



REPUBLIC OF KENYA



KENYA LAW
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**Kiragu v Muchunku (Environment and Land Appeal 205 of 2017)
[2022] KEELC 15486 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15486 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 205 OF 2017**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

PETER KAGUNYU KIRAGU PLAINTIFF

AND

ANNE HG MUCHUNKU DEFENDANT

RULING

1. This ruling is in respect of two applications filed by the plaintiff and the defendant dated October 4, 2021 and October 29, 2021 respectively.

A. Plaintiff's Application dated October 4, 2021

2. The plaintiff filed the instant notice of motion dated October 4, 2021 seeking orders that;
 - a. Spent.
 - b. Spent.
 - c. Consequent to prayer 2 herein above being granted, the Honorable Court be pleased to order the defendant to pay the costs of the eviction exercise that may be incurred by the plaintiff/decree holder.
 - d. Such further and/or other orders be granted as the court may deem fit and expedient.
3. The application is supported on the grounds on the face of it and the supporting affidavit of even date sworn by Peter Kagunyu Kiragu, the Plaintiff. He deponed that on July 15, 2021 this honorable court entered judgment – PKK1 in his favor as against the defendant by ordering the defendant to give vacant possession of the subject land. That the plaintiff duly extracted the court's decree -PKK2 on August 3, 2021 and notified the Defendant to give vacant possession vide PKK3; a letter dated August 3, 2021. That before commencing execution, the defendant applied for stay of execution in this court



and the court granted interim stay for 60 days and directed the defendant to apply for substantive stay of execution in the Court of Appeal. That the interim has since long lapsed and the defendant continues to deprive the plaintiff enjoyment of the fruits of his judgment hence the application.

4. The defendant's counsel Lilian Nchogu and Francis Orioki swore a replying affidavit dated October 22, 2021 and admitted this court's judgment in favor of the plaintiff. That dissatisfied with the judgment they lodged a notice of appeal – LNOK1 on July 15, 2021 and a memorandum of appeal dated September 13, 2021. That contemporaneously they filed an Application dated September 16, 2021 for substantive stay of execution before the expiry of the interim stay of execution granted by this court. That the CoA directed parties to file their rival submissions which was duly done but the court is yet to pronounce itself on the said application. That the plaintiff's move to commence execution will greatly prejudice the defendant who has been in occupation of the suit property yet the Court of Appeal is fully seized of the matter. That in any event the plaintiff failed to comply with the mandatory provisions of sections 152 E& F of the Land Act that inter alia require him to serve a three month notice before the intended eviction.
5. In a rejoinder, the plaintiff filed a supplementary affidavit sworn on November 15, 2021 and accused the defendant of inordinate delay in filing his appeal at the Court of Appeal barely two weeks to the lapse of the interim stay. He maintained that he fully complied with the provisions of the law on eviction and since the defendant has not established any irreparable loss on her part, the application ought to be allowed.
6. The application was canvassed by way of written submissions. The plaintiff through the firm of M/ S Kamunge & Nyakeri Advocates filed submissions dated November 15, 2021 and drew two issues for determination; whether the plaintiff is entitled to the orders sought and, in whose favor, does the balance of convenience tilt.
7. On the first issue, reliance was placed on Order 22 rule 6, 29(1) Civil Procedure Rules, section 38 Civil Procedure Act and rule 9 of the Auctioneer Rules, 1997 on execution of decrees. That having demonstrated that there is a valid judgment in his favor that has not been overturned or reviewed, then the order for eviction should be granted as was in the case of Lucy Ghati v Alex Wambura John & Anor [2019] eKLR. Secondly that the balance of convenience tilts in the plaintiff's favor as he's entitled to enjoy the fruits of his Judgment.
8. Opposing the motion, the firms of Lilian Nchogu & Co Advocates and Orioki Kenyeru & Co Advocates filed submissions dated December 14, 2021 on behalf of the defendant. They drew a singular issue for determination which is whether the plaintiff is entitled to execution order pending the hearing and determination of this application.
9. It was submitted that the purpose of stay of execution is to preserve the substratum of the subject matter. That since the Court of Appeal is fully seized of this matter, this court ought to decline the plaintiff's prayers and order for *status quo* so as not to render the appeal nugatory.
10. The germane issue for determination is whether the application is merited.
11. It is common ground that Judgment was delivered herein on July 15, 2021 in favour of the plaintiff in terms of prayers a and b of the plaint dated October 19, 2017 that; an order of eviction over title no Ruiru/Ruiru East Block 2/24631 and an order of permanent injunction restraining the defendant, her agents, workers, her personal representatives or any other persons claiming through her, from entering, trespassing or in any manner whatsoever occupying Ruiru/Ruiru East Block 2/24631, 24632, 24633, 24634, 24635, 24636, 24737, 24738, 24639, 24640, 24641, 24642, 24643 and 24644 in any manner inconsistent with the plaintiff's title. Dissatisfied with the Judgment, the defendant applied for stay



of execution pending appeal and this court granted interim stay for 60 days on July 26, 2021. The defendant was directed to seek substantive stay of execution in the Court of Appeal alongside their appeal. The defendant moved the Court of Appeal on September 16, 2021 and parties were directed to file their rival submissions.

12. The interim stay of execution lapsed on or about September 29, 2021 and before then the plaintiff had already extracted the decree issued on August 17, 2021 with a view to enjoy the fruits of his judgment. The Court of Appeal did not issue any stay order and in my view upon the lapse of the interim stay, the plaintiff's right to execute judgment accrued.
13. Taking into account the nature of prayers sought in the rival applications, I will determine the defendant's motion dated October 29, 2021 as follows:-

B. Defendant's Motion dated October 29, 2021

14. The defendant craves for orders That;
 - a. Spent.
 - b. The honorable court be pleased to extend the order of stay of execution issued on July 29, 2021 for another period of 60 days and/or until such a time when the substantive notice of motion application dated September 16, 2021 pending before the Court of Appeal is heard and determined.
 - c. In the alternative this honorable court do issue an order of status quo pending the hearing and determination of the said substantive application before the appellate court.
 - d. Both the plaintiff and the defendant have been directed by the appellate court that they will be notified on the interparty hearing on the pending notice of motion. (sic)
15. The motion is premised on the grounds thereto and supporting affidavit of the defendant's counsel Lilian Nchogu and Francis Orioki. At the risk of being repetitive, it suffices to state that the averments in the supporting affidavit are a replica of the replying affidavit summarized in para 4 above. The deponents admitted that the interim stay of execution granted on July 29, 2021 had expired and that if this court does not extend the same, the defendant stands to suffer irreparable loss and her appeal will be rendered nugatory.
16. The application is opposed. The plaintiff swore an undated replying affidavit and averred that the defendant moved the Court of Appeal only two weeks to the lapse of interim stay. That the prayer for extension of interim stay is an abuse of court process and the plaintiff is entitled to evict the defendant who has failed to give vacant possession of the suit land.
17. The defendant through her counsel filed submissions dated December 14, 2021. She submitted that Order 22 rule 22 (1) *Civil Procedure Rules* *inter alia* provides for stay of execution for a reasonable time to enable the judgment debtor seek appropriate reliefs in court and that this court under order 50 rule 5 *Civil Procedure Rules* has power to enlarge time as may be necessary and, in this case, extend the interim stay order issued on July 29, 2021. That the extension of the order will ensure maintenance of *status quo* pending the determination of the appeal.
18. Conversely the plaintiff in opposing the motion filed submissions dated November 11, 2021. He pointed out that indeed the court had granted interim stay of 60 days as provided for under Order 22 rule 22(1) *Civil Procedure Rules*. That the defendant moved the Court of Appeal late in the day and no plausible explanation has been proffered for this court to exercise its discretion in her favor. That there is evidence that has been tendered to show by way of evidence the irreparable loss the defendant



stands to suffer in the event such stay is denied. That the right of appeal must be balanced against the weighty right of to enjoy fruits of a Jdt.

19. The sole issue for determination is whether the application is merited.
20. The common facts of the case cut across in both rival applications. The defendant urges this court to extend the interim orders of stay of execution issued on July 29, 2021. As already stated above the orders lapsed on or about September 29, 2021 so that at the time of filing the instant motion on November 1, 2021, there were no orders in place capable of being extended as prayed. Prayer 2 therefore is moot.
21. On prayer 3 the defendant prays for an order of *status quo* pending the hearing of her application for stay of execution in the Court of Appeal. According to the application is premised on section 3A of the [Civil Procedure Act](#) which states;

“ 3A. Saving of inherent powers of court.
Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
22. The defendant drew this court’s attention to para 13 of the plaintiff’s replying affidavit filed in the Court of Appeal sworn on September 20, 2021 where he deposed and emphasized that; ‘That at any rate, upon the pronouncement of the superior court, I am keen to enter upon and recover the suit property, but however the suit property shall not be alienated and/or disposed of. In this regard the suit property shall remain and be available post the determination of the appeal’. The plaintiff termed this averment as his utmost gesture to avail the suit property post appeal.
23. Further reference is made to PKK3 a notice of eviction to the defendant dated August 3, 2021 demanding vacant possession within 30 days. This is despite the interim stay which as discussed was to lapse September 29, 2021. In my view the plaintiff’s move to serve the said notice was premature and contrary to the existing court order at the time.
24. For the foregoing reasons I am of the view that purely in the interest of justice the court exercises its discretion and grants *status quo* of the suit property in terms of prayer 3 only pending the Court of Appeal ruling.
25. This application having succeeded in part, the plaintiff’s motion dated October 4, 2021 be and is hereby struck out.
26. Each party to bear their own costs.
27. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 20TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff / Respondent – Absent

Orioki / Lilian Nchogu for Defendant / Applicant

Court Assistant – Phyllis / Kevin

