



REPUBLIC OF KENYA



**Aroka v Ngore & 3 others (Environment & Land Case 784 of 2017)  
[2023] KEELC 21825 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21825 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 784 OF 2017  
MN KULLOW, J  
NOVEMBER 29, 2023**

**BETWEEN**

**DAMIAN MITAMBO AROKA ..... PLAINTIFF**

**AND**

**HELLEN ADHIAMBO NGORE ..... 1<sup>ST</sup> DEFENDANT**

**CAROLINE OWADE ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH OLAGO OGUTU ..... 3<sup>RD</sup> DEFENDANT**

**KENNEDY OBUYA OGUTU ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 12<sup>th</sup> May, 2023 and filed under a Certificate of Urgency, the Plaintiff/Applicant sought for the following orders: -
  - a. Spent
  - b. The Honourable Court be pleased to grant liberty to the Plaintiff/ Applicant, to carry out, implement and/or enforce the Judgment and Decree of the Honourable Court, rendered on the 27<sup>th</sup> day of October, 2020.
  - c. The Honourable Court be pleased to direct that the Eviction order issued herein pursuant to the Judgment and Decree of this Honourable Court made on the 27<sup>th</sup> day of October, 2020 be executed and/or implemented by M/S Odongo Investment Auctioneers.
  - d. The Honourable Court be pleased to order and/or direct the O.C.S, Ndhiwa Police Station to provide reasonable security to facilitate the execution, enforcement and/or implementation of the Eviction Order in line with the Decree of this Honourable Court issued on the 27<sup>th</sup> day of October, 2020.



- e. Costs of this Application be borne by the Defendants/ Respondents.
  - f. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is supported by grounds on its body and the Applicant's Supporting Affidavit sworn on even date. The Application was opposed; the Respondents filed a Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 5<sup>th</sup> June, 2023. It was canvassed by written submissions; the Applicant filed his written submissions together with authorities dated 9<sup>th</sup> June, 2023 while the Respondents filed their submissions and authorities dated 8<sup>th</sup> July, 2023.
  3. In summary, the Applicant's averments and submissions are inter alia that; he filed a suit against the Respondents for trespass on 09/06/2015, seeking orders of declaration, eviction and permanent injunction. The suit was heard and determined vide a Judgment issued on 27/10/2020, whose effect was to order the eviction of the Respondents from the suit property.
  4. Aggrieved and dissatisfied by the said Judgment and Decree; the Respondents filed a Notice of Appeal dated 29/10/2020 at the Kisumu Court of Appeal vide Civil Application No. E095 of 2022. The Defendants also filed a Notice of Motion Application dated 30/11/2020; seeking a Stay of Execution of the Judgment and Decree of the Court issued on the 27/10/2020. The said Application was heard and determined vide a Ruling dated 9/6/2021, whose effect was to grant a conditional Stay of Execution of the Judgment and Decree within strict timelines.
  5. Upon obtaining the Orders for stay of execution, the Respondents failed and neglected to pursue the intended Appeal within the strict timelines and consequently, an Application seeking the withdrawal of the Notice of Appeal and vacation of the stay of execution orders was filed. The same was heard and allowed on 27/02/2023 by the Kisumu Court of Appeal, thus the Notice of Appeal was withdrawn and all the consequential orders thereto vacated.
  6. Despite the said orders of the Court of Appeal, the Judgment and Decree of the this court, the Respondents have continued to occupy and remain in occupation of the suit property, without any lawful basis or justification and against the valid judgment and Decree of this court.
  7. The Respondents on the other hand acknowledged the filing of the Notice of Appeal at the Kisumu Court of Appeal and the conditional Order for Stay of Execution granted by this court on 9/6/2021. They however faulted the delay on prosecuting the Appeal at the Court of Appeal to the typing, signing and certification of the Court Proceedings on time due to the backlog in the typing pool and urged the court to take judicial notice of the same.
  8. They further contended that the orders sought in the Court of Appeal seeking to withdraw the pending Appeal were not done in good faith and the same was intended to primarily frustrate him and deny him the chance to have the Appeal heard on merit. They urged the court to dismiss the Application and grant him the opportunity to file the Record of Appeal in the Court of Appeal.
  9. After careful analysis, the sole issue for determination is whether the applicants have met the prerequisite for grant of the Orders of Eviction sought and the Application dated 12/05/2023 is merited;



## Analysis and Disposition

10. Section 38 of the [Civil Procedure Act](#) provides empowers the court to enforce execution of Decrees and provides as follows:-

“Subject to such conditions and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree–

....

(f) in such other manner as the nature of relief granted may require.

11. The Applicant’s claim is that the decree has remained unexecuted and he continues to suffer prejudice despite being the lawful registered owner of the suit property and the court issuing judgment in his favor. There is no existing appeal pending in any court nor stay orders for whatever reason in respect to the said order.
12. The Applicant further contends that the Respondents upon obtaining the conditional orders for stay of execution failed and neglected to pursue the intended Appeal and consequently, vide a Ruling rendered on the 23/02/2023; the Notice of Appeal was withdrawn and the consequential orders for stay of execution were thereby vacated. That despite the said orders, the Respondents have refused and failed to vacate the suit property as ordered by the judgment and decree hence the need to be evicted in full compliance and execution of the decree of this Honourable Court.
13. The Respondent has acknowledged the withdrawal of the Notice of Appeal dated 29/10/2020, lodged in the Kisumu Court of Appeal vide Civil Application No. E095 of 2022 and the Orders for Stay of execution issued on the 9/6/2021 being vacated. He however averred that the Application in the Court of Appeal was made in bad faith and attributed the delay in prosecuting the Appeal and filing the Record of Appeal on time to the delays in the typing, signing and certification of the Court Proceeding. She has urged the court to dismiss the Application and grant her the opportunity to file the Record of Appeal at the Court of Appeal.
14. Before delving into the merits of the instant Application, I wish to comment on the averments made by the Respondents in asking the Court to grant them an opportunity to file the Record of Appeal at the Court of Appeal.
15. Justice Joel Ngugi in Nakuru HCC NO. 193 OF 2011, Sammy Kuria Ndung’u v Samuel Mbugua Ikumbu while addressing the issue of Application made after the filing of a Notice of Appeal at the Court of Appeal held as follows: -
- “... It makes sense that once a Notice of Appeal has been lodged, any further applications related to the appeal should be filed at the Court of Appeal which is then seized of the matter. This prevents the ugly spectacle or contretemps of a litigant litigating the same issue in two different layers of our Courts. It provides for a predictable docket management system...” (emphasis mine)
16. The said averments by the Respondents are therefore untenable and this court being functus officio is unable to grant the same. Any Application touching on the Notice of Appeal and/or the intended Appeal should be filed at the Court of Appeal. Be as it may, it is important to note that the Notice of Appeal at the Court of Appeal has since been withdrawn.



17. Moving to the substantive Application; the decree sought to be executed has its genesis on the judgment issued by Ong’ondo J. issued on the 27<sup>th</sup> October, 2020 whose effect was to allow the Plaintiff/ Applicant’s claim against the Defendants/ Respondents and which ordered in part as follows: -
- “ (ii) there be and is hereby granted an Order of Eviction against the Defendants, their agents and/or servants from LR No. Kanyamwa/ K/Kwamo/437.
- (iii) there be and is hereby granted an Order of Permanent Injunction restraining the Defendants either by themselves, agents, servants and/or anyone claiming under the Defendants from entering upon, re-entering, trespassing onto, building on, cultivating, interfering with and/or in any other manner dealing with the suit property, that is, LR No. Kanyamwa/ K/Kwamo/437 and/or any portion thereof.
- (b) the Defendants be and are hereby ordered and/or directed to vacate the suit land, that is, LR No. Kanyamwa/ K/Kwamo/437 within a period of Forty-Five (45) days from the date hereof failing which eviction order to issue accordingly...”
18. A plain reading of Orders No. (ii) and (b) of the said Decree expressly directs the Respondents to vacate the portion of parcel No. LR No. Kanyamwa/ K/Kwamo/437 within a period of 45 days. The said order is in effect for the eviction of the Respondents from the suit parcel which the court declared the Plaintiff/ Applicant as the lawful registered owner. The said Judgment was delivered on 27<sup>th</sup> October, 2020 and the same has neither been set aside, varied and/or reviewed.
19. The court is of the view that the judgement and decree dated 27<sup>th</sup> October 2020 was a final adjudication of the rights of the parties within the meaning of the *Civil Procedure Act* even though the same was subject to appeal by the aggrieved parties in exercising their right to appeal.
20. It is not in dispute that there was a conditional Order for stay of execution delivered on 9/6/2021. It is also not in dispute that the Respondents failed to comply with the conditions set out in the said order, this is a fact which has been acknowledged by the Respondents that there was a delay in filing the Record of Appeal within the strict timelines as ordered.
21. Further, it is common ground that following the inaction or omission by the Respondents to prosecute the Intended Appeal, the Applicant herein filed an Application in the Court of Appeal seeking to withdraw the Notice of Appeal and vacate the orders of stay of execution granted by the court on 9/6/2021. As held earlier in the ruling, the averments made by the Respondents touching on the Notice of Appeal and the said Application for withdrawal can best be entertained at the Court of Appeal since this court is functus officio and bereft of the requisite jurisdiction to entertain the same. It is therefore clear that following the Order by the Court of Appeal issued on the 23/02/2023, the Notice of Appeal was withdrawn and the orders for stay of execution were vacated.
22. Consequently; in the absence of an order staying the Judgment and Decree of this court or an Appeal lodged at the Court of Appeal; it is my finding that the said orders issued by Ong’ondo J. on the 27.10.2020, allows the Applicant to evict the Respondents from the suit property. The 45 days period issued within which the Respondents were allowed to willfully vacate the suit property has since lapsed and there is therefore no lawful basis or justification for the Respondents continued use and occupation of the suit land.



23. The Orders of the Court vide the Decree dated 05/11/2020 remain valid court orders which must be respected and obeyed by all parties herein. The Applicant herein has an equal right to enjoy the fruits of the judgment issued in his favor.

### **Conclusion**

24. In the circumstances, therefore, I accordingly find that the Application dated 12<sup>th</sup> May, 2023 is merited and I proceed to allow it on the following terms;
- a. An Order be and is hereby granted to the Plaintiff/ Applicant, to carry out, implement and/ or enforce the Judgment and Decree of the Honourable Court, rendered on the 27<sup>th</sup> day of October, 2020.
  - b. An Order be and is hereby made that the Eviction order issued herein pursuant to the Judgment and Decree of this Honourable Court made on the 27<sup>th</sup> day of October, 2020 be executed and/or implemented by M/S Odongo Investment Auctioneers.
  - c. This Court further Orders and/or directs the O.C.S, Ndhiwa Police Station to provide reasonable security to facilitate the execution, enforcement and/or implementation of the Eviction Order in line with the Decree of this Honourable Court issued on the 27<sup>th</sup> day of October, 2020.
  - d. Costs of the Application to be borne by the Defendant/ Respondent.

It is so Ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

\_\_\_\_\_ for the Applicant

\_\_\_\_\_ for the Respondents

Court Assistant -Tom Maurice/ Victor

