



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kuria & another (Both Suing as Personal Representatives of The Estate of Francis Kuria Njoroge) v Chirchir (Environment & Land Case 165 of 2017) [2022] KEELC 2990 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2990 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 165 OF 2017**

**CG MBOGO, J**

**JUNE 23, 2022**

**BETWEEN**

**FLORENCE WANJIKU KURIA ..... 1<sup>ST</sup> PLAINTIFF**

**JOB ELIJAH KURIA ..... 2<sup>ND</sup> PLAINTIFF**

**BOTH SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF FRANCIS KURIA NJOROGE**

**AND**

**JOEL KIPKOSGEI CHIRCHIR ..... DEFENDANT**

**RULING**

1. What is before this court for determination is a Notice of Motion application dated June 2, 2021 and a Notice of Motion application dated December 17, 2021. The Notice of Motion dated 2<sup>nd</sup> June, 2021 is filed by the plaintiff and is expressed to be brought under order 3, 3a and order 35 rules 1 and 2 of the *Civil Procedure Rules* seeking the following orders: -
  1. That this honourable court be pleased to issue an eviction order against the defendant, his agents and servants and persons trespassing and or unlawfully occupying parcel of land known as Narok/Cis-Mara/Nkobon/77.
  2. That this honourable court do authorize the Officer Commanding Station Ololulunga Police Station to give necessary assistance and security to the plaintiffs and or its agents and servants in the eviction exercise.
  3. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and in the supporting affidavit of the 1<sup>st</sup> plaintiff sworn on June 2, 2021. The 1<sup>st</sup> plaintiff deposed that on September 26, 2019, they obtained



judgment and decree against the defendant and that the defendant being aware, has failed and refused to vacate from the suit land within the stipulated period. Further that the plaintiffs intend to develop the suit land but the defendant's continued trespass and occupation are frustrating their efforts.

3. The application is opposed by a replying affidavit of the defendant sworn on February 17, 2022. The defendant deposed that upon finding out that judgment had been entered against him, he sought the services of another advocate because the previous advocate failed to attend court. That thereafter, he filed an application for stay of execution dated July 8, 2020 and that in total disregard to his application, the plaintiffs filed the instant application. And that whereas the application dated July 8, 2020 was dismissed, he filed a notice of appeal vide an application dated December 17, 2021 and for this reason, he is likely to suffer irreparable loss if eviction is allowed.
4. The 1<sup>st</sup> plaintiff filed a supplementary affidavit sworn on 3<sup>rd</sup> March 2022. The 1<sup>st</sup> plaintiff buttressed the contents of the supporting affidavit sworn on June 2, 2021 and another allegedly sworn on January 18, 2022.
5. The Notice of Motion application dated December 17, 2021 filed by the defendant is brought pursuant to order 42 rule 6 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking the following orders: -
  1. spent
  2. spent
  3. That there be stay of execution pending determination of appeal.
  4. That necessary direction be given.
6. The application is premised on the grounds on the face of it and in the supporting affidavit of the defendant sworn on even date. The defendant deposed that being dissatisfied with the ruling delivered on October 27, 2021, he has preferred an appeal which his advocate is yet to file for the reason that he needs to seek leave from court before filing an appeal which he has high chances of success. The defendant further deposed that he has been in occupation of the suit land since the year 2011 and has made substantial developments thereon and deserves a chance to tell his side of the story.
7. The application is opposed by the replying affidavit of the 1<sup>st</sup> plaintiff sworn on March 3, 2022. The 1<sup>st</sup> plaintiff deposed that her late husband was the registered proprietor of the suit land and together with the 2<sup>nd</sup> plaintiff, they were appointed the administrators of the estate of her late husband. She further deposed that by a judgement delivered on September 26, 2019, the plaintiffs were declared the beneficial owners of the suit land. Further, that the application is an abuse of court process and wanting in form and substance for the reason that the defendant has not demonstrated the requisite conditions for stay pending appeal and the same has been overtaken by events since the decree has been acted upon by the Land Registrar and the suit title has been issued in her name. That the defendant is engaging in forum shopping and is guilty of material non-disclosure for failing to disclose that he has filed an application in the Court of Appeal.
8. The plaintiff filed written submissions with respect to both applications dated 8<sup>th</sup> March, 2022. The plaintiffs submitted that the principles for granting stay of execution was restated in the case of Richard Kubondo versus Ndungu Waweru [2019] eKLR and further that the defendant has conceded in his supporting affidavit that he is yet to file an appeal which means he has failed on the first condition for grant of stay of execution. The plaintiffs urged this court to rely on the case of Mohamed Salim T/ A Choice Buthbert versus Nasserpuria Memon Jamat [2013] eKLR, James Mathuva Makewa versus Nzavi Ngului [2021] eKLR and Agnes Muthoni Nyanjui & 2 Others versus Annah Nyambura Kioi



§ 3 others [2015] eKLR and dismiss the defendant's application and allow the application dated June 2, 2021.

9. The defendant did not file written submissions to the notice of motion application dated June 2, 2021. Instead, the defendant filed written submissions to the notice of motion application dated December 17, 2021 dated March 21, 2022. The defendant raised two issues for determination as follows: -
  - a. Whether the applicant has met the threshold for grant for stay of execution pending appeal.
  - b. Who bears the costs of the application.
10. The defendant submitted that he is in occupation of the suit land and has carried out massive developments thereon, which if evicted, would suffer substantial loss and, the developments destroyed and that being the successful party in this application owing to the issues he has raised, then he is entitled to costs. The defendant relied on the following authorities: James Wangalwa & another versus Agnes Naliaka Cheseto, Patrick Kithaka Borici & another versus Shadrack Nyaga Njeru Chuka Elc Civil Appeal Case No. 08 of 2019, John Odongo versus Joyce Irungu Mubatia Kakamega Civil Appeal No. 46 of 2014 and Richard Kiprotich Kenduywo versus Daniel Muchanga Nyukuri Kitale ELC Case No. 59 of 2013.
11. I have considered both applications, the replies thereof, the written submissions and the authorities cited and the issues for determination are whether the Notice of Motion application June 2, 2021 is merited and whether this court ought to or can order grant of stay of stay of execution pending appeal.
12. I have perused the record in this file and I note that this court delivered Judgment in favour of the plaintiffs on September 26, 2019 and on December 9, 2020 a decree was issued on the same. I further note that after delivery of the said judgment, the defendant herein filed an application dated July 8, 2020 seeking stay of execution of the Judgment delivered on September 26, 2019 among others. This court, while dismissing the said application, found no issue raised that would enable it interfere with the judgment of the court. It is pursuant to the above sequence of events that has prompted filing of both applications by both parties.
13. The principles upon which the court assesses the application dated December 17, 2021 are laid down in order 42 rule 6 of the Civil Procedure Rules which provides as follows: -
  - “(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.”
14. However, I am constrained to entertain the said application for the reason that it has already been determined by my brother and for that reason I will speak no more.
15. With respect to the application for eviction, a look at the decree issued by this court on December 9, 2020 ordered that the defendant do vacate from the suit land within 60 days and in default eviction orders do issue thereafter. The defendant has in opposition to the application for eviction deposed that he has lived on the suit land since the year 2011 and has made massive development thereon. In my view, the reasons advanced by the defendant are hopeless because he seems reluctant to do so. It is



only fair that the plaintiffs enjoy the fruits of their judgment. I do note that in the presence of a formal order arising out of the Judgment of the court delivered on September 26, 2019, I am only inclined to allow the notice of motion application dated June 2, 2021. The notice of motion application dated December 17, 2021 is hereby dismissed.

16. I hereby direct as follows: -

1. That an eviction is hereby issued against the defendant, his agents, servants and/or any person in occupation of parcel of land known as Cis-Mara/Nkobon/77.
2. That the Officer Commanding Station Ololulunga Police Station do provide supervision, security and assistance in the eviction exercise.
3. That the defendant to pay costs of the notice of motion application dated June 2, 2021 and the notice of motion application dated December 17, 2021. It is so ordered.

**DATED, SIGNED and DELIVERED VIA EMAIL ON 23<sup>RD</sup> JUNE, 2022.**

**MBOGO C.G**

**JUDGE**

In the presence of: -

CA: Timothy Chuma

