



REPUBLIC OF KENYA



**Mboro v Tokion & 3 others (Environment & Land Case 944 of 2017)
[2024] KEELC 5890 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5890 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 944 OF 2017
MN GICHERU, J
SEPTEMBER 16, 2024
(FORMERLY NAIROBI ELC NO. 1281 OF 2015)**

BETWEEN

MARY WARIARA MBORO PLAINTIFF

AND

TITUS TOKION 1ST DEFENDANT

GEORGE MBUGUA 2ND DEFENDANT

THE KAJIADO LAND REGISTRAR 3RD DEFENDANT

MENETO SIMINKOR OLOGURRO 4TH DEFENDANT

RULING

1. This ruling is on the notice of motion dated 9/12/2022. The motion which is by the 4th defendant seeks the following orders.
3. A stay of execution of the judgment delivered on 12/10/2022 and all consequential orders pending the hearing and determination of the intended appeal.
4. Any other orders and directions this court may deem fit and just to grant.
5. That costs of this application be provided for.

The motion is brought under the provisions of Sections 1A, 1B, 3A and 66 of the *Civil Procedure Act*, Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure rules and all other enabling provisions of law.

2. The motion is based on twelve (12) grounds and is supported by two affidavits by the 4th defendant dated 9/12/2022 and 22/12/2023 respectively. The 4th defendant has annexed four exhibits which include a copy of the judgment and decree, copy of memorandum of appeal, copy of letter requesting



for certified copies of proceedings and judgment and copies of receipts dated 25/1/2023 and 27/1/2023 prove filing of the appeal.

3. The gist of the above material filed by the 4th defendant is as follows. Firstly, on 12/10/2022 judgment was entered for the plaintiff against all the defendants. The same judgment dismissed the 4th defendant's counterclaim. Secondly, the 4th defendant is apprehensive that the plaintiff will execute the decree and evict the 4th defendant from the suit land and render him homeless. Thirdly, the appeal has high chances of success and has been filed timeously. Fourthly, the 4th defendant is willing to abide by any terms and conditions as to security of due performance of the decree as the court may deem fit to impose. For the above and other reasons, the 4th defendant prays for the orders in the motion.
4. The motion is opposed by the plaintiff who has sworn a replying affidavit dated 26/4/2023 in which she replies as follows. Firstly, the 4th defendant was granted 60 days stay of execution which lapsed around 13/12/2022. Secondly, the 4th defendant had sufficient time to file an appeal and seek the orders of stay from the Court of Appeal. Thirdly, the applicant is not in occupation of the suit land and has never been in occupation. It is therefore not true for him to say that he has a home thereon. Fourthly, as the registered owner, the plaintiff ought to be allowed to enjoy the fruits of her judgment without further delay. For the above and other reasons, she prays for the dismissal of the motion.
5. Even though the plaintiff's counsel told the court on 19/3/2024 that he had filed written submissions on 18/3/2024, I do not see the said submissions on record. The only submissions that I see are those filed by the 4th defendant's counsel. The single issue identified in the said submissions is as follows.

“Whether the applicant has met the threshold for orders of stay of execution pending appeal”.

6. I have carefully considered the motion in its entirety including the affidavits, the grounds and the annexures. I have also considered the written submissions by learned counsel for the 4th defendant. I make the following findings.
7. Under Order 12 rule 6(2) of the Civil Procedure Rules, three conditions must be proved before an order of stay of execution can be granted. They include,
 - i. The applicant proving substantial loss if the order sought is not granted and,
 - ii. The application has been made without unreasonable delay and,
 - iii. Such security as the court orders for the due performance of the decree being given by the applicant
8. All the three conditions must be met. Failure to meet even one of them means that the application will not be allowed. The 4th defendant deposes that she will be rendered homeless if the application is not allowed as he will be evicted from her home. She did not attach even a single picture of the home. During the trial, the issue of the home never arose. It has suddenly arisen in the current application. It is disputed by the plaintiff that the 4th defendant is in occupation of the suit land. I am not satisfied that the 4th defendant is in occupation of the suit or a part of thereof. I am not satisfied that she has a home thereon. Without a home on the land and without occupation of the same, I find that the 4th defendant will not suffer any substantial loss.
9. On the second condition of the application being made without unreasonable delay, I find that there is great delay in prosecuting this application. The applicant was allowed 60 days stay of execution to give her sufficient time to pursue her appeal. The appeal was filed in January 2023 which is almost 1



½ years ago. It is not proper that a matter pending before the Court of Appeal for more than one (1) year should also be pending before this court.

10. Regarding the third condition of security for the due performance of the decree, I find that though the applicant may meet this particular condition, it would not help because the other two conditions are unmet.
11. For the above stated reasons, I find no merit in the motion dated 9/12/2022 and I dismiss it with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16TH DAY OF SEPTEMBER 2024.

M.N. GICHERU

JUDGE

