



REPUBLIC OF KENYA



KENYA LAW
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**Mukiira v Miaka (Environment and Land Appeal 116 of 2021)
[2023] KEELC 21111 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21111 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 116 OF 2021**

CK NZILI, J

OCTOBER 25, 2023

BETWEEN

MOSES MUROKI MUKIIRA APPELLANT

AND

JESKA MUKORURU MIAKA RESPONDENT

RULING

1. The court is asked to stay the execution of the decree following the judgment on 12.7.2023 in favor of the respondent. The grounds are set on the face of the application dated 26.7.2023 and the affidavit in support sworn by Moses Muroki Mukiira on the even date. Unlike the respondent, the applicant states that the decree shall evict him from the suit land where he has a home and lives with his family. It is averred that the prejudice he was likely to suffer outweighs that of the respondent and that the application is filed without inordinate delay. Additionally, the applicant avers that he is willing to furnish reasonable security if the court orders so.
2. The application is opposed by Jeska Mukoruru Miaka, the respondent, by a replying affidavit sworn on 6.9.2023. It is stated that the applicant does not reside on the suit land and has not demonstrated how he stands to suffer substantial loss, for he has never been in occupation of the said land.
3. The respondent averred that no security has been furnished, the appeal was unmerited, there has been a delay in filing the appeal, and no sufficient cause has been shown for not filing the notice of appeal. Further, the respondent averred that the applicant has come to court with unclean hands since he forcibly harvested miraa crops a day after the judgment, leading to a police report and crop assessment report per annexures marked JMM "1A and B". The respondent avers that on 4.8.2023, the applicant, alongside his children, went to the land and misrepresented the court's order, leading to a letter from her advocates dated 4.8.2023 and attached as annexure JMM "2".



4. It was averred that on 5.8.2023, the applicant made threats to kill the respondent and her family, and to make good his threats, they invaded the land on 6.8.2023 while armed with crude weapons, took occupation of the land and harvested miraa plants on 11.8.2023 as per Occurrence Book report and police order to arrest attached as annexures JMM "3" and JMM "4" respectively. Therefore, the respondent averred that the applicant has been abusing court orders and was contemptuous and should not be granted any orders.
5. By written submissions dated 17.9.2023, the applicant urged the court to grant the orders sought, for he has met the threshold under Order 42 of the *Civil Procedure Rules*. Reliance was placed on *Stephen Wanjohi vs Central Glass Industries Ltd* NRB HC Civil Case No. 6726 of 1991.
6. Order 42 Rule 6 of the *Civil Procedure Rules* provides that the court may grant a stay of execution to preserve the substratum of an appeal pending its hearing or determination if the application is filed on time, substantial loss has been shown, security for the due realization of the decree has been offered and lastly, if it is in the interest of justice to do so. The judgment of this court was delivered on 12.7.2023. A notice of appeal was court-stamped by the court registry on 26.7.2023, it is neither dated nor signed. The Deputy Registrar, nevertheless, received it on 7.8.2023.
7. In this application, the firm of Mutembei Kimathi and Co. Advocates also sought leave to come on record for the applicant. The same law firm also lodged the notice of appeal even before leave was granted. A notice of change of advocates dated 26.7.2023 was filed alongside the application. There is no indication of compliance with Order 9 Rule 9 of the *Civil Procedure Rules*, and perhaps consent was sought from the previous advocates on record. Similarly, there is no indication if the previous lawyers have been served with this application. Therefore, the application is brought by a law firm improperly on record.
8. On the question of substantial loss, the law is that the execution of a decree is a lawful process. See *James Wangalwa & another Agnes Naliaka Cheseto* (2012) eKLR, A party seeking a stay must demonstrate with tangible evidence that there is apparent and genuine loss likely to change the substratum of the appeal, if stay orders are not granted.
9. Going by the history of this matter, the respondent has been on the land, not the applicant. The respondent has also attached records and police reports to show that the applicant has taken the law into his own hands even after losing the appeal. He who comes to equity must do equity. The applicant is silent on the damning allegations and reports by the respondent that he has resorted to extra-judicial means to interfere with the lower court decree, yet there is no stay order.
10. It is not enough to say that one is occupying some land. No valuation reports or photographs have been attached to the application showing any developments belonging to the applicant that are likely to be affected by the execution. The appeal was dismissed; hence, the court cannot stay a negative order. Further, the application was filed almost a week after the judgment was delivered. The proposed security has not been stated. Costs for the appeal have also not been offered. The upshot is that I find the application both incompetent and lacking merits. The same is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 25TH DAY OF OCTOBER 2023

In Presence Of

C.A Kananu

Miss Masamba for respondent



HON. CK NZILI
ELC JUDGE

