



**Waititu & 3 others v Gethi. & another (Environment & Land Case
50 of 2018) [2022] KEELC 3926 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 50 OF 2018**

YM ANGIMA, J

JULY 28, 2022

BETWEEN

DAVID KIMENGERE WAITITU 1ST PLAINTIFF

**DAVID GITONGA (SUING AS THE PERSONAL REPRESENTATIVES OF
THE ESTATE OF THE LATE BENJAMIN ITHINYAI M'NARANGUI
(DECEASED). 2ND PLAINTIFF**

JOHN NGOGHO NDURERE 3RD PLAINTIFF

**JAMES MUTHAMI NDURERE (SUING AS THE PERSONAL
REPRESENTATIVES OF THE ESTATE OF THE LATE NDURERE MUHUNYO
GATHII (DECEASED) 4TH PLAINTIFF**

AND

ANGELA WAIRIMU GETHI. 1ST DEFENDANT

MURUA LIMITED 2ND DEFENDANT

RULING

1. By a notice of motion dated 20.12.2021 grounded upon Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21), Order 51 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Defendants sought an order for the Officer Commanding Ndaragwa Police Station to supervise the implementation of the decree amended on May 5, 2020 by evicting the 1st, 2nd, 3rd and 4th Plaintiffs, their agents, servants and family members from the suit property, that is, LR No 7381 (IR 6406/1) and demolition of any structures thereon to yield vacant possession to the Defendants.
2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Peter Nderitu Gethi on December 20, 2021 and the exhibits thereto. The Defendants contended that the Plaintiffs had lost their claim over the suit property vide



a judgment dated November 12, 2019 and amended on May 5, 2020; that their application for stay of execution pending appeal was dismissed on November 4, 2021; and that despite asking for 30 days to vacate the suit property in November, 2021 the Plaintiffs had failed to yield vacant possession of the suit property. It was further contended that the Plaintiffs were in deliberate disobedience of the amended decree hence they should be forcibly evicted from the suit property.

3. The 3rd Plaintiff, John Ngotho Ndurere filed a replying affidavit sworn on March 7, 2022 in opposition to the said application. It was contended that the said application was incompetent, bad in law and fatally defective. It was contended that the Plaintiffs being dissatisfied with the decree and amended decree had lodged an appeal before the Court of Appeal being Nyeri Civil Application No E005 of 2020 which was still pending determination.
4. It was contended that the Plaintiffs were in occupation of the suit property on which they had undertaken massive developments hence they shall be rendered homeless and destitute if evicted. The Plaintiffs contended that they should be accorded an opportunity to prosecute their pending appeal to its logical conclusion since they had an arguable appeal. The Plaintiffs further contended that their pending appeal shall be rendered nugatory if they were evicted from the suit property hence they prayed for dismissal of the application with costs.
5. The court has considered the Defendants' notice of motion dated December 20, 2021, the 3rd Plaintiff's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination is whether or not the Defendants have made out a case for the granting of the orders sought. It is evident from the application that the Defendants are seeking implementation of the amended decree so that they may enjoy the fruits of their judgment.
6. It is evident from the material on record that the decree was originally passed on November 12, 2019 and amended on May 5, 2020. That is more than 2 years ago. The material on record shows that the Plaintiffs' application for stay of execution pending appeal was dismissed by this court on November 4, 2021. Contrary to the Plaintiffs' claim that they have a pending appeal against the decree before the Court of Appeal, there is no evidence on record to that effect. The material on record simply shows that the Plaintiffs filed an application for stay of execution and extension of time to file an appeal out of time in Nyeri Civil Application No E005 of 2020. The record shows that the prayer for stay of execution was withdrawn by the Plaintiffs' advocate whereas the prayer for extension of time to appeal out of time was to be heard later. There is no evidence on record to demonstrate that the said application was ever heard or allowed.
7. The court is of the opinion that in the absence of an order of stay of execution either from this court or the Court of Appeal, there can be no legitimate reason to deny the Defendants enjoyment of the fruits of their judgment. The court is thus satisfied that the Defendants have made out a case for the grant of the orders sought for implementation of the decree made in their favour.
8. The upshot of the foregoing is that the court finds merit in the Defendants' notice of motion dated December 20, 2021. Accordingly, the same is hereby allowed in terms of Order No. (2) thereof with costs to the Defendants.

It is so decided.

RULING DATED AND SIGNED AT NYAHURURU THIS 28TH DAY OF JULY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Njoki Mureithi for the Plaintiffs



Mr. Mapesa for the Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

