an afterthought prompted by his expressed desire to execute the decree. The plaintiff adds that the defendants have been indolent and there is no excusable explanation why the plea for stay was brought 18 months after delivery of Judgment.
16. I have considered the application, the response to the application and the parties' respective submissions. The single issue to be determined in the application dated 24/2/2023 is whether the criteria for grant of an order of stay of execution pending appeal has been met. The criteria is contained in Order 42 rule 6 (2) of the [Civil Procedure Rules](#) which provide as follows:

- “(2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

17. While there is no doubt that eviction could occasion substantial loss to the parties being evicted from the suit properties, no excusable explanation has been tendered to satisfactorily explain the delay of 18 months in bringing the application for an order of stay of execution. It is clear that the applicants elected to disregard the Judgment of the court. They brought this application after being served with the decree-holder’s application dated 11/1/2023.
18. Secondly, the applicants have not offered any security relating to the subsisting decree. The court decreed the defendants to vacate the suit properties. The least that the defendants were expected to do at this point is to offer security for their continued stay on the suit land. In cases of this nature, the party seeking stay is expected or present to the court a professional assessment of the market rent for a similar property and offer to deposit in court or in a joint interest earning account the market rent as reasonable security. The defendants have not done that. They want to continue staying on the land post-judgment without offering any form of security. The trial court having decreed them to vacate the land, they are expected to offer security for their continued occupation of the land.
19. Looking at the approach and attitude of the defendants on this matter, it is clear that they have not appreciated the legal implications of the decree which the plaintiff holds and the implications of the mandatory requirements of Order 42 rule 6(2) of the Civil Procedure Rules. They expect the court to exercise its jurisdiction under Order 42 of the Civil Procedure rules capriciously.
20. I have said enough regarding the defendants’ disregard of the mandatory requirements of Order 42 rule 6(2) of the Civil Procedure Rules. In summary, there is no merit in the application dated 24/2/2023. There is no merit in the application because the defendants/applicants have not bothered to satisfy the mandatory requirements of Order 42 rule 6(2) of the Civil Procedure Rules. They elected not to seek stay within reasonable time. Coming to this court after 18 months, they similarly elected not to bother about the requirement for security. The result is that the application dated 24/2/2023 is rejected for lack of merit.

Disposal Orders

21. In the end, the plaintiff’s application dated 11/1/2023 and the defendant’s application dated 24/2/2023 are disposed as follows:
- a. The Officer Commanding Githiga Police Station shall provide security driving the enforcement of the Judgment and the Decree in this suit.
 - b. The defendants’ Application dated 24/2/2023 is rejected for lack of merit.
 - c. The defendants shall bear costs of the two applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 25TH DAY OF OCTOBER 2023

B M EBOSO

JUDGE

In the presence of: -

Ms Waweru for the plaintiff



Court Assistant: Osodo/Hinga

