



Mogesi v Nyakundi (Environment and Land Miscellaneous Case E016 of 2024) [2025] KEELC 4972 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEELC 4972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS CASE E016 OF 2024**

CK NZILI, J

JULY 2, 2025

BETWEEN

PATROBA O MOGESI APPLICANT

AND

STEPHEN GEORGE NYAKUNDI RESPONDENT

RULING

1. What is before the court is an application dated 18/3/2025. The applicant seeks a stay of execution of the decree in the Chief Magistrates Court in Kitale ELC No 55 of 2020 in respect of the judgment delivered on 6/11/2023, including an order of eviction issued on 23/7/2024. Further, the court is asked to grant leave to appeal against the ruling made on 5/3/2025. The reasons are contained on the face of the application, a supporting and a supplementary affidavits sworn by Patroba O. Mogesi on 18/3/2025 and 9/4/2025.
2. The applicant deposes that he is still the registered allottee of UNS. Residential Plot No 32 Kitale Ref. No 20080/XXV111 is attached as POM-1, which he is still under occupation. The applicant deposes that the eviction carried out against the respondent was contrary to Section 152E of the Land Act. Further, the applicant deposes that other than a sale agreement, the respondent holds no title to the suit property.
3. Again, the applicant deposes that without a declaration of ownership of the suit property, he is not entitled to an order of eviction. The applicant deposes that the ruling delivered on 5/3/2025 dismissed his application dated 5/12/2024, yet he was not given leave to appeal, which has exposed him to losing the suit property. Nevertheless, the applicant deposes that he has filed a notice of appeal as per annexure marked POM-3, hence he needs to have his rights safeguarded, otherwise, the intended appeal will be rendered nugatory.



4. Accordingly, the applicant deposes that unless the order is made, the threatened eviction will be carried out, resulting in loss of his plot, which has sentimental value since it has his matrimonial home. The applicant deposes that he is willing to abide by any terms as to security for the court may impose. The applicant deposes that the eviction is imminent in view of the annexure marked POM-4.
5. The application is opposed through a replying affidavit sworn by George Stephen Nyakundi on 2/4/2025. It is deposed that the applicant has persistently disobeyed court orders, hence he has unclean hands. It is deposed that the decree of the court was issued on 30/11/2023 ordering he applicant to move out of the suit property, which he ignored.
6. Following disobedience, the respondent avers that he came back to court on 23/7/2024 seeking the assistance of the OCS Kitale Police Station to assist in the eviction and the removal of the applicant, her family, agents or other persons bound by the order from the land. The two orders are annexed as GSN-1 and 2.
7. The respondent deposes that on 16/11/2024, he learned from the OCS that the applicant was evicted from the suit land by removing all her belongings and a temporary structure therein was demolished. The respondent deposes that despite the eviction, the applicant went back to the suit property, reconstructed the same structure and moved in, disregarding the court order of eviction. The respondent deposes that since the applicant's application for stay of execution was declared by both the trial court and this court, this court should not grant such relief, whose outcome is to deny the respondent from enjoying the fruits of his judgment.
8. Equally, the respondent deposes that this application is similar to the one dismissed on 5/3/2025 and hence, the court cannot reopen the issues and particularly the new issues of the matrimonial home and allotment letter, being raised at this juncture. The respondent deposes that both the applicant and his have moved out of the suit property, leaving it vacant.
9. The respondent states that he has leased the same to college students, who are currently in occupation, hence the application is a delay tactic, coming too late, two years after the judgment was issued in his favour.
10. By way of a supplementary affidavit, the applicant insists that he is still in occupation of the suit land as per annexed photographs marked POM-1(a) and (b), after the purported attempted eviction failed. The applicant deposes that he has not disobeyed any court orders; otherwise, it is the respondent who violated the law on eviction without serving the requisite notice and also undertaking the same in the presence of the responsible government officers, from where the suit property is situated. The applicant has attached copies of the CD extract and a certificate marked POM-2(a) and (b).
11. The applicant avers that the respondent in the replying affidavit has not disclosed all the material facts on whether in the attempted eviction, there was compliance with the law on eviction and also Article 40 of the *Constitution*, hence the respondent was perpetuating an illegality in the name of an eviction.
12. Similarly, the applicant denies that his application is res judicata, since there is a notice of appeal filed against the ruling of 5/3/2025. The applicant deposes that the alleged place he has relocated to and the date of the lease and the names of the college students have not been disclosed. The applicant deposes that the respondent is yet to clear the balance in the purchase price or disclosed that he was refunded Kshs.180,000/=, which he still holds, otherwise he is out to unjustly enrich himself going by annexure marked POM-3(a), (b) and (c), for him to retain both the money and the suit property.
13. On 5/3/2025, this court, differently constituted, dwelt with an application for stay of execution of the judgment, decree dated 6/11/2023 and for leave to appeal out of time to this court against the said



judgment or decree. The court found the delay of one year both inordinate and unreasonable. The court also discharged the interim order of stay.

14. The applicant has once again come to this court seeking leave to appeal against the ruling and also a stay pending his intended appeal. The application was filed on 18/3/2025. It is not clear why the applicant did not seek leave to appeal when the ruling was being delivered on 5/3/2025. Equally, the applicant, on one hand, deposes that there is a pending appeal in view of a notice of appeal attached as POM-3, yet he still seeks leave of this court.
15. That notwithstanding, it is a right of a party to seek leave to appeal. I find that the applicant deserves the leave to exercise his constitutional right to appeal against the ruling of this court to the Court of Appeal.
16. As to stay of execution, the applicant has stated that he is still in occupation of the suit property, since the purported eviction aborted for non-compliance with Section 152E of the *Land Act*. The respondent has also admitted that despite the eviction by the OCS, the applicant went back to the suit premises, hence, deserves no audience or mercy from this court, being a serial flouter of court orders, unless the orders are in his favour.
17. The application before me is not challenging an otherwise illegal and unconstitutional eviction. A party that possesses an eviction order must comply with the law. At the same time, a party aggrieved by an intended or impending eviction which is not in conformity with the law has the right under the law on eviction to challenge it through objection proceedings to execution or otherwise. The eviction order dated 23/7/2024, was not issued in these proceedings. The applicant should therefore raise her objection before the court seized of the matter and not before this court. There is no pending appeal against the said order or decree before this court.
18. Equally, and given the court discharged the interim order of stay, the court is functus officio and cannot re-open the issue.
19. The upshot is that the court declines to issue any stay orders. The application is allowed only in terms of leave to appeal being granted. There will be no order as to costs.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALA ON THIS 2ND DAY OF JULY 2025.

In the presence of:

Court Assistant – Dennis

Bikunda for the applicant present

Nyakundi in person

Mafumbo for respondent absent

HON. C.K. NZILI

JUDGE, ELC KITALA.

