



REPUBLIC OF KENYA



**Mugambi v Mramba (Environment & Land Case 38 of 2020)  
[2022] KEELC 3113 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3113 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 38 OF 2020**

**MAO ODENY, J  
JUNE 27, 2022**

**BETWEEN**

**BENEDETTE MWIKALI MUGAMBI ..... PLAINTIFF**

**AND**

**MARK KAZUNGU MRAMBA ..... DEFENDANT**

**RULING**

1. This ruling is in respect of two notice of motions dated October 5, 2021 and October 21, 2021 respectively by the defendant/applicant seeking the following orders: -

Application dated October 5, 2021

- a. Spent
  - b. That the Honourable court be pleased to order for stay of execution of the ruling and order of this court issued on 31<sup>st</sup> August 2021 pending the hearing and determination of this application
  - c. That the Honourable court be pleased to order for a stay of execution of the ruling and order of this court issued on 31<sup>st</sup> August 2021 pending hearing and determination of Mombasa Civil Appeal No. 44 of 2021 Mark Kazungu Mramba Vs Benedette Mwikali Mugambi.
  - d. That all other consequential proceedings be stayed pending the appeal referred to in prayer 3.
  - e. That the costs of this application be provided for.
2. This application is grounded on the supporting affidavit of Mark Kazungu Mramba the Applicant who deponed that the plaintiff had filed an application for summary judgment and mandatory injunction directing him to demolish all his buildings on the suit property which order was granted and has since been extracted.



3. The applicant deponed that he has occupied the suit property together with his family and for more than twenty years and having been dissatisfied with the order of eviction he had appeal vide Mombasa civil Appeal No. 44 of 2021 Mark Kazungu Mramba vs Benedette Mwikali Mugambi which appeal raises triable issues. He also stated that he has no alternative accommodation or other dwelling house to relocate to and is willing to deposit security as directed by the court.

Application dated October 21, 2021.

- a. Spent
  - b. That pending the hearing and determination of this application the defendant/applicant be restored and/or reinstated back to the suit property known as Parcel No. LR No 20252/3 Kilifi CR No. 30843 situate at Kilifi Township within Kilifi County.
  - c. That pending the hearing and determination of Civil Appeal No. 44 of 2021 Mark Kazungu Mramba vBenedette Mwikali Mugambi the defendant/applicant be restored and/or reinstated back to the suit property known as Parcel No. LR No 20252/3 Kilifi CR No. 30843 situate at Kilifi Township within Kilifi County.
  - d. That there be a stay of further execution of the ruling/order in Malindi ELC No. 38 of 2020 pending the hearing and determination of Civil Appeal No. 44 of 2021 Mark Kazungu Mramba vBenedette Mwikali Mugambi
4. The application is supported by the affidavit of Mark Kazungu Mramba who reiterates the contents of his Supporting Affidavit dated 5<sup>th</sup> October 2021 where he depones that he filed a record of appeal and served on the Plaintiff together with the application for stay of execution.
  5. He further stated that on 16<sup>th</sup> October 2021, the Plaintiff in the company of goons and policemen, evicted him from the suit property rendering him and his family destitute which was in blatant violation of the law as the eviction by the Plaintiff was not in good faith but aimed solely at defeating the Appeal.
  6. In response to both applications, the plaintiff filed grounds of opposition dated 11<sup>th</sup> November 2021 opposing the application that the orders sought have been overtaken by events.
  7. Counsel agreed to canvas the application vide written submissions which were duly filed.

#### **Defendant Applicant's Submissions**

8. Counsel for the applicant submitted that the applicant had filed an application for stay of execution pending the hearing of the application inter partes and hearing of Mombasa Civil Appeal No 44 of 2021. Counsel submitted that execution was not in compliance with order 21 rule 8 of the [Civil Procedure Rules](#) which provides as follows; -

“any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgement, shall sign and seal the decree accordingly.”
9. Counsel further submitted that the order leading to the execution by way of eviction was neither prepared nor submitted for approval before it was forwarded to the registrar thus it was a flagrant breach of the law and relied on the case of Penguin Holdings Ltdv Daniel Luwambi & otherswhere the



court ordered that the appellants be restored back to the land in the manner obtaining before eviction and do remain there until the appeal is heard and determined for reasons of non-compliance with order 21 rule 8.

10. It was counsel's further submissions that the execution of the orders of the court were illegal for want of compliance with section 94 of the Civil Procedure Act which provides that ; -

a. "Where the High Court, considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained, by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed, as soon as the amount of the costs shall be ascertained by taxation."

11. Counsel further submitted that before execution proceeds in the absence of taxation the court ought to grant leave, for the same to proceed which leave at the discretion of the court and relied on the cases of *Bamburi Portland Cement Co. Ltd v Hussein* (1995) LLR *Lakeland Motors Ltd v Sembi* (1998) LLR 682 (CAK) and *Sparkle Properties Limited vs Johana Ngai & others*.

12. Lastly counsel submitted that the evictions did not comply with the United Nations Guidelines on Evictions which states that state organs and all persons in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as enunciated by The United Nations Office of the High Commissioner for Human Rights in General Comment No. 7 "The right to adequate housing (Art.11.1): forced evictions. (20/05/97) CESCR General comment 7. (General Comments)." Paragraph 15 and 16 provide as follows:

1. "15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of rights recognized in both the international covenant on human rights. The committee considers that the procedural protections which should be applied in relation to forced evictions include:

- a. an opportunity for genuine consultation with those affected;
- b. adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- c. information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- d. especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- e. all persons carrying out the eviction to be properly identified;
- f. evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- g. provision of legal remedies; and
- h. provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.



13. That the orders herein were executed on Saturday night with little or no opportunity for immediate redress in total contravention of the UN guidelines on evictions and urged the court to allow the application as prayed.

### **Plaintiff's Submissions**

14. Counsel gave a brief background to the case and stated that the defendant/ applicant filed a suit in the High Court, being ELC No. 98 of 2017 (OS), seeking for orders of adverse possession against the plaintiff/respondent herein in respect of the suit premises, being Plot LR No. 20252/3, Kilifi, CR No. 30843 but the same was dismissed upon trial.
15. Further that since no orders of vacant possession were issued in favour of the plaintiff/respondent in the matter, the present suit was filed together with an application for mandatory injunction and/or summary judgment which upon hearing, the application was allowed with an order that the defendant/applicant removes himself and his structures from the suit premises within 45 days and in default execution to proceed and/or issue.
16. That on September 10, 2021, the plaintiff/respondent extracted the orders made herein on August 31, 2021 and subsequently had the defendant/applicant removed from the suit premises which was after the expiry of the 45 days' period given by the court, prompting the filing of the two applications before the court.
17. It was counsel's submission that the application dated October 5, 2021 has been overtaken by events as the defendant/applicant was evicted upon expiry of the 45 days granted by the court hence there is nothing to stay.
18. On the second application dated October 21, 2021 counsel relied on order 21 sub-rule 7 of rule 8, which states as follows: -

"Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order."
19. That the law gives liberty to any party in a suit to prepare a draft decree for approval and/or amendments and/or execution by the court thus there is nowhere stated herein above that a failure to prepare a draft decree calls for restoration of the evicted party back to the suit premises.
20. Counsel submitted that the court made orders of mandatory injunction and/or eviction of the defendant/applicant from the suit premises on August 31, 2021 and the orders were extracted and signed on September 10, 2021 which orders were specific and there was no need to have a decree prepared and/or amended and/or approved by the court.
21. It was counsel's further submission that order 21 rule 8 of the *Civil Procedure Rules* is meant to ensure that a decree is drawn up in accordance with the judgment issued and that an order extracted upon delivery of a ruling does not require approval or amendments from the opposing party.
22. Finally, counsel stated that the eviction was sanctioned by the court upon hearing both parties hence it cannot be termed as forced evictions in contravention of the United Nations Guidelines on Evictions and urged the court to dismiss the application with costs.



## Analysis and Determination

23. These are two applications for stay of execution and restoration of the applicant back to the suit property pending the hearing and determination of appeal.
24. The first application dated October 5, 2021 has been overtaken by events as the applicant had already been evicted as per the court order that gave him 45 days to vacate failure to which eviction to issue. The application is therefore spent which necessitated the filing of the second application dated October 21, 2021.
25. The issues for determination are whether the applicant has met the threshold for stay of execution pending the hearing and determination of appeal and whether the applicant having been evicted can be restored to the suit land pending hearing of appeal.
26. Grant of stay of execution pending appeal is anchored on order 42 rule 6 of the [Civil Procedure Rules](#), which provides as follows: -
  - (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 Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  - (2) No order for stay of execution shall be made under subrule (1) unless—
    - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - (b) 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.
  - (3) ...
  - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
  - (5) ...
  - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
27. An applicant seeking an order of stay of execution pending appeal must satisfy the above conditions before the court can grant the orders which are discretionary.
28. Counsel for the applicant faulted the eviction on the ground that it did not comply with order 21 rule 8 of the [Civil Procedure Rules](#) that the draft decree was neither sent to the Applicant nor the Registrar for approval.



29. Counsel further stated that the Applicant did not comply with section 94 of the Civil Procedure Act as the decree was executed before taxation without leave of the court.
30. The plaintiff's suit for adverse possession was dismissed and the current suit gave him 45 days to vacate the suit premises failure to which he should be evicted. The plaintiff did not vacate within the stipulated timeline hence the eviction was effected as per the court order. The respondent was under a duty to carry out the eviction as the Plaintiff was in breach of the orders of the court.
31. In the case of Nairobi Civil Suit No 1029 of 1982, *Joackim Ngugi Kiarie v UI-Yate & others* the court held as follows: -
- "I am not satisfied that the defendants have demonstrated the substantial loss they would suffer. They are not the registered owners of the suit property and their claim for adverse possession was dismissed by the court while the plaintiff's claim was upheld and therefore until the judgment of the plaintiff is reversed he is entitled to the benefits that it bestows on him unless it occurs to the court that the judgment was patently wrong on the basis of the record".
32. The above case is similar to the current one where the plaintiff's suit for adverse possession was dismissed and he has not shown that he will suffer any substantial loss as the order of eviction has already been effected. He is not a registered owner of the suit land and his claim for adverse possession had been dismissed.
33. On the applicability of section 94 of the Civil Procedure Act on non-monetary decrees, the court in the case of Sparkle Properties Limited vs Johana Ngai & 8 others [2020] eKLR stated thus: -
- "...On my part, I can't quite grasp the philosophy behind Section 94, save probably for monetary decrees, so that the judgment creditor does not need to face execution twice, once for the money in the decree, and secondly for the money in the costs. That is the only reason that I can see apparent on the face of section 94. But where the decree is not for money, I really find it difficult to see the reason behind Section 94. If, assuming, the decree is for delivery of a chattel, say a car, why should the decree holder have to wait until the costs are taxed for him to execute for the delivery of the car? And if he has another car for use for his daily errands, would it be considered "necessary" for him to execute for delivery of the car before taxation of costs? In decrees for delivery of land, why should a decree holder wait, until the costs are taxed for him to execute for possession of the land? On my part, I find little or no correlation between the delivery of the land and the payment of the costs. I think it is time we relooked the necessity of Section 94."
34. I am in agreement with the Learned Judge on the applicability of section 94 of the Civil Procedure Act on non-monetary decrees. The Applicant was ordered to vacate the suit land within 45 days failure to which he would be evicted. This had to happen first as the Applicant was in breach. The court order had to be implemented. There was no monetary decree which had to be ascertained and costs calculated before the eviction. I find that this ground of the application fails.
35. On the second issue as to whether the respondent was in contravention of order 21 rule 8 of the Civil Procedure Rules which states that the rule does not the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order. The effect is that the court has discretion to approve a draft order at the time of pronouncing the judgment. In this case the court pronounced an order that the Applicant should vacate the suit property within 45 days failure to which the Applicant to be evicted.



36. Order 21 rule 8 of the *Civil Procedure Rules* is meant to ensure that a decree is drawn up in accordance with the judgment issued and that an order extracted upon delivery of a ruling does not require approval or amendments from the opposing party. This order emanated from a ruling of the court after the applicant's suit for adverse possession had been dismissed.
37. On the issue whether the applicant should be restored to the suit after eviction, having found that the respondent followed the right procedure in implementation of the eviction order there would be no reason to restore the applicant to the suit land. Had the process been flawed then the court could have considered the application on its merits.
38. In the case of *Absalom Dova...vs...Tarbo Transporters* (2013) eKLR, the court held that:-  
"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage but administers the justice that the case deserved. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination".
39. Similarly, in the case of *Selestica Ltd...vs...GoldRock Development Ltd* (2015), the court held that:-  
"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of Appeal are safeguarded and the appeal if successful is not rendered nugatory. However, the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his Judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs".
40. The relief of stay of execution is discretionary and the court must balance the competing interests of the parties where one seeks to enjoy the fruits of the judgment and the other the right to appeal. The applicant has not satisfied the principles for grant of stay of execution especially the one that requires an applicant to show that he/she will suffer substantial loss.
41. The upshot is that both applications are dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 27<sup>TH</sup> DAY OF JUNE, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

