



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC CASE NO. 35 OF 2019(O.S)

JOSEPH NJUGUNA KABUGUA.....PLAINTIFF/APPLICANT

VERSUS

PETER NJUGUNA GIKKIO.....1ST DEFENDANT /RESPONDENT

JOHN THUO GIIKIO.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated 27th September 2021, brought by the Plaintiff/Applicant herein seeking for orders that;

- 1. An order do issue evicting the Defendants/Respondents from the land parcel No. L.R No. Loc 1/Thuita/1078, Thika.***
- 2. That the eviction order be executed /effected by the Court Bailiff with the O.C.S Kihumbu-ini Police Station supervising and providing security.***
- 3. That the Defendants / Respondents to shoulder the costs of the instant Application and all the costs that the Applicant incurs in executing the eviction order.***

The Application is premised on the grounds that there is a Judgment on record in favour of the Plaintiff/ Applicant and that the Defendants/ Respondents have refused to vacate the suit land and adhere to the terms of the Judgment. That the Judgment was delivered on 26th May 2021, where the Court declared that the Defendants/ Respondents are illegally occupying the suit property. Further, that the Defendants/ Respondents were ordered to vacate the suit property within 90 days and it is more than 120 days, and they are yet to vacate.

That the Defendants/ Respondents have started cultivating the suit property, planting crops and putting up developments on the said property in contravention of the Court order.

In his supporting Affidavit, **Joseph Njuguna Kabugua**, averred that he is the registered owner of the suit property and he has been unable to access it as the Respondents are in possession. That there is a judgment in his favour in which the Defendants/Respondents were ordered to vacate the suit property. Further, that he is informed by his Advocates on record which information he believes to be true that the Defendants/Respondents have filed an Appeal out of time without leave of Court, but that **no** Appeal or second Appeal operates as a **Stay of Execution**. That it would be just to have the eviction orders issued against the Respondents.

The Application was opposed and the Defendants/Respondents swore a Replying Affidavit on 11th November 2021, and acknowledged that the Court entered Judgment and Ordered them to vacate from the suit property within 90 days, from the date of the said Judgment, failure to which they shall be evicted from the suit property. That dissatisfied with the said Judgment, they filed an Appeal against the said Judgment. That they have been informed by their Advocates, which information they believe to be true that the Plaintiff/Applicant is likely to execute the **Decree** at any time unless the Court orders the Stay of Execution. That their Appeal has a reasonable chance of success and if the Plaintiff/ Applicant executes, then their Appeal will be rendered nugatory. That it is in the interest of justice that stay of execution be granted, pending the hearing and determination of the Appeal.

The Plaintiff/ Applicant filed a further Affidavit sworn on 2nd December 2021, by **Joseph Njuguna Kabugua**, who averred that it is only through this Application that he would be able to enjoy the fruits of his Judgment. That the orders of **stay** cannot be lodged by the Defendants/ Respondents through an Affidavit and without relying on the required provisions of law. Further that the process of execution has been put in motion and the same does not amount to substantial loss. That by not allowing the Application, the Court shall be perpetuating and or abetting an **illegality**, as it will allow the Defendants/ Respondents to continue staying and utilizing the suit property in

contravention of the Court Decree.

The Application was canvassed with by way of written submissions which the Court has carefully read and considered. The Court notes that in their Replying Affidavit the Defendants/ Respondents have casually sought for **Stay of Execution, pending Appeal**. It is not in doubt that what is before Court is the **Notice of Motion Application** dated **27th September 2021**, brought by the Plaintiff/ Applicant seeking for the **eviction** of the Defendants/ Respondents from the suit property.

Stay of Execution of a Decree pending an Appeal is such a serious Application and the Court does not understand why the same would be sought in a Replying Affidavit and on what basis the Defendants/ Respondents would like the Court to grant the stated **Stay**, without even laying down the grounds or basis for such prayers. The same having not been brought substantively, the Court finds and holds that it cannot even be an issue for determination.

The Court therefore finds and holds that the issue for determination is **whether the Plaintiff/ Applicant is entitled to the orders sought**.

The Plaintiff/ Applicant has sought for the eviction of the Defendants/ Respondents from the suit property. It is evident that Judgment was delivered on **26th May 2021**, in favour of the Plaintiff/ Applicant. It is further not in doubt that in the said Judgment, the Court ordered Defendants/ Respondents to **vacate** the suit property within **90 days**, in default they be evicted. It is now past the **90 days** period granted to the Defendants/ Respondents by the Court and approaching **10 months** after the delivery of the said Judgment and it is clear that the Defendants/ Respondents are still in possession and occupation of the suit property contrary to the Court orders.

The Defendants/ Respondents have stated that they have filed an Appeal and that should the Court **not stay** the **Decree** herein, the Plaintiff/ Applicant will proceed and execute the said Decree. It is trite that a **Notice of Appeal** or even a **Memorandum of Appeal** does not automatically operate to a **Stay of Execution** as per the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** which provides that;

“(1) no appeal or second appeal shall operate as a stay of execution or proceedings under a Decree or order appealed from except appeal case of in so far as the Court appealed from may order but.....”

The mere fact that an Appeal has been filed does not necessary result in the Court Ordering a Stay of Execution. There being no **Stay of Execution**, and given that there is no pending Application for Stay of Execution, the Court finds no reasons to prevent the Plaintiff/ Applicant from enjoying the fruits of his Judgment by effecting the Judgment of the Court that ordered the eviction of the Defendants/ Respondents, if they failed to vacate the suit property within **90 days**, from the date of the said Judgment.

Consequently, this Court finds and holds that the Plaintiff is entitled to enjoy the fruits of his judgment and therefore the prayer for eviction is merited.

The Plaintiff/ Applicant has also sought for supervision and provision of security by the O.C.S Kihumbu-ini Police Station. While ordinarily the Court would be reluctant to bring in Police in Civil matters, the Defendants/Respondents even with the Court ordering them to vacate have failed to do so, and they have not denied that they are cultivating on the said land. The Court finds the said prayer merited.

The Upshot of the foregoing is that the Court finds the Notice of Motion Application dated **27th September 2021** is merited and the same is allowed entirely in terms of prayers No **(2), (3) & (4)** accordingly.

It is so ordered.

Dated, Signed and Delivered Virtually at Murang’a this 17th day of February, 2022.

L. GACHERU

JUDGE

Delivered online

In the presence of;

Mr Andati for the Plaintiff/Applicant

M/s Waithira Mwangi for the Defendants/Respondents

Kuiyaki - Court Assistant

L. GACHERU

JUDGE