



**Kigira v Kigira (Environment & Land Case 88 of 2020)  
[2022] KEELC 12709 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12709 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 88 OF 2020**

**JG KEMEI, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**PETER NGIGI KIGIRA ..... PLAINTIFF**

**AND**

**FREDRICK NGANGA KIGIRA ..... DEFENDANT**

**RULING**

1. There are two notice of motion under consideration in this ruling; notice of motion dated the 8/3/2022 and the one dated the 20/4/2022.
2. The plaintiff's motion dated the 8/3/2022 is seeking the following orders;
  - a. Spent.
  - b. That the defendant/respondent through himself, his kin, employees and servants be compelled by an order of eviction, to grant the plaintiff/applicant vacant possession of all that parcel of land referenced Komothai/kiratina/853.
  - c. That the Officer Commanding Police Station (OCS) Kibicho Police Station be ordered to provide security and ensure urgent and peaceful eviction of the respondent from the suit land and vacant possession of the property to the applicant; and
  - d. Costs be provided for.
3. The application is supported on the face of the record on the grounds cited thereto and the Supporting affidavit of the plaintiff/applicant sworn on even date. The plaintiff avers that he has obtained judgement in the suit whereupon the court declared him as the owner of the land but the defendant is adamant in the occupation of the suit land. That he has issued the relevant notices for eviction of the defendant under section 152E of the Land Act but the defendant is yet to deliver vacant possession



hence the filing of this application. That the defendant is occupying the land illegally and there is now need to forcefully evict him and urged the court to grant his prayers.

4. The defendant has not filed any response in opposition to the application.
5. That notwithstanding the defendant moved the court on the 21/4/2022 and filed the motion of even date seeking the following orders;
  - a. Spent
  - b. That pending the hearing and determination of this application there be stay of execution of the judgement and all other proceedings.
  - c. That there be an order of stay of execution of the judgement and all other proceedings or ruling delivered on the 10/2/22 or the enforcement of the whole judgement delivered on the 24/6/2021 and the ruling delivered on the 10/2/2022 pending the hearing of the intended appeal and or until further orders of the court.
  - d. Pending the interpartes hearing of the application, an interim relief be granted in prayer no 2 above.
  - e. Costs of the application.
6. The application is supported on the face of the grounds adduced thereto and the supporting affidavit of the defendant where he avers that he is in possession of the suit land which land is ancestral and is currently a subject of succession between him and the plaintiff; that his application dated the October 13, 2021 to set aside judgment to allow the trial to start afresh was dismissed; he is aggrieved by the decision of the court in the ruling of the delivered on the 10/2/2022 for which he has preferred an appeal, a notice of appeal has been served upon the plaintiff; there is no decree extracted by the plaintiff to allow for eviction as envisaged in the manner sought in the application of the 8/3/2022; if the court declines to grant stay his appeal shall be rendered nugatory hence the prejudice he stands to suffer;
7. With respect to substantial loss the defendant argues that the suit land is ancestral land which was transferred to the plaintiff in unclear circumstances after the demise of their father and allowing the application for eviction, the plaintiff is likely to utilize the land in a manner that would defeat his interest.
8. On the intended appeal, he was of the view that it has high chances of success seeing that; he has a constitutional right to be heard before judgment is rendered; his defence has triable issues; his advocates mistake in failing to diarize the hearing date ought not be visited on him; disallowing his application for fresh hearing is drastic in the face of the defendant's right to be heard.
9. That he filed this application without delay and urged the court to grant it in his favour.
10. Parties elected to canvass both applications by way of written submissions which I have read and considered.
11. I shall start with determining the application of the defendant for obvious reasons. If it succeeds there will be no need to discuss that one seeking eviction. In the event that it fails then i shall look at the plaintiff's application in that order.

#### **The Application Dated The 20/4/2022**

12. The application seeks two prayers in one, which is stay of execution of the judgment delivered on the 24/6/2021, the ruling delivered on the 10/2/2022 and all other proceedings in this suit.



13. This motion was filed by the defendant on the October 13, 2021. It seeks orders to set aside the judgement of this court rendered on the 24/6/2021.
14. The motion is opposed by the plaintiff through the grounds of opposition filed on the 13/5/2022 for reasons that;
  - a. The application in seeking to stay the judgement and the proceedings of this court is *resjudicata*, the earlier application dated the October 13, 2021 was decided by way of dismissal on the 10/2/2022.
  - b. Secondly that the application is an abuse of the process of the court.
15. The provisions governing stay of execution are found in order 42 rule 6 which states as follows;
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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.”
16. It is not in dispute that the suit was heard *exparte* and the judgement of the court delivered on the 24/6/2021. It is also not in dispute that the October 13, 2021 the defendant filed an application seeking orders of stay of execution of the said judgement as well as the orders to set aside the said Judgment. The court determined the application on the 10/2/2022 and pronounced itself on the matter. Seeking the same prayers in this motion amounts to relitigating the same issue and I dare say the same is now *resjudicata*.
17. Even if I was to consider the argument of the defendant advanced in the submissions that the application seeks stay of execution of the ruling delivered on the 10/2/2022, I have perused the said ruling and note that the ruling dismissed the application without pronouncing any positive orders. The court is at a loss as to what is to be stayed. The application dated 20/4/2022 is unmerited it is dismissed.
18. I find that the application dated 20/4/2022 is unmerited. It is dismissed.

### **The Application Dated The 8/3/2022**

19. The application for stay having been declined, the plaintiff having in his favour a judgment in the suit, I find no grounds to hinder him from executing the judgment. I have seen the steps that the plaintiff has taken to effect the eviction process in line with section 152E of the [Land Act](#) and my view is that



even without going through the process in the *Land Act*, the plaintiff is at liberty to execute by way of eviction under order 22 rule 29 of the *Civil Procedure Rules*.

20. The application dated 8/3/2022 is granted in line with the judgement delivered on the 24/6/2021.
21. I make no orders as to costs.
22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 22ND DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;  
E. K. Gitonga for Plaintiff/Applicant  
Kamau for Defendant/Respondent  
Court Assistant – Phyllis Mwangi

