



Kiarie v Joreth Limited & 2 others (Environment & Land Case 658 of 2012) [2025] KEELC 3439 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 658 OF 2012
CG MBOGO, J
APRIL 30, 2025**

BETWEEN

MWANGI KIARIE PLAINTIFF

AND

JORETH LIMITED 1ST DEFENDANT

LAZARUS WANJOHI WAIRAGU 2ND DEFENDANT

PATRICK NGUGI WAIRAGU 3RD DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated 17th December, 2024, and the notice of motion dated 29th January, 2025 respectively. The notice of motion dated 17th December, 2024 is filed by the plaintiff/applicant, and it is expressed to be brought under Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and Order 1, Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules, seeking the following orders:
 1. Spent.
 2. That the firm of Ms. Angote Lornah LLP be granted leave to come on record for the plaintiff in place of Gichahi & Co. Advocates.
 3. That the honourable court be pleased to issue an order that the Deputy Registrar of this court do execute all the necessary transfer documents in place of the defendants to enable the plaintiff be registered as a proprietor of land parcel LR. No. 13330/47.
 4. That the costs of this application be in the cause.



2. The application is premised on the grounds inter alia that judgment has already been delivered in this matter, hence the need for leave to be granted to the firm of Angote Lornah LLP, and further for the plaintiff/applicant to ventilate his issues.
3. The application is supported by the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that he has instructed a new advocate to represent him in this matter, as his former advocate inadvertently omitted to request the Deputy Registrar to sign the transfer forms in case the defendants fail to sign. He deposed that judgment in this matter was delivered on 27th February, 2019, and that a decree was issued on 2nd May, 2019. He prayed that the application be allowed, and deposed that the defendants/respondents would not be prejudiced in any way.
4. The application was opposed by the replying affidavit of the 3rd defendant/respondent sworn on 29th January, 2025. The 3rd defendant/respondent deposed that judgment in this matter was delivered on 27th February, 2019 in favour of the plaintiff/applicant. Further, that their advocate filed a record of appeal, and they are awaiting a hearing date before the Court of Appeal. He deposed that if the application is allowed, it will render their appeal nugatory as the plaintiff/applicant is likely to transfer the property to third parties, making it impossible to transfer the land back to them, in case the appeal succeeds.
5. The 3rd defendant/respondent deposed that if the orders sought are granted, he stands to suffer irreparable loss and harm. Also, that the reason why they had not filed an application for stay pending appeal earlier was that there no threat of execution by the plaintiff/ applicant, which is now imminent.
6. The notice of motion dated 29th January, 2025, is filed by the 2nd and 3rd defendants/ respondents. It is expressed to be brought under Order 51 Rule 1, Order 42 Rule 6 (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking the following orders:-
 1. Spent.
 2. That there be a stay of execution of the judgment and decree issued herein by Honourable Lady Justice K. Bor on the 27th February, 2019 pending the hearing and determination of the Court of Appeal.
 3. That costs of this application be to the applicant.
7. The application is premised on the grounds inter alia that this court delivered judgment in this matter on 27th February, 2019, and being dissatisfied with the said judgment, they lodged an appeal at the Court of Appeal.
8. The application is supported by the affidavit of the 3rd defendant/respondent sworn on even date. The 3rd defendant/respondent deposed that being dissatisfied with the judgment delivered on 27th February, 2019 in favour of the plaintiff/applicant, their advocate lodged an appeal. He deposed that the plaintiff/applicant has filed an application seeking execution of the judgment and to have the suit property transferred to him. He deposed that if the application is allowed, the same will render their appeal nugatory, as the plaintiff/applicant is likely to transfer the suit property to third parties.
9. The 3rd defendant/respondent deposed that there was no threat of execution by the plaintiff/applicant when the judgment was delivered, however, the threat is now imminent. He deposed that unless the orders are granted, he stands to suffer irreparable loss and harm. In support of their application, 2nd and 3rd defendants annexed copies of the notice of appeal lodged on 5th March, 2019, and the memorandum of appeal dated 21st October, 2021.



10. The application was opposed by the replying affidavit of the plaintiff/applicant sworn on 10th March, 2025. The plaintiff/applicant deposed that the application lacks merit and it is clear that the 2nd and 3rd defendants/respondents have made it in mala fides, and in effort to frustrate him from enjoying the fruits of judgment. Further, that it has been made after inordinate delay with the judgment having been delivered in February, 2019. The plaintiff/applicant deposed that the 2nd and 3rd defendants/respondents have not annexed any evidence of the existence of the appeal in question, and even if the same was filed as alleged, it cannot act as an obstruction to him enjoying the fruits of his successful litigation. Further, that they have not complied with the conditions for stay of execution pending appeal.
11. The applications were canvassed by way of written submissions. The plaintiff/applicant filed his written submissions dated 10th March, 2025. With regard to their notice of motion dated 17th December, 2024, the plaintiff/ applicant raised one issue for determination which is whether the applicant is entitled to the orders of this honourable court to authorise the Deputy Registrar to execute the transfer documents in place of the defendants/respondents. On this issue, the plaintiff/ applicant submitted that this court should apply the overriding objective rule and grant the orders sought. He urged the court to regard equity as done that which ought to have been done. The plaintiff/ applicant relied on the cases of Chase International Investment Corporation and Another v Laxman Keshra and Others [1978] KLR 143; [1976-80] 1 KLR 891, CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No. 329 of 2001 [2004] eKLR and Charles Mukoma Kimaru v Johnstone Muchomba Kaguya [2020] eKLR.
12. With regard to the 2nd and 3rd defendants/respondents' notice of motion dated 29th January, 2025, the plaintiff/applicant submitted that for this application to succeed, the 2nd and 3rd defendants/respondents ought to satisfy the conditions laid down in Carter & Sons Limited v Deposit Protection Board & 2 Others, Nairobi Civil Appeal 291 of 1997. He submitted that the 2nd and 3rd defendants/respondents have failed to demonstrate the loss they will suffer, and that as such, the decree ought to be executed. Further reliance was placed in the cases of Charles Wahome Gethi v Angela Wairimu Gethi, Nairobi Civil Appeal no. 302 of 2007UR 205/2007, and Rashid K Too v Fred Imbatu [2019] eKLR.
13. The plaintiff/applicant submitted that the 2nd and 3rd defendants/respondents have not demonstrated sufficient cause, having brought the application six years after the delivery of the judgment. Further, that no security has been offered for the due performance of the decree, and in fact no offer has been made to that effect. To buttress on this submission, the plaintiff/applicant relied on the cases of Wycliffe Sikuku Walusaka v Philip Kaita Wekesa [2020] eKLR, Bildad Simiyu Khakina & 2 Others v Dr. Henry Kerre Wakhungu & 2 Others [2020] eKLR, and In Re Estate of M'itwamwari M'raiji (Deceased) [2018] KEHC 2352 eKLR.
14. The 2nd and 3rd defendants/respondents filed their written submissions dated 11th March, 2025. With regard to their notice of motion dated 29th January, 2025, they submitted that Order 42 Rule 6 of the Civil Procedure Rules is applicable to the extent that they stand to suffer irreparable loss if the order of stay of execution is not granted. They submitted that if the suit property is transferred to the plaintiff/ applicant, there will be no control on how he can deal with the property, and that it is likely that he may sell it to third parties. They submitted that all they seek is for this court to preserve the subject matter pending the hearing and determination of the appeal. They relied on the case of Barno v Tiny Bees Credit (K) Ltd [2024] KEHC 14377 (KLR).
15. On security for costs, the 2nd and 3rd defendants/respondents submitted that they are ready to have the suit property preserved as it is registered in their name, and thus the court can order for its preservation pending the outcome of the appeal. On undue delay, they submitted that there was no imminent



- danger and risk of execution until the plaintiff/applicant filed the application for execution. They submitted that their application is merited, and it is only fair that the suit property is preserved pending the hearing and determination of the appeal.
16. On the plaintiff's/applicant's notice of motion, the 2nd and 3rd defendants/respondents submitted that their application for stay pending appeal is merited and it is only fair and in the interest of justice that the suit property is preserved and be available for transfer to the successful party.
 17. I have carefully analysed and considered both applications, the replies thereof and the written submissions filed by the respective parties. In my view, the issue for determination is whether there is merit in the applications and what orders should issue in the circumstances.
 18. I have perused the record in this matter, and I note that judgment was delivered on 27th January, 2019, in favour of the plaintiff/applicant. A decree was extracted and issued on 2nd May, 2019. The plaintiff/applicant desirous to execute the decree has sought the assistance of this court to enable the Deputy Registrar sign the transfer documents. On the other hand, and while faced with the application, the 2nd and 3rd defendants/respondents arose from slumber and realized that the suit property is now at risk of disposition. This prompted them to file the latter application as well as respond to the former application.
 19. With regard to the notice of motion dated 29th January, 2025, Order 42 Rule 6 (2) of the Civil Procedure Rules gives conditions which a party ought to meet before such order is granted as follows:-
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
 20. In their arguments as to whether they have met the above conditions, the 2nd and 3rd defendants/respondents argued that there is a pending appeal at the Court of Appeal which will be rendered nugatory if the orders are granted. Further, they maintained that they saw no need of seeking stay of execution pending appeal as there was no risk of the suit property being sold except that it has now arisen. On costs, they argued that since the suit property is registered in their names, the court can order that the same be preserved in that condition pending the determination of the appeal.
 21. In all consideration, none of the grounds advanced by the 2nd and 3rd defendants/respondents are persuasive at this stage. While they have a right to appeal, and without any order setting aside the judgment found in favour of the plaintiff/applicant, stay of execution is not automatic just for the sole reason that an appeal lies before the superior court. The delay in bringing forth this application is a testament as to the 2nd and 3rd defendants/respondent intent to further frustrate the plaintiff/applicant. In my view, the notice of motion dated 29th January, 2025 is hopeless and totally lacks merit.
 22. With regard to the notice of motion dated 17th December, 2024, it is not in dispute that judgment was delivered on 27th February, 2019 in favour of the plaintiff/applicant. The plaintiff/applicant seeks to enforce the decree issued on 2nd May, 2019 to realize the fruits of his judgment. From the arguments from the respective parties, it appears that the 2nd and 3rd defendants/respondents are bent on ensuring that the plaintiff/applicant is not registered as the owner of the suit property. There being no orders staying the judgment and the decree, I see no reason why the plaintiff/applicant ought not to experience the fruit of his judgment.



23. Arising from the above, this court finds merit in the notice of motion dated 17th December, 2024 and it is allowed in the following terms:-

- i. The firm of Ms. Angote Lornah LLP is hereby granted leave to come on record for the plaintiff in place of Gichahi & Co. Advocates.
- ii. The Deputy Registrar of this court is hereby ordered and directed to execute all the necessary transfer documents in place of the defendants to enable the plaintiff be registered as a proprietor of land parcel LR. No. 13330/47.
- iii. The notice of motion dated 29th January, 2025 is dismissed with costs to the plaintiff/applicant.
- iv. The plaintiff/applicant is also awarded costs of this application (the notice of motion dated 17th December, 2024).

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL, 2025.

HON. MBOGO C.G.

JUDGE

30/04/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Gachuhi for the 2nd and 3rd Defendants

Mr. Mbaji for the 1st Defendant - present

Angote & Co. Advocates for the Plaintiff – absent

