



Gitonga (Suing As The Legal Representative Of M'Ithinji M'Mwamba Alias Fredrick M'Ithinji - Deceased) v Nkirote & another (Environment & Land Case 172 of 2016) [2023] KEELC 22387 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22387 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 172 OF 2016
CK NZILI, J
DECEMBER 13, 2023**

BETWEEN

JOSEPH KITHINJI GITONGA PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE OF M'THINJI M'MWAMBA
ALIAS FREDRICK M'THINJI - DECEASED**

AND

JENNIFFER NKIROTE 1ST DEFENDANT

JULIUS KIAMBATI M'MBURA 2ND DEFENDANT

RULING

1. This court is asked to stay the execution of the judgment delivered on 4.10.2023, pending an intended appeal to the Court of Appeal. The grounds are set out on the face of the applicants, supporting and supplementary affidavits sworn by Julius Kiambati on 5.10.2023 and 19.10.2023 respectively. The 2nd applicant avers as the legal administrator; the respondent has threatened to evict him and his tenants from the suit plot, sell and alienate it. The 2nd applicant avers that if evicted, he will suffer substantial loss because he runs clothes and M-pesa businesses worth millions, though the exact value has not been ascertained. He attached photographs marked JK "4" and "5" as annexures.
2. The applicant avers the suit property is a prime property in Meru Town, which he bought in 2016 as per a sale agreement attached as annexure JK "6" and the lease certificate as JK "7". The applicant avers that the respondent may be unable to compensate him for losing his tenants and business income. Additionally, applicant avers that he was willing to offer reasonable security and has come to court without reasonable delay.
3. The application is opposed through a replying affidavit sworn by Joseph Kithinji Gitonga on 12.10.2023. He termed the application a delaying tactic to deny him enjoyment of the fruits of his



- judgment, yet he had illegally acquired the deceased's estate. Further, the respondent avers there was no threat of eviction since the due process of the law has to be followed, and in any event, the applicants were not living on the suit property.
4. The respondent avers that he had no intention of evicting any tenants, for he needs the rental income; otherwise, the applicant was a crying wolf out to mislead the court to get favorable orders, deceitfully. The respondent avers that the decree's purpose was for the land registrar to revert the land ownership to the deceased's estate and nothing more.
 5. As to the rental income, the respondent avers the deceased was initially the landlord, and some of the current tenants belonged to the estate, including Mr. Njoroge Mworira, Gakii, and Murithi, and that the 42 stall's income per month was Kshs.490,000/= . Therefore, the respondent avers that the 2nd applicant should not be allowed to benefit from his wrongdoing by gaining income from the estate. Alternatively, the respondent avers that the 2nd applicant should deposit the rental income before the court as a show of good faith.
 6. In a supplementary affidavit sworn on 19.10.2023, the applicants state that the issue of rental income was concluded in the judgment and cannot be revisited. It is averred that the respondent was not entitled to the rent accruing from the suit plot because he had not claimed the plot as a legal administrator. The 2nd applicant reiterates that he would suffer substantial loss for his clothes and M-pesa business.
 7. Regarding the exact number of tenants, the applicant says he only collects rental income of Kshs.107,000/= since some of the rooms were vacant and some tenants had fallen into arrears from hard economic times. He states he uses the rental income to offset the loan he had obtained to acquire the plot as per his bank statement attached as annexure JKM "2". By an order dated 12.10.2023 this court directed the deputy registrar of the court to visit the locus in quo and file a scene visit report. The scene visit report is dated 16.11.2023.
 8. By written submissions dated 16.11.2023, the applicants urge the court to find that 'he' has met the conditions for the grant of stay of execution under Order 42 Rule 6 of the *Civil Procedure Rules*. On substantial loss, the 'applicant' submitted that the 2nd defendant operates a clothes and M-pesa business on the plot as per annexure JKM "4", worthy of millions of money, which the respondent has not denied or controverted and more so, when the threats for eviction were real. Reliance is placed on the *County Government of Kwale v Saumu Said Nyanya & 3 others* (2017) eKLR.
 9. On delay, the applicant submits he moved to court a day after the judgment was delivered on security; the 2nd applicant submits he was willing to provide reasonable security as would be directed by the court.
 10. On the scene visit report, the 2nd applicant submits the scene visit report shows a good number of the rental rooms were empty and open, and whatever rent he was collecting was channeled towards offsetting the loan, and since the court pronounced itself on the rent, it should not revisit it. Reliance was placed on *Rose Njiru v. John Nicholas Muthuri* (2019) eKLR, *Waweru Mwaura v Mary Wanjiru Njenga* (2016) eKLR, *Amal Hauliers Ltd v Abdul Nasir Hassan* (2017) eKLR.
 11. The respondent relies on written submissions dated 22.11.2023, that no substantial loss or damage has been demonstrated with factual evidence by way of accounts. Further, the respondent submits that the Deputy Registrar's report could not show any substantial loss since the tenants in place were there even before the 2nd applicant acquired the plot. Therefore, it is in the interest of justice for the tenants to remain for the estate to get income. On clean hands; the respondent submits that the 2nd applicant has come with unclean hands and does not deserve the drink of the cup of equity for he in the past



- went against a court order to deposit rental income, yet he failed to do so alleging no rental income but the report by the Deputy Registrar show at least Kshs.107,000/= has been forthcoming every month.
12. Order 42 Rule 6 (1) & (2) of the [Civil Procedure Rules](#) provides that no appeal or second appeal shall operate as a stay of execution, but the court appealed from May.
 13. Therefore, the respondent submits that the 2nd applicant has been deceitful. Moreover, since the 2nd applicant has disclosed that he is a tenant and a businessman, no license or business permits have been attached. The respondent insists that due process has to be followed; otherwise, the applicant does not deserve the relief for sufficient cause has not been shown.
 14. In [Visbram Ravji Halal and another v Thorton and Turpin](#) (1963) Ltd (1990) KLR 365, the Court of Appeal said the superior court's discretion is fettered by three conditions, namely sufficient cause, substantial loss, security, and the filing of the application without unreasonable delay.
 15. In [Wycliffe Sikuku Walusaka v. Philip Kaita Wekesa](#) (2020) eKLR, the court said the offer for security must, of course, come from the applicant as a sign of good faith that he was pursuing the appeal in the interest of justice and not merely as a decoy to obstruct and delay the respondent's rights to enjoy the fruits of his judgment.
 16. In [Carter and Sons Ltd v. Deposit Protection Fund Board & 2 others](#) C.A No. 291 of 1997, the court said the mere fact that there were substantial grounds for appeal would not justify an order of stay. In [Consolidated Marine v Nampijja & another](#) Civil Application No. 93 of 1989 (NRB), the court said the purpose of the stay was to preserve the subject matter in dispute so that the appellant's right to exercise his undoubted right of appeal is safeguarded and, if the appeal is successful, is not rendered nugatory.
 17. In [Kenya Commercial Bank v Suncity Properties Ltd & 5 others](#) (2012) eKLR, the court said in an application for stay, there were always two competing interests that must be considered, namely; that of a successful litigant entitled to enjoy the fruits of his judgment and that of an unsuccessful litigant exercising the undoubted right of appeal, who should be safeguarded from his appeal being rendered nugatory and that the two competing interest should always be balanced.
 18. In [Machira t/a Machira & Co. Advocate v East African Standard](#) (2002) KLR 63, the court observed substantial loss over and above mere words must be proved with specific details and particulars and where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.
 19. As to the unreasonable delay in [Jaber Mohseen Ali & another v Priscilla Boit & another](#) (2014) eKLR, the court said what is unreasonable delay depends on the surrounding circumstances of each case, for even one day delay would be unreasonable depending on the judgment of the court and any order given thereafter.
 20. On fruits of judgment, in [Antoine Ndiaye v African Virtual University](#) (2015) eKLR, the court said stay of execution was designed on the basis that no one would be worse off under an order of the court as such an order does not introduce any disadvantage, but administers the justice that the case deserves and that in balancing the two competing rights, the court would focus on their reconciliation which is not a question of discrimination. On rendering the appeal nugatory, the court in [Kenya Shell Ltd v. Kibiru & another](#) (1986) KLR 410, said a court must address whether refusing the stay would render an appeal nugatory.
 21. Applying the preceding case law, the effect of the judgment made on 4.10.2023 is that the transfer of the half share of LR No. Meru Municipality Block II/51 to the name of Jeniffer Nkirote and late to



the 2nd applicant were nullified. The court ordered that the suit land revert to the names of the deceased M'Ithinji M'Mwamba as of 14.7.2016 to be dealt with under the *Law of Succession Act*. The court found the transfer of the half share to the 2nd applicant was irregular in the absence of letters of administration, a power of attorney, or authorization from the deceased's estate. The 1st and 2nd applicants had not counterclaimed for the land.

22. The court pronounced itself on the legality of the sale agreement dated 22.8.2016. As to the rental income, counsel for the applicants has told this court not to revisit the issue. The applicants are speaking on both sides of their mouths. The only attempt to demonstrate substantial loss is that the applicant would lose rental and M-pesa business income worth millions of shillings, whose value cannot be ascertained.
23. The 2nd applicant has not given specific details and particulars everybody knows. Rental and business income is quantifiable. If the “applicant” were honest, he would remember that he had sworn an affidavit on 7.11.2018, not so long ago. Despite a court order, the “applicant” failed to remit any rental income to the joint account till the judgment was delivered. In his defense, the 2nd applicant told the court there was minimal or no rental income due to Covid 19 and harsh economic times.
24. The 2nd applicant knows he has been reaping colossal rental and business income from the suit land. He does not want this court to relook at the issue of rent backward but forward. Such an invitation demonstrates that the 2nd applicant withheld vital information from the court to resist a court order to deposit the rental income pending the hearing.
25. Going by the scene visit report, the 2nd applicant should have fully disclosed all his tenants and provided the rent book, list of his tenants, amount of rent collected, and rental income returns shared with Kenya Revenue Authority. Since the 2nd applicant had said he had no rental income worthy of depositing in the joint account as ordered by the court, he cannot turn around based on the doctrine of estoppel and plead substantial loss based on facts which he had denied their existence. To do otherwise would allow the 2nd applicant to enrich himself and make a mockery of court orders.
26. Besides the rental income, the 2nd applicant has not given specific particulars or details on how he will suffer if the land reverts to the deceased's estate. There is no evidence that an eviction notice has been issued to the 2nd applicant for the deceased's estate to take vacant possession. The basis of a perceived fear from an alleged oral notice or threat holds no water.
27. Courts do not act based on perceived fear but on tangible evidence of imminent danger. Additionally, the 2nd applicant has not offered to surrender the lease certificate before the court. It is not enough to state willingness to offer security without specifying it as a show of good faith.
28. As to the 1st applicant, there is no authority to plead or swear the affidavit attached to the application before the court. The 1st applicant has not demonstrated the substantial loss or damage she was likely to suffer if the stay was not granted.
29. The upshot is that I find no sufficient cause shown to grant stay orders. Granting the orders sought is also not in the interest of justice. The application is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH DAY OF DECEMBER, 2023.

In presence of

C.A Kananu/Mukami

Parties



Miss Muia for the plaintiff

Respondent

Miss Mugo for Carl Peters Mbaabu for the defendants/applicant

HON. CK NZILI

JUDGE

