



REPUBLIC OF KENYA



Ogeto & 2 others v Nur & 3 others (Environment & Land Case 436 of 2009) [2025] KEELC 1284 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 436 OF 2009**

**AA OMOLLO, J
MARCH 13, 2025**

BETWEEN

**SAMMY LEONARD ASANDA OGETO 1ST PLAINTIFF
MICHAEL KORIR KIPNGENO 2ND PLAINTIFF
JAMES NYAKUNDI NYARIENDA 3RD PLAINTIFF**

AND

**NURIA ABDI NUR 1ST DEFENDANT
STEPHEN NYAGAKA 2ND DEFENDANT
PAULINE MUSYIMI 3RD DEFENDANT
JAMES N NYANGOKA 4TH DEFENDANT**

RULING

1. The Plaintiffs herein filed a notice of motion dated 24th September 2024 supported by an affidavit sworn by Tom Omao, an Advocate on record for the Plaintiffs on the same date seeking for the following orders;
 - i. Spent
 - ii. That an order do hereby issue in favour of the Applicant as owner of land title no. LR NO. 209/10939 (the suit property) to evict the Respondents from the same with immediate effect;
 - iii. That upon the grant of prayer (2) above, the OCS Embakasi Police Station be compelled to ensure that the same is complied with.
 - iv. That costs of the suit and of the Application be awarded to the Plaintiffs/Applicants.



2. The motion is based on the grounds that the Plaintiffs/Applicants prosecuted this matter before this Court and a judgement was delivered on the 22nd day of September, 2017 in favour of the Plaintiffs. That following the delivery of the said judgement and personal service upon the Defendants, they have failed, ignored and/or refused to leave the suit property title LR NO. 209/10939 and a Statutory notice to vacate served on them which was ignored.
3. The Defendants filed a notice of motion dated 14th November 2024 supported by an affidavit by Nuria Abdi Nur on the same date seeking for the following orders;
 - a. Spent
 - b. There be stay of execution of judgement delivered on 22nd September 2017 and the consequential orders therefrom pending hearing and determination of an intended appeal.
 - c. The court do direct the time within which the appeal should be filed heard and determined.
 - d. The court do grant leave to the 1st and 2nd defendant leave to file a Notice of Appeal and the Appeal out time
 - e. Costs of this application be in the appeal
4. The motion is based on the grounds as those in the undated replying affidavit sworn by Nuria Abdi Nur in response to the Plaintiffs' application seeking for eviction orders.
5. The grounds are; that after the suit was determined and upon delivery of the Judgement, the defendants intended to appeal the decision but they were approached by one of the plaintiffs (James Nyakundi Nyarienga) who asked them not to waste time and money to file the appeal since they (plaintiffs) will not evict them. That the 3rd Plaintiff was not even for the filing of the suit in the first place.
6. That the Defendants believed what the plaintiffs told them hence the reason they never pursued the appeal. For seven years after delivery of the said judgement, they have been in occupation of the suit land measuring approximately 50 x 100 feet, peacefully. That the 3rd Plaintiff had advised they look for a surveyor to assist them to draw beacons on the land for its proper identification but before they could get one, Corona Pandemic struck the country, and subsequently were unable to afford a surveyor's fee.
7. The Defendants stated that recently, the plaintiffs' advocates served them with an application to have them evicted, which is an unexpected ambush on the defendants who believed in the promise of the plaintiffs noting that they have a very good and arguable case for the Court of Appeal to determine. Consequently, they have applied for certified copies of the proceedings, judgement and decree to enable them prepare a record of appeal and ready to comply with the conditions which the court shall stipulate on the basis of granting stay orders.
8. The Defendants pray that they be excused for the inordinate delay in filing the application and stated that if the stay order is not granted, the appeal will be rendered nugatory.

Submissions:

9. The Plaintiffs filed submissions dated 2nd December 2024 with regard to the two applications. I have not seen the Defendants' submissions on record.
10. The Plaintiffs submitted that in determining whether their application should be allowed, the Court must consider the Defendant's seven-year delay in raising their defense against the Plaintiff's judgment. That the judgement was delivered by Lady Justice Kemei on 22nd September 2017, ordering the



Defendants to vacate the Plaintiff's land (LR NO. 209/10939). Yet the Defendants have ignored eviction the notices and continued with their unlawful occupation.

11. The Plaintiffs contended that the Defendants application dated 14th November 2024, brought nearly seven years after the judgment constitutes an inexcusable delay under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. They stated that the Court has consistently held that those who delay asserting their rights cannot prejudicially affect others, as seen in the case of *Mbogo & Another vs Shah* (1968)1 EA 93.
12. That also the Defendants have not demonstrated any substantial loss or provided sufficient evidence to show that their appeal is arguable, thus failing to meet the criteria for granting a stay.
13. Regarding the cost of the application, the general rule under the *Civil Procedure Act*, Section 27, is that costs follow the event, meaning the successful party is entitled to costs unless the court finds a good reason to order otherwise and in support cited the case of *Peter Njuguna Gitau v Daniel Kiprono Kiptum & 3 Others* (2022), where this Court upheld this principle, stating that the successful party should generally be awarded costs.
14. The Plaintiffs submitted that given that the Plaintiff's application is meritorious and the Defendants' application seeks to delay enforcement of a judgment already in their favor. It is appropriate for the Plaintiff to be awarded costs for the application, as the Defendants' actions represent an abuse of the judicial process.

Analysis and Determination:

15. There are two applications before this court for determination with the Plaintiffs' application dated 24th September, 2024 being the first in time seeking for execution of the decree by way of eviction from land title no. LR NO. 209/10939. On the other hand, the Defendants' application dated 14th November, 2024 seeks stay of execution of the judgment that was delivered on 22nd September, 2017.
16. By the nature of the orders sought, this court has opted to consider the merits or otherwise of the Defendants application as its success shall block the execution of the impugned judgement. The Defendants explained that they delayed in bringing the present application because one of the Plaintiffs had assured them that they would not be evicted.
17. This is contrary to the Plaintiffs response who have vehemently opposed the said Defendants' application stating that the Defendants ignored the court order by continuing to be in occupation of the suit land. In addition, the Plaintiffs aver that the motion for stay has been filed with undue delay with intent to prevent them from enjoying the fruits of the judgement.
18. The first issue to determine is whether the Defendants' undue delay in filing their application can be excused. The Court of Appeal in *Kenya Ports Authority v Silas Obengele* Civil Application No Nai 297 of 2004 [2006] 2 KLR 112 stated that:

“Whereas it is now settled that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted where there was material before the single judge from which he could and did conclude that the delay or the periods of delay...the full bench will not interfere”
19. In this case, the Defendants have filed their application for stay seven years after the delivery of the impugned judgement and they also did not file notice of appeal which as per the law they are required to file within 14 days of the delivery of the judgement. They do not say when the Plaintiffs approached



them and the promise of not to evict nor produce any evidence to support the explanation of the said promise. Taking into consideration the fact that the Defendants were aware of the existing decree, a prudent person was expected to have the promise reduced into writing or record some consent in court. Instead, they filed this application only after the Plaintiffs moved the court for eviction.

20. It is trite law that equity aids the vigilant and not the indolent. One of the many doctrines of equity states that delay defeats equity. In the case of Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi [2014] eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31st Edition) at page 99:

“The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

21. The Defendants therefore has not satisfied me that the inordinate delay has not been explained and the application ought to be refused the chance to bring back a claim to stay and or leave to file notice of appeal a judgement that was delivered over seven years ago. The application dated 11.11.2024 is unmerited and is hereby dismissed with costs.
22. On the other hand, the Plaintiffs have sought for orders of eviction against the Defendants from the land in subject. The said application has been brought principally under Sections 150,152A, 152B, of the *Land Act*, 2012 (as amended) and Section 1A,3A of the *Civil Procedure Act*. It is not in objection that the judgement delivered was in favour of the Plaintiffs and it ordered the Defendants to vacate the Plaintiffs' land (LR NO. 209/10939) and that the Defendants have also been issued with eviction notice, yet they continue to be in unlawful occupation.
23. Therefore, the Plaintiffs' application is in the circumstances properly before the court thus this court should issue the sought eviction orders.
24. With regard to costs, although the court has discretion in issuance, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). As such, a successful party should normally be awarded costs of an action unless, for good reason, the court directs otherwise. There is no good reason why the Plaintiffs should not be awarded costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH, 2025

A. OMOLLO

JUDGE

