



**M'ikilima v Kiriinya & another (Environment & Land Case  
95 of 2005) [2022] KEELC 12714 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12714 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 95 OF 2005  
CK NZILI, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**RIUNGU M'IKILIMA ..... APPLICANT**

**AND**

**STEPHEN KIRIINYA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN GIKUNDA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the court are two applications dated February 28, 2022 and March 18, 2022 respectively. In the 1<sup>st</sup> application, the defendant seek for review or variation of the judgment and or decree herein to the extent that the OCS Meru Police Station be replaced with the OCS Kariene police Station in order to enforce the decree. The reasons given are that the subject land now falls under Kariene Police Station and not Meru Police Station.
2. The application is opposed through a replying affidavit sworn on March 18, 2022 by Riungu M'ikilima, the judgment debtor on the ground that an appeal against the decree exists at Nyeri Court of Appeal which would be rendered nugatory should this application be allowed, and execution occur by removing him from his only matrimonial home where he lives with his family.
3. Further, the respondent states that he has filed an application for stay of execution which is pending ruling otherwise it is only fair he be allowed to ventilate his appeal which raises arguable points.
4. In the 2<sup>nd</sup> application, the judgment debtor seeks for a stay of execution pending appeal based on the reasons on its foot, the affidavit sworn by Riungu M' Ikilima on March 18, 2022 and an attached memorandum of appeal and a copy of the application for execution.



5. He deposed that if eviction occurs his family will lose a residence and proprietorship rights. Further, he averred eviction threats are imminent, there has been no inordinate delay and that there will be prejudice if the application is allowed.
6. The decree holder has opposed the application through a replying affidavit sworn on June 9, 2022 stating that there has been inordinate delay until the application of review was filed prompting this application; the appeal stands no chance of success; substantial loss has not been disclosed; security has not been offered; 3 years delay has not been explained; this application is an afterthought; if stay is granted there would be substantial injustice visited upon him since he will not enjoy the fruits of his judgment and it is not in the interest of justice to grant the orders sought.
7. With leave of court, parties filed written submissions dated June 9, 2022 and May 5, 2022 respectively. The decree holder urges the court to find under Order 45 Rule 1 *Civil Procedure Rules* the application is meritorious and allow it guided by the reasoning in *Ajit Kumar Rath v State of Orisa & others* Supreme Court Case 596, since the error is understandable. As regards stay, the decree holder submitted 3 years delay is inordinate, security has not been offered and substantial loss has not been demonstrated. Reliance is placed on *Naomi Muriuki v Boniface Njuki Runji* (2016) eKLR, *Stephen Gichubi Wachira & 3 others v Michael Muriuki Ngibuini* (2016) eKLR and *Machira t/a Co Advocates v EA Standard* (2002) eKLR.
8. The judgment debtor submitted the review of the decree to enforce the judgment would mean evicting him from the suit land despite the pending appeal and stay application, from his matrimonial home which will prejudice him.
9. On stay, the judgment debtor submitted if the execution ensures his appeal shall be rendered nugatory and remain an academic exercise, his rights to fair hearing and equal protection of right to property will be under risk and therefore it is only just and fair that the status quo be maintained.
10. Reliance was placed on *RWW v EKW* (2019) eKLR and *Butt v Rent Restriction Tribunal* (1982) KLR 417 on the proposition that there is need for preservation of the suit land to safeguard both rights.
11. Order 45 *Civil Procedure Rules* grants the court powers to review or vary its orders and or decree on the grounds that there is error apparent on the face of it, mistake or for any other sufficient reason.
12. In this application, the reason given is that the suit land falls under Kariene Police Station and not Meru Police Station. That fact has not been disputed by the respondent.
13. Therefore, I find no prejudice to be occasioned since this is a genuine error or anomaly curable under the law.
14. On stay of execution, an applicant to be entitled to stay of execution pending appeal has to demonstrate that the application is brought on time, if there is delay the same is explained to the satisfaction of the court substantial loss will be occasioned if stay is not granted the appeal would be rendered nugatory, security for due execution of the decree has been offered and that it is in the interest of justice to grant the orders sought.
15. While expounding the above principles, the court in *Butt v Rent Restriction Tribunal* (supra) held particular circumstances in the case should be considered as the court exercises its best discretion so as not to prevent the appeal and render it nugatory should the appeal court reverse the decision.
16. The applicant herein has not demonstrated any special circumstances other than indicating to be occupation and his family stand to be rendered homeless.



17. Asenath Ongeru J, in *RWW v EKW* (supra) took the view that the preservation of the subject matter in dispute is key so that the rights of both parties are safeguarded to avoid any prejudice to either of them.
18. In essence this court is called upon to balance the two competing rights of the enjoyment of the fruits of the judgment in favour of the decree holder and the right to appeal to the judgment debtor.
19. In this matter the applicant has taken 3 years to make the application for stay. He has given no explanation for the inordinate delay. It is not stated why he had to await until the application for review was filed. He is behaving like beacons which only shine when there are lights. Again, the applicant has not offered any security for the due realization of the decree should the appeal fail. See *Stephen Gichubi Wachira & 30 others (supra) and Naomi Muriuki v Boniface Njuki Runji* (supra).
20. The court is also required under Sections 1A, 1B & 3A of the *Civil Procedure Act* as read together with Article 159 of the *Constitution* to find out if it is in the interest of justice to grant the orders of stay. See *Regional Institute of Business Management v Lucas Ondong Otieno* (2020) eKLR.
21. In this matter, the applicant has been indolent for over three years. He has not stated the measures he has taken to fast track or facilitate the hearing on his appeal, since the decree was issued on October 18, 2018 and certified copies of the proceedings availed to him.
22. There must be expeditious disposal of cases and parties have an equal duty to participate in the said endeavor.
23. The applicant has had his share of blame until the respondent has moved to this court to apply for the review of the decree. It is not automatic that if the decree is issued there will be execution as the law provides for a notice to show cause where the decree is over a year old.
24. Substantial loss has not been demonstrated over and above the ordinary loss. See *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR. I therefore find it is not in the interest of justice to grant the orders sought
25. The upshot is that the application dated February 28, 2022 is allowed and the one dated March 18, 2022 is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**In presence of:**

Mukaburu for plaintiff

Soi for Kiyuki for defendant

HON. C.K. NZILI

ELC JUDGE

