



**Kiangamwe v Luka & another (Environment & Land Case
32 of 2014) [2023] KEELC 21507 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 32 OF 2014**

**A KANIARU, J
OCTOBER 17, 2023**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT ORDER
37 RULES 7 AND 9 OF THE CIVIL PROCEDURE RULES AND SECTION 3A OF THE
CIVIL PROCEDURE ACT AND ALL THE OTHER ENABLING PROVISIONS OF THE LAW**

BETWEEN

NJAGI KIANGAMWE PLAINTIFF

AND

WINSTON MUGO LUKA 1ST DEFENDANT

GITHUMBU NJERU 2ND DEFENDANT

RULING

1. This is a composite ruling that focuses on two applications, viz: A Notice of Motion dated 1/2/2021 and another Notice of Motion initially dated 17/2/2021 but which was later amended and re-dated 1/3/2021 (For ease of reference, the two applications will hereafter be referred to as 1st and 2nd applications respectively). The 1st application is expressed to be brought under Section 98 of the *Civil Procedure Act* and Rule 3A (sic) of the Civil Procedure Rules. The plaintiff in the suit is the applicant in the 1st application. The respondents are the defendants. The prayers sought in the 1st application are as follows:
 1. That the court do authorize the deputy Registrar/Executive officer to execute all the necessary documents in place of the defendant/respondent to facilitate transfer of parcels of land No. MBEERE/MBITA/4808 to 4829 all inclusive to enable the plaintiff/applicant acquire said parcels of land in accordance with the judgement delivered on 28/5/2020.
 2. That costs of the application be provided for.



2. The 2nd application is anchored on Section 1A, 1B and 3A of the *Civil Procedure Act*, order 42 rule 6 of the Civil Procedure Rules, Article 47 of *the Constitution* and all other enabling law. The prayers in the application are as follows:
 1. Spent.
 2. As a matter of urgency, this honourable court be pleased to stay the execution pending the hearing and determination of the appeal.
 3. Pending the hearing of the intended appeal this honourable court be pleased to stay the ruling granted by this honourable court on 12/10/2020.
 4. Costs of this application be provided for.
3. It is necessary to highlight the background leading to and/or surrounding the two applications. This is a concluded matter and the two applications relate to post-judgement processes that each side wants to pursue. The applicant in the 1st application would wish to see the judgement executed so that he can enjoy the fruits of his labour. The applicant in the 2nd application first tried to have the judgement reviewed but his application to that effect was dismissed vide a ruling delivered by this court on 12/10/2020. He is trying to appeal against that ruling and as he does so, he wants the ruling stayed.
4. The applicant in the 1st application is justifying his application on the basis that he won this case and has a judgment in his favour. The applicant in the 2nd application is justifying his application on the basis that he is going on appeal against the ruling that declined to review the judgement.
5. The applications were responded to via replying affidavits. Each side opposed the prayers sought in the applications in which they are respondents.
6. The applications were to be canvassed through written submissions. Rose Njeru for the applicant in the 1st application filed submissions on the two applications under consideration on 20/9/2022. Njiru Bonface for the applicant in the 2nd application did not file any submissions.
7. Counsel for the applicant in the 1st application gave a brief history of the matter and a short highlight of the substance of the two applications under consideration. She then submitted, inter alia, that the 2nd application seeking stay of execution of ruling pending appeal was only filed after the 1st application seeking effectuation of the judgement had been filed. It was submitted that the ruling sought to be stayed was essentially a dismissal of an earlier application in which the same party had sought the same orders. Being a dismissal, it was pointed out that there was nothing to stay.
8. It was submitted also that the notice of appeal made available to court by the applicant in the 2nd application was filed in court out of time. This was pointed out because the ruling sought to be appealed against was delivered on 12/10/2020 while the notice of appeal was filed on 12/1/2021, some 90 days later.
9. Further, the applicant in the 2nd application was said not to have shown any record of appeal. The court was urged to take the position that the applicant in the 1st application is entitled to the fruits of his judgement. The court was further urged to dismiss the amended Notice of Motion filed by the applicant in the 2nd application and allow the 1st application.
10. I have considered the two applications, the responses made to the applications, the submissions of the applicant in the 1st application, and the court record generally. As I pointed out earlier, there is already a judgement on record in this matter. The applicant in the 1st application successfully persuaded the



court concerning the merits of his entitlement to ownership of the disputed parcels of land as an adverse possessor.

11. It is necessary to appreciate that the applicant in the 2nd application had filed an earlier application dated 18/8/2020 seeking, among other orders, review of the judgement. He sought also stay of execution of the decree arising from the judgement. That earlier application was dismissed vide a ruling delivered on 12/10/2020. It is that ruling that the applicant in the 2nd application intends to appeal against. It is the same ruling in respect of which he is seeking an order of stay.
12. I reckon that I should first consider the 2nd application as it is the one that seeks stay of execution in its main prayers (prayers 2 and 3). My decision on this one will obviously imply or suggest the way forward concerning the 1st application. Regarding this 2nd application, I think the issue before me is whether its merits have been demonstrated. First, I begin by saying that I don't understand what the stay sought in prayer 2 is all about. It is not clear to me whether the stay sought pending appeal relates to the judgement already delivered or to the ruling being appealed against. If I were to grant this prayer, I don't know whether I would be staying the judgement or the ruling. Court orders are supposed to be succinct, unambiguous, and capable of enforcement. They are never made in vain. Where the prayer sought is vague or capable of interpretation in different ways, the court is always reluctant to issue it. To the extent that prayer 2 is not clear as to what is to be stayed, then it can be said to be vague or unclear and therefore not grantable.
13. As regards prayer 3, it is clear that what is sought is stay of the ruling delivered by this court on 12/10/2023. As submitted by the applicant in the 1st application, the ruling resulted in dismissal of the application earlier filed by the applicant in the 2nd application to review and stay the judgement. In the ruling, the court did not give a positive command that can be stayed. It appears to me that the applicant in the 2nd application does not really know or appreciate what stay of execution is all about. Stay of execution, called in Latin "Cesset executio", meaning "Let execution cease" entails issuance of an order by a court to stop some form of enforcement action. The question that arises in this matter is whether the ruling sought to be stayed in this matter ordered or directed some action to be taken. And the answer to this is obviously NO. It is therefore easy to agree with the applicant in the 1st application when he says that there is nothing to stay.
14. The applicant in the 2nd application seems not to realize that the dismissal of his application for review of the judgement and stay of its execution left that judgement ready for execution and enforcement. It is the judgment itself that contains something that can be acted upon or enforced. It is therefore the judgement only that can be stayed. But the court is of the view that it can not be invited to stay that same judgement as it had been invited to do so in the earlier application. It dismissed the earlier application and with it therefore also dismissed the prayer for stay of execution. Another stay of execution therefore can only be legitimately sought in the court of appeal.
15. It is also easy to fault the feasibility or legality of the appeal that the applicant in the 2nd application is intending to prefer. Usually, when a judgment or ruling is delivered, the losing party usually has 30 days within which to file an appeal unless the applicable law states otherwise. The right of appeal is not an automatic right of a party. It is conferred by law and is normally supposed to be exercised within a given time-frame.
16. The ruling intended to be appealed against was delivered on 12/10/2023. The notice of appeal annexed to the 2nd application shows clearly that the notice was received by the court on 12/1/2021. As observed by the applicant in the 1st application, that was 90 days after the delivery of the impugned ruling. The right of appeal was available within 30 days after the delivery of the ruling. The applicant in the 2nd application obviously needed to apply for extension of time to file appeal but did not do so. His notice



filed after 90 days obviously lacks a sound legal basis. It was filed out of time. The appeal intended to be filed will obviously meet legal headwinds and would most likely be dead on arrival.

17. Further to this, it is necessary to appreciate that the applicant in the 2nd application talked of having an arguable appeal. He didn't make available any material to show he has such an appeal. There was no memorandum of appeal accompanying the application to show what kind of appeal that applicant in the 2nd application intended to prefer. Such a memorandum would have enabled the court to appreciate whether the appeal is arguable or not. Besides, the law require that an order of stay of execution needs to be accompanied with an order for security for costs. There is no undertaking by the applicant in the 2nd application to offer such security for costs.
18. When all is considered therefore, it is clear that the merits of the 2nd application have not been demonstrated. That application is therefore for dismissal and is hereby dismissed with costs to the applicant in the 1st application.
19. I now turn to the 1st application. This is an application that seeks the assistance of this court in the enforcement of the judgment delivered in the suit. The dismissal of the 2nd application means that the judgement is left standing and ready for enforcement. There is nothing standing in the way of its execution.
20. In addition, the submissions made by the applicant in the 1st application makes a good case for allowing it. The applicant in the 2nd application did not file submissions. He was given ample time to do so but never seized the opportunity. There is no counter weight therefore to the submissions already on record. The upshot, therefore is that the applicant in the 1st application deserves to be allowed to enjoy the fruits of his judgement. The 1st application is therefore allowed. The costs of the 1st application will be borne by the applicant in the 2nd application.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF OCTOBER, 2023.

In the presence of Rose Njeru for plaintiff/Applicant and in the absence of Bonface Njeru for defendants/applicants

Court assistant: Leadys

A.K. KANIARU

JUDGE

17.10.2023.

