



**Wanyama v Mugeni & another (Environment and Land Appeal
11 of 2016) [2024] KEELC 5895 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL 11 OF 2016
BN OLAO, J
SEPTEMBER 16, 2024**

BETWEEN

DESTERIO NYONGESA WANYAMA APPLICANT

AND

GILBERT WESONGA MUGENI 1ST RESPONDENT

AHMED MOHAMED 2ND RESPONDENT

RULING

1. This ruling was scheduled for delivery on 20th February 2024. However, I was away attending to my ailing step-mother who later passed away and was buried on 30th March 2024.
2. I then resumed duties in April 2024 before proceeding on my pre-scheduled annual leave from May 2024 until July 2024 followed thereafter with the vacation upto 15th September 2024.
3. That explains the delay in the delivery of this ruling which is now being delivered soon after the vacation. The delay is highly regretted.
4. The judgment in this appeal was delivered by Kaniaru J on 30th July 2019 in favour of Desterio Nyongesa Wanyama (the Applicant herein). Gilbert Wesonga Mugeni And Ahmed Mohamed (the 1st and 2nd Respondents respectively) were aggrieved with that judgment and moved to the Court of Appeal to challenge the same vide Civil Appeal No 227 of 2019. They also approached the Court vide their Notice of Motion dated 26th August 2019 seeking the substantive remedy that there be a stay of execution of the decree herein pending the hearing and determination of the appeal. That application was heard by Omollo J who, vide a ruling delivered on 3rd December 2019, allowed it on the following conditions:



- i. “All rents due from the tenants in occupation of the suit premises to be deposited in Court from December 2019 until the appeal before the Court of Appeal is heard and determined and or if the stay lapses.”
 - ii. “In case of default by any of the tenants, the Respondent is at liberty to levy distress to recover the arrears which once recovered to be deposited in Court less costs incurred for such distress.”
 - iii. “The Applicant to refund the Respondent the sum of Kshs.266,900 paid to him as party and party costs within 45 days of today.”
 - iv. “In default/disobedience of any one condition, the stay given herein shall lapse.”
 - v. “Costs of this Motion abide the winner of the appeal before the Court of Appeal.”
5. I now have for my determination the Appellant’s Notice of Motion dated 17th August 2023 in which he seeks the following orders:
- a. The Honourable Court be pleased to order the release of the sum of Kshs.1,255,000 deposited in Court by the 1st Respondent herein to the Appellant in partial settlement of the decree herein.
 - b. In the alternative to (a) above the Honourable Court be pleased to order the release of a sum of Kshs.266,900 out of the sum of Kshs.1,255,000 deposited in Court by the 1st Respondent as refund of the party and party costs paid to the 1st Respondent as ordered by the Court on 3rd December 2019.
 - c. The Honourable Court be pleased to order for the eviction of the Respondents and all other tenants in occupation of the suit premises being plot NO 318 within Busia Town in execution of the decree herein.
 - d. The Officer Commanding Station [OCS] Busia Police Station be and is hereby directed to provide security during the eviction exercise in (b) above.
 - e. Costs be provided for.
6. The application is grounded on the grounds set out therein and supported by the affidavit of the Appellant.
7. The basis of the application is that the Appellant holds a decree directing, inter alia, the eviction of the Respondents from the plot NO 318 in Busia Municipality and payment of rent and mesne profits by the Respondents. That the Respondents have appealed the judgment herein but have failed to comply with the orders as directed by the Court for stay of execution pending appeal and therefore, the default clause is now operative. It is just and expedient that this application be allowed. That upon perusal of the Court file, the 1st Respondent has made a payment of Kshs.1,255,000 as tabulated in paragraph 6 of the supporting affidavit but has not been doing so on a monthly basis as ordered and has also not paid the party and party costs in the lower Court as directed. In the process, the Respondents have defaulted on the conditional stay granted to them and frustrated the distress process.
8. Annexed to the application are the following documents:
1. Copy of plaint in Busia Chief Magistrate’s Court Civil Case NO 31 of 2011.
 2. Decree issued herein on 10th July 2019.
 3. Copy of Notice of Motion dated 26th August 2019.



4. Order issued on 3rd December 2019.
 5. Copies of receipts for various amounts of money paid into Court by the 1st Respondent.
 6. Copy of a letter dated 1st February 2021 from Eshikhoni Auctioneers and addressed to Omondi & Co. Advocates.
9. In opposing the application, the Respondents filed grounds of opposition raising the following:
1. That the application is an abuse of the due process of the Court.
 2. That the application is against the conditions of stay of appeal granted.
10. The application has been canvassed by way of written submissions. These have been filed both by Mr Omondi instructed by the firm of Omondi & Company Advocates for the Appellant and by Mr Ipapu instructed by the firm of Ipapu P. Jackah & Company Advocates for the Respondent.
11. I have considered the application, the supporting affidavit and grounds of opposition as well as the submissions by counsel.
12. It is not in dispute that vide a ruling delivered on 3rd December 2019, Omollo J granted the Respondents a conditional order of stay of execution pending the hearing and determination of their appeal against the judgment of Kaniaru J delivered on 30th July 2019. The terms of that conditional stay are adequately captured in paragraph 6 of the Appellant’s supporting affidavit and I need not repeat them. Nonetheless, and for the avoidance of doubt, I shall capture the terms NO (i), (iii) and (iv) which are:
- (i): “All rents due from the tenants in occupation of the suit premises to be deposited in Court from December 2019 until the Appeal before the Court of Appeal is heard and determined and or if the stay lapses.”
 - (iii): “The Applicant to refund the Respondent the sum of Kshs.266,900 paid to him as party and party costs within 45 days of today.”
 - (iv): “In default/disobedience of any one condition, the stay given herein shall lapse.”
13. Clearly, the conditions stipulated by Omollo J in her ruling delivered on 3rd December 2019 were supposed to be complied with conjunctively and not selectively. In other words, the Appellants were required to meet ALL the conditions, not only some of them, to enjoy the stay orders. According to paragraph 6(i) of the Appellant’s supporting affidavit, the first installment paid by the Respondents following the orders of stay was Kshs.100,000 paid on 21st October 2020. That was almost 12 months from the date Omollo J delivered her ruling on 3rd December 2019 in which the judgment specifically directed that all rents due “be deposited in Court from December 2019”. No payment was made in December 2019 and as is now clear, the first installment was made in October 2020. It would appear from the schedule of payments made from 7th December 2020 that the amount of rent payable by the Respondents monthly was Kshs.35,000 but even then, the sum of Kshs.100,000 paid on 21st October 2020 was not only late but it did not settle all the sum that the Respondents were in arrears. The Respondents having elected to only file grounds of opposition and not a replying affidavit in response to the Appellant’s averments as contained in his supporting affidavit, the only conclusion which this Court can make is That The Appellant’s Averments Are Admitted. In The Case Of *Daniel Kibet Mutai & 9 Others -v- Attorney General C.a. Civil Appeal No 95 of 2016* (2019 eKLR), the Court addressed that issue as follows in paragraph 34:



- 34: “The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the Respondents either through an affidavit in response or through cross-examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellant’s claims.” Emphasis mine.

The same Court stated as follows in the case of Attorney General & 6 Others -v- Mohamed Balala & 11 Others C.a. Civil Appeal No 191 of 2012 [2014 eKLR]:

“We do not think that the grounds of opposition were sufficient to counter the complaints by the Respondents. They were neither a defence nor evidence that the High Court could have relied on to find favour with their arguments. The grounds so to speak were a mere skeleton which required beefing up by way of evidence either through a replying affidavit or other means. Being mere skeleton, the judge could not really tell what the appellants case was or what they were upto. The grounds required to be elucidated, elaborated and expounded upon by the appellants so that the High Court could appreciate the issues being ventilated by the appellants in answer to the respondent’s allegations. In the absence of such, the High Court was quite right in holding that the petition was undefended. The appellants did not expect the High Court to embark on a fishing expedition of it’s own to find out exactly what the appellants defence was; put the other way, it was not the duty of the High Court to firm up the grounds of opposition on behalf of the appellants. Further, the grounds of opposition could not pass for evidence as they were not deponed or deposed to by any of the appellants.”

14. It is clear that the Appellant’s averments in this case have not been rebutted by the Respondents. The first installment was paid on 21st October 2020 and accordingly, in view of condition NO (iv) of the terms of stay of execution issued by Omollo J, “In default/disobedience of any one condition, the stay given herein shall lapse,” must now be activated. If the Respondents were unable, for any good reasons, to satisfy any of the conditions set out in the ruling, they were at liberty to approach the Court for an extension of time within which to comply. They did not comply with condition NO 1 nor did they seek an extension of time within which to do so. Section 1A (3) of the Civil Procedure Act provides in clear terms that:

“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of this Court.” Emphasis mine.

15. The Respondents not only failed to comply with the condition to deposit the rent due “from December 2019” as directed but also did so intermittently.
16. With regard to the refund of Kshs.266,900 paid as party and party costs, the Appellant has averred in paragraph 9 of his supporting affidavit as follows:

- 9: “That similarly, the 1st Respondent never refunded me the party and party costs paid to him in the lower Court as directed.”



This averment was also not rebutted as there was no replying affidavit. It must therefore be taken as having been admitted. All that the Respondents have done is to annex to their submissions, a copy of letter dated 23rd January 2020 as evidence of payment of the sum of Kshs.266,900. I will cite it in extenso:

“Dear Sir

RE: Busia H.c. Elc Ca No 11 Of 2016 Desterio Nyongesa -v- Gilbert Wesonga Mugeni

The above captioned matter refers.

Kindly do issue us with a receipt in the sum of Kshs.266,900 in respect of costs paid to yourselves on account of CC NO 31 of 2011.

Attached find a copy of the banking slip for your perusal.

Yours faithfully

Ipapu P. Jackah & Co. Advocates”

However, no copy of any banking slip was attached to the said letter. And in view of the un-rebutted averments in paragraph 9 of the Appellant’s supporting affidavit cited above, this Court can only arrive at the inevitable conclusion that the said costs were not refunded. Counsel for the Respondent has submitted in paragraph 6 of his submissions that:

- 6: The Respondent further submit that prayer (b) of the application is mischievous. All the money due and owing from the Respondents in party to party costs have been fully paid by the Respondents. The Applicant is being dishonest with the Court as all the money claimed was paid but the Applicant never issued the Respondents with an official receipt of payment. This prompted the Respondents to do a letter to counsel for the Applicant to be issued with an official receipt which remains un-answered to date (annexed hereto is the said letter and duly received by the Applicant’s counsel dated 23rd January 2020)”.

That letter is the one referred to above. It has been introduced in these proceedings by way of submissions. However, as stated by the Court of Appeal in Daniel Toroitich Arap Moi -v- Mwangi Stephen Muriithi & Another 2014 eKLR:

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties “marketing language”, each side endeavouring to convince the Court that it’s case is the better one. Submissions, we reiterate, did not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.” Emphasis mine.

In view of all the above, this Court must accept as true, the Appellant’s assertion that the Kshs.266,900 being party and party costs are yet to be paid.

17. The Appellant also seeks an order of eviction of the Respondents and all tenants from the suit property being plot NO 318. In their response to that, their counsel has made the following submissions at paragraph 7:

- 7: “In response to prayer (c), the ruling by the Learned Judge never touched on the issue of eviction of the Respondents and/or tenants and therefore that prayer is far fetched.”



It is clear that Omollo J in her ruling delivered on 3rd December 2019 in which the stay orders were granted, the Judge issued specific orders. However, those orders were issued in respect to the judgment of Kaniaru J delivered on 30th July 2019 in which he had allowed the Appellants appeal and had granted him judgment in terms of prayer NO (a), (b) (bb) and (c) of his amended plaint and dismissed the Respondents' counter-claim. In paragraph (c) of his amended plaint, the Appellant had sought for an order of eviction of the 1st Respondent from the Appellant's shop. As is now obvious from the above discourse, the Respondents did not comply with the conditions stipulated by Omollo J in her ruling delivered on 3rd December 2019. And since the Respondents defaulted on the above mentioned terms of stay pending appeal, the consequence as Omollo J did state in paragraph (iv) of her ruling already cited above, "the stay given herein shall lapse". The consequence of that lapse is that the judgment by Kaniaru J delivered on 30th July 2019 becomes ripe for execution which means that the Respondents must be evicted from the suit property.

18. Granted all the above, I am not minded to grant prayer (a) and (b) of the Appellant's Notice of Motion dated 17th August 2023. After all, doing so will only amount to a partial settlement of the decree herein. Now that the opportunity of stay of execution pending appeal was availed but has been squandered, the order that commends itself to me is to allow the Appellant to execute his decree while the Respondents can pursue their appeal in the Court of Appeal but without the luxury of a stay of execution from this Court. The Respondent will also be entitled to the refund of the Kshs.1,255,000 already deposited in Court. I cannot make any orders with regard to the Kshs.266,900 being the party and party costs since the receipt thereof has been denied by the Appellant.
19. Ultimately therefore and having considered the Notice of Motion dated 17th August 2023, this Court makes the following disposal orders:
 1. Prayers NO (a) and (b) are declined.
 2. The sum of Kshs.1,255,000 deposited in this Court as per the receipts annexed be refunded forthwith to the 1st Respondent.
 3. The Appellant is at liberty to forthwith execute the decree in terms of prayer NO (a), (bb), (c) and (d) of his amended plaint and as affirmed by Kaniaru J in his judgment delivered on 30th July 2019 and which includes the eviction of the 1st Respondent and all the tenants from the suit property being plot NO 318 in Busia Town.
 4. Thereafter, the Respondents and all those claiming under him shall be enjoined permanently from entering, trespassing, alienating, occupying, residing on, leasing, selling, demolishing or in any other way dealing with the shops occupied by the 1st Respondent on the suit property being plot NO 318 Busia Town.
 5. The Officer Commanding Station (OCS) Busia Police Station be and is hereby directed, upon request, to provide security during the eviction exercise should there be resistance.
 6. Costs of the application are awarded to the Appellant.

BOAZ N. OLAO

JUDGE

16TH SEPTEMBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 16TH DAY OF SEPTEMBER 2024 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

