



Kigo & another v Kinyanjui alias Kamau Ndwaru & another (Environment & Land Case 316 & 634 of 2009 (Consolidated)) [2022] KEELC 3107 (KLR) (22 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3107 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 316 & 634 OF 2009 (CONSOLIDATED)
SO OKONG'O, J
JUNE 22, 2022

BETWEEN

FLORENCE NJOKI KIGO PLAINTIFF

AND

JOHN NDWARU KINYANJUI ALIAS KAMAU NDWARU DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 634 OF 2009

BETWEEN

JOHN NDWARU KINYANJUI PLAINTIFF

AND

FLORENCE NJOKI KIGO DEFENDANT

RULING

1. On 25th May 2017, judgment was entered herein in favour of Florence Njoki Kigo (hereinafter referred to only as “the plaintiff”) against John Ndwaru Kinyanjui alias Kamau Ndwaru (hereinafter referred to as “the defendant”) in which the defendant was ordered to vacate all that parcel of land known as L.R No. Dagoretti /Ruthimitu/631 (hereinafter referred to as “the suit property”) immediately failure to which he be forcefully evicted therefrom. A permanent injunction was also issued restraining the defendant and members of his family from occupying, entering, cultivating or in any other way interfering with the suit property. The defendant’s claim over the suit property by adverse possession was dismissed.



2. On 19th June 2017, the defendant filed an application by way of Notice of Motion dated 16th June 2017 seeking a stay of execution of the said judgment pending the hearing and determination of the intended appeal to the Court of Appeal. In a ruling delivered on 28th February 2019, the court allowed the defendant's application on the following terms:

“I therefore allow the application dated 16th June, 2017 in terms of prayer 3 thereof on condition that the defendant pays into an interest earning bank account in the joint names of the advocates on record for the parties a sum of Kshs. 500,000/- within 30 days from the date hereof as security in default of which the stay shall stand discharged without any reference to the court. The costs of the application shall be in the cause.”

3. On 1st April 2019, the defendant filed an application for extension of time within which to deposit the said sum of Kshs. 500,000/- for a period of 7 days and for the stay order that had lapsed to be reinstated. On 4th April 2019, the court made an order by consent extending the time within which the defendant was to deposit the said sum of Kshs. 500,000/- by 7 days. It appears that the defendant did not comply with the order for the deposit of security which was a condition precedent to the stay of execution even after that extension of time as a result of which the stay order lapsed.
4. On 9th November 2019, the plaintiff filed an application seeking the eviction of the defendant from the suit property by Moran Auctioneers under Police supervision on the ground that the stay of execution order that was granted to the defendant was conditional and that the defendant had failed to comply with the condition as a result of which the stay lapsed. This application was abandoned.
5. On or about 15th April 2021, the plaintiff applied for execution of the decree that was issued herein and sought a notice to issue against the defendant to appear in court and show cause why he should not be evicted from the suit property. On 15th April 2021, the court issued a notice to the defendant to appear in court and show cause why he should not be evicted from the suit property. The Notice to Show Cause came up for hearing before Hon. I. N. Barasa SDR who upon satisfying herself that the defendant had been served with the notice and had not shown cause ordered that warrants be issued for the eviction of the defendant from the suit property. The said order by Hon. Barasa has not been set aside. On 28th September 2021, warrants of eviction were issued to Icon Auctioneers to evict the defendant from the suit property. The said auctioneers thereafter moved to the suit property on 21st February 2022 and evicted the defendant therefrom.
6. What is now before me is the defendant's application brought by way of Notice of Motion dated 22nd February 2022 in which the defendant has sought orders that; the plaintiff be restrained from entering into the suit property, remaining thereon and continuing to demolish the structures thereon; a mandatory injunction compelling the plaintiff to return and reinstate all the animals and other properties that she removed from the suit property; a finding that the plaintiff was in contempt of the orders issued by the court on 28th February 2019 and an appropriate punishment to be meted out against the plaintiff including but not limited to imprisonment for up to 6 months and the costs of the application.
7. The defendant's application that was supported by the affidavit of the defendant was brought on the ground that despite the fact that the defendant had complied with the order for furnishing security that was a condition for stay, the plaintiff still went ahead with the help from the Police and hired goons to evict the defendant from the suit property in the process of which they demolished his home and carted away his household goods, documents, farm animals and implements rendering him homeless and destitute. The defendant averred that he was not aware of any order authorising his eviction from the suit property. In his affidavit in support of the application, the defendant averred that a cheque



for Kshs. 500,000/- was forwarded to the plaintiff's advocates who deposited the same at KCB Bank, Milimani Law Court Branch.

8. The application was opposed by the plaintiff through a replying affidavit sworn on 9th March 2022. The plaintiff contended that the order of stay that was granted to the defendant lapsed when the defendant failed to comply with the condition for furnishing of security. The plaintiff averred that it was after the lapse of the stay order that she applied for execution and obtained an order for the eviction of the defendant from the suit property. The plaintiff averred that before the eviction order was made, a notice was served upon the defendant but he failed to appear in court to show cause why he should not be evicted. The plaintiff annexed to her affidavit correspondence exchanged between the plaintiff's and the defendant's advocates on the issue of the deposit of Kshs. 500,000/- that the defendant was required to make. The plaintiff averred that no basis had been laid to warrant holding her in contempt. The plaintiff urged the court to dismiss the application terming it vexatious, baseless and a waste of court's time.
9. The application was argued by way of written submissions. Both the defendant and the plaintiff filed submissions dated 15th March 2022. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the plaintiff in opposition to the application. Finally, I have considered the submissions by counsels and the various authorities cited in support thereof. All the orders sought by the defendant are predicated upon the defendant's contention that his eviction from the suit property was unlawful as he was enjoying an order of stay of execution of the decree of the court made against him on 25th May 2017. In the circumstances, what I need to determine first is whether as at the time an eviction order was issued and the defendant evicted from the suit property, there was an order of stay of execution of the said decree.
10. The burden was upon the defendant to demonstrate the existence of the said order of stay since the same was conditional. The defendant did not place any evidence before the court showing that he complied with the condition upon which the stay order was granted within the time that was prescribed by the court. The defendant was granted an order of stay of execution on 28th February 2019 on condition that he was to deposit a sum of Kshs. 500,000/- in a joint interest earning bank account in the names of the advocates for the parties within 30 days of the order in default of which the stay was to lapse. The 30 days lapsed without the defendant making the deposit and together with it went the stay order.
11. On 4th April 2019, the time within which the defendant was to deposit the said sum of Kshs. 500,000/- was extended by 7 days which means that the defendant was to make the deposit by 11th April 2019. The defendant did not place any evidence before the court showing that he made the deposit on or before 11th April 2019. In his affidavit, he stated that his advocates forwarded the cheque together with the account opening forms to the plaintiff's advocates and that the said advocates deposited the cheque at KCB Bank Milimani Law Court Branch. The defendant did not state in his affidavit when the said cheque was forwarded to the plaintiff's advocates. The defendant did not also place before the court any evidence showing that the cheque was actually deposited at KCB Bank.
12. In his submissions, the defendant claimed that his advocates forwarded the said cheque to the plaintiff's advocates on 8th May 2019. Even if it is assumed that the statement in the submission is correct, it means that the cheque was forwarded to the plaintiff's advocates outside the 7 days' period that was granted to the defendant by the court on 4th April 2019. The defendant did not therefore make the deposit as directed by the court with the result that the stay order in his favour lapsed.
13. It is therefore my finding that as at the time that the order for the eviction of the defendant from the suit property was made on 2nd February 2022 and the defendant eventually evicted on 22nd February



2022, the order of stay of execution that was granted to the defendant had lapsed. There was therefore nothing stopping the plaintiff from executing the decree in her favour. The eviction of the defendant from the suit property was lawful in the circumstances.

14. Due to the foregoing, I find no basis upon which the orders sought by the defendant can be granted. The eviction was carried out by a licensed auctioneer with the assistance of the Police who were directed to give such assistance by the court. If the auctioneer committed any illegal acts while carrying out the defendant's eviction, the defendant is at liberty to institute appropriate proceedings against the auctioneer. There is no evidence that the plaintiff was personally involved in the eviction of the defendant and that she carried away from the suit property any property belonging to the defendant.
15. The upshot of the foregoing is that the defendant's application dated 22nd February 2022 has no merit. The application is dismissed with costs to the plaintiff.

DELIVERED AND DATED AT NAIROBI THIS 22ND DAY OF JUNE 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ambani for the Plaintiff

Mr. Ibrahim for the Defendant

Ms.C.Nyokabi-Court Assistant

