



Maingi & 3 others v Ndumi & another (Environment and Land Appeal E012 of 2023) [2024] KEELC 447 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEELC 447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E012 OF 2023
A NYUKURI, J
FEBRUARY 1, 2024**

BETWEEN

PATRICK MULWA MAINGI APPLICANT

AND

MUTHOKA MUYO 1ST APPELLANT

MUTUKU NZUKI 2ND APPELLANT

KYALO NZUKI 3RD APPELLANT

AND

IRENE NDUMI 1ST RESPONDENT

JEFFERSON MUSYOKI PAUL 2ND RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion dated 11th December 2023 filed by the 1st appellant seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to enlarge time to the 1st applicant/appellant to comply with the orders issued in the ruling dated 26th July 2023 pending the hearing and determination of the appeal filed.



- d. That in the alternative, the Honourable Court be pleased to enlarge time to the 1st applicant/appellant for compliance of the orders issued in the ruling dated 26th July 2023 for a limited time of one year.
- e. That the costs of this application provided for.
2. The application is premised on grounds on its face and the supporting affidavit sworn on 11th December 2023 by Patrick Mulwa Maingi, the 1st appellant. The appellant's case is that in the ruling of the lower court made on 26th July 2023, the appellants were given sixty days to vacate LR Mavoko Block 3/4412 (suit property) and in default they would be evicted without further notice. He deposed that he was dissatisfied with that ruling and preferred the appeal herein. He stated that the respondents had served him with an eviction notice. He asserted that he has been in occupation of the suit property for more than 20 years, where he has made substantial development including building his permanent matrimonial home.
3. He stated that he lives on the suit property with his children and grandchildren and that it was practically impossible to put up another home in time and relocate, in view of the orders of the court. He sought for the court to temper justice with mercy, compassion and a human face and consider that his orphaned grandson sat for his primary school KCPE exams and should be given time to allow him to join high school. He stated that no prejudice will be suffered by the respondent. He attached a copy of the Memorandum of Appeal, orders of eviction issued against him, and his grandchildren's birth certificates.
4. The application is opposed. Jefferson Musyoki Paul, the 2nd respondent filed a replying affidavit sworn on 18th January 2024, opposing the application. He stated that judgment was entered against the applicant on 23rd October 2019 in CMCC No 793 of 2013 (Irene Ndumi & another v Patrick Mulwa Maingi and 3 others), and that the appellants filed an appeal vide ELC Appeal No 60 of 2019 (Patrick Mulwa Maingi & 3 others v Irene Ndumi and another) whereof judgment was entered on 19th September 2022 dismissing the appeal with costs. He stated that between the time of the judgment and when the order of eviction was issued, it was 10 months, which was a sufficient period for the applicants to arrange their vacation from the suit property.
5. He stated that for over one year, the applicants have failed to vacate the suit property despite the orders of the court, when the respondent is the registered proprietor thereof and is entitled to ownership rights protected under Article 40 of the Constitution of Kenya 2010. His position was that the application was an abuse of the court process and that litigation must come to an end. He attached a copy of the judgment dated 31st October 2019 in Machakos CMCC No 793 of 2013; a Memorandum of Appeal dated 22nd November 2019 and a judgment of this court dated 19th September 2022.

Analysis and determination

6. I have carefully considered the application herein, the supporting affidavit, as well as the replying affidavit. The only issue that arise for determination is whether the applicant deserves the orders sought.
7. Order 50 rule 6 of the Civil Procedure Rules provides for the power of the court to enlarge time; as follows;

Where a limited time has been or fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such



enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

8. The power to enlarge time is discretionary and that discretion ought to be exercised judiciously and not whimsically or capriciously. Extension of time is an equitable relief and a party seeking the same ought to explain the reasons for delay to the satisfaction of the court.
9. In the case of *Nick Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] KLR - SCK the court held as follows;
 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is reasonable reason for the delay which ought to be explained to the satisfaction of the court;
 5. Whether there would be any prejudices suffered by the respondents if the extension was granted;
 6. Whether the application had been brought without undue delay; and;
 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
10. In the instant case, the applicant alleges that he has lived on the suit property for 20 years with his family and that therefore, it is practically impossible to vacate the same in 60 days. On the other hand, the defendant argues that the order to vacate the suit property was issued in a judgment in Machakos CMCC No 793 of 213 on 31st October 2019 and that an appeal against that judgment by the appellant was dismissed by this court on 19th September 2022 and that therefore the applicant has had sufficient time to vacate the suit property.
11. Having considered arguments on both sides, it is clear that the court's finding that the applicants' presence on the suit property is unlawful is final and has not been set aside and or reviewed as the applicants appeal vide Machakos ELC Appeal No 60 of 2019 was dismissed on 19th September 2022. Even then, the applicant did not vacate or seek for time to vacate the suit property. He stayed put and it is after the respondent obtained an order for him to vacate in 60 days vide the ruling of 26th July 2023, that he is now complaining that 60 days period is too short for him to comply. The applicant has not told this court what he has been doing since the date of this court's judgment on 19th September 2022 and the date of filing the instant application on 11th December 2023, in view of the finding that his occupation of the suit property was unlawful. That is a period of over fourteen months. I do not think that the application herein was made in good faith, as the applicant only came to court upon being served with orders issued in July 2023. If the applicant needed one year to vacate, as he alleges; that need would have arisen upon the dismissal of his appeal on 19th September 2022 and therefore he should have vacated the suit property in September 2023. The orders issued by the trial court in Machakos



CMCC No 793 of 2013 having been upheld by this court in ELC Appeal No 60 of 2019, are orders which the applicant was bound to comply with since September 2022 when his appeal was dismissed. The excuses for non compliance by the applicant are not plausible.

12. In the premises, I find no justification to extend time for compliance with the orders of the trial court of 26th July 2023. I also find that this application is an abuse of the court process and should not be countenanced by this court.
13. The upshot is that I find no merit in the application dated 11th December 2023 and I hereby dismiss the same with costs to the respondent.
14. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1ST DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms. Thiong'o for applicant

Mr. Musyimi holding brief for Mr. Mutinda for respondents

Josephine - Court Assistant

