



Kinuthia v Macharia (Donee of Power of Attorney - Ruth Wambui) & another (Environment & Land Case 292 of 2018) [2023] KEELC 17865 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 292 OF 2018**

JG KEMEI, J

JUNE 8, 2023

BETWEEN

THEDROUS CHEGE KINUTHIA PLAINTIFF

AND

ELIZABETH MACHARIA (DONEE OF POWER OF ATTORNEY - RUTH WAMBUI) 1ST DEFENDANT

TERESIAH WANJIKU 2ND DEFENDANT

RULING

1. There are two applications, the subject of this Ruling. The 1st application is dated 27/7/2021 filed by the Plaintiff. The 2nd application dated the 22/12/2021 is filed by the Defendants.

The Plaintiff's Application dated 27/7/2021

2. This motion is brought under Order 51 Rule 1 of the *Civil Procedure Rules*; Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and all other enabling provisions of the law. The Plaintiff seeks the following orders;
 - a. Spent.
 - b. That this Honourable Court do issue an eviction and demolition order against the Defendants/Applicants herein to vacate and give vacant possession of Land Parcel No Thindigua 76/748.
 - c. That the OCS Kiambu Police Station / Area Chief Thindigua to furnish security at the time of eviction and demolition of the Defendants/Applicants semi-permanent structures on the subject suit property.



- d. That cost of this application be cost in the cause.
3. The application is premised on the grounds stated below:
 - a. That the 2nd Defendant/Applicant Notice of Motion Application dated 2nd December, 2018 was dismissed with costs vide a Ruling which was delivered by this Honourable Court on 23rd July, 2020.
 - b. That as per the Court's Ruling this Honourable Court declared that the decree issued in favour of the Plaintiff/Respondent in CMCC No 1 of 2010 over the right of ownership of land parcel No Thindigua 76/748 is still valid.
 - c. That the Defendants/Applicants did not lodge any appeal against the said Ruling and the statutory thirty (30) days for doing so has elapsed.
 - d. That despite the said Ruling the Defendant's / Applicants in disobedience and contravention of the same are still trespassing and occupying the Plaintiff/Respondent subject parcel of land.
 - e. That the Defendants/Applicants continued occupation of the subject parcel of land is causing Plaintiff/Respondent untold suffering and mental anguish beside hindering his right of use and occupation of the same thus suffering loss and damage.
 - f. That the issues in dispute arose many years ago and it is therefore prudent that litigation must come to an end.
 - g. That is it in the interest of justice that the orders sought for herein be granted.
 4. In support of the application, Theodrous Chege Kinuthia through a sworn Affidavit dated 27/7/2021 deponed as follows; That vide a Court Ruling delivered on 23/7/2020 he was declared the rightful owner of Parcel No Thindigua 76/748 he stated that the said Ruling has never been appealed against and therefore it's still valid and that notwithstanding the said Ruling the Defendants have continued to trespass and occupy the subject land in disobedience of the Court order, visiting upon him untold suffering and mental anguish, in addition to hindering him from utilising and occupying the suit land.
 5. It would appear from the record that the Defendants have not opposed the application seeing that they have not filed any Replying Affidavit. Instead the Defendants countered it with their own application dated the 22/12/2021 set out below.

The Defendants' Application Dated 22/12/2021

6. Vide an Amended Notice of Motion dated 22/12/2021 the Defendants sought the following orders
 - a. Spent
 - b. Spent
 - c. That the Court issues injunctive orders restraining Plaintiff / Respondent or his agents and assigns from trespassing into the LR No LR No 76/748.
 - d. That this Honourable Court be pleased to order stay of execution of the decree dated 7/4/2015 and the Court eviction order dated the 30/5/2018 made against the Defendants/Applicants herein.
 - e. That the Court be pleased to stay the execution of decree issued.
 - f. That cost of this application be costs in the cause.



7. The Motion is premised on the following grounds:-
- a. That the Respondent through his agents has trespassed into LR No 76/748 with intention to sell / offer for the said property for sale and or at any rate alienate the said property.
 - b. That the Respondent has intentions to evict and or interfere with the silent and quiet enjoyment of the LR No 76/748 which is currently in the possession of the Defendant/ Applicant and this cannot wait until the normal Court operation resume.
 - c. That the Respondent has approached the Court vide application dated the 27th July 2021 wherein he is seeking for eviction orders pursuant to Court order dated 30/5/2018 hinged in the Court decree dated the 23/7/2020 and the application is pending before this Honourable Court.
 - d. That the Respondent will in all likelihood and without the benefit of the Court interfere with the said possession and silent enjoyment of the property unless restrained by this Honourable Court.
 - e. That the Respondent is currently a suspect for forgery, fraud, false pretences and investigations are ongoing at the DCI headquarters – Nairobi with regard to the parcel of land herein.
 - f. That a report on forgery claims against Plaintiff/Respondent dated the 24/9/2021 was released by the Land Fraud Investigations Unit, of the Directorate of Criminal Investigations which reveals that indeed forgery was committed and the Share Certificate used as the basis of conferring the certificate of the title LR No 76/748 to Plaintiff/Respondent was obtained by forgery.
 - g. That a raft of Defendant/Applicant constitutional rights are under threat of being infringed upon by the unlawful and illegal acts of Plaintiff/Respondent herein.
 - h. That the Defendant / Applicant are apprehensive that unless restrained the Plaintiff/ Respondent might will execute the eviction orders and demolish the Defendant/Applicant Residential houses if granted.
 - i. That the Plaintiff/Respondent application has been slated for hearing on the 12th October 2021 in which the Plaintiff/Respondent is seeking for orders for the Officer Commanding Station (OCS) to enforce /execute the eviction order and it is therefore imperative and in the interest of justice that the application annexed herewith be heard urgently before the 12th October 2021 when the Plaintiff/Respondent application has been stated slated for hearing.
8. In support of the Motion Elizabeth Wairimu Macharia the 1st Defendant herein, stated that she is a nominee of Ruth Wambui Chege alias Wambui Chege vide a Power of Attorney dated 12/9/2018. That she also has the authority of the 2nd Defendant, Teresia Wanjiku whom she has deponed on her behalf.
9. She stated that she has credible evidence from agents on the ground that the Plaintiff is seeking to unlawfully sell or otherwise alienate the suit property, in particular, some prospective buyers were taken by various agents to the suit property on the 1/8/2021 to view the property for the purpose of disposal. That the said unlawful trespass was perpetuated by the Plaintiff and the potential purchasers.
10. The deponent stated that the Plaintiff is being investigated by the Directorate of Criminal Investigations for forgery, impersonation and fraud with respect to the acquisition of the suit land. Following the said investigation, she stated that, she is in receipt of a forensic document examiners



report dated 24/9/2021 from the Land Fraud Division of the Kiambu Criminal Investigations Department regarding forgery of a signature of one Harrison Gicharu Nganga.

11. That from the said report Share Certificate No 202 registered in the name of the Plaintiff was fraudulently obtained and was not signed by Harrison Gicharu Nganga who at the relevant time was the Chairman of Thindigua Company Limited (the original owner and allotting company of the suit land). That from the written statements of the former officials of Thindigua Company Limited the Plaintiff was never a member or a shareholder of Thindigua Company Limited. She contended that this vital evidence is yet to be examined, tried and interrogated by the Court nor rebutted by the Plaintiff.
12. In addition, she avers that the land ownership dispute has never been heard and determined. That in light of the newly discovered evidence, it is clear that the tribunal considered and relied on forged documents tendered by the Plaintiff to arrive at its decision of 7th January 2010, hence the award and subsequent decree issued by the Chief Magistrate's Court in Kiambu of 7/4/2015 is tainted with unlawfulness. That the Plaintiff seeks title on the strength of a forged share certificate and the intended eviction against the Defendant rests on irregular acquisition of title.
13. That the fraudulent conduct of the Plaintiff is intended to deny the Defendant proprietary rights in the suit land. The Defendant argues that she has an indefeasible title to the suit land in accordance with Section 26 of *Land Registration Act*.
14. The Applicant further states that the process of acquisition of the suit land by the Plaintiff raises constitutional issues or questions that call for interrogation in a full trial by the Court. Some of the constitutional questions, she avers, are; the consideration whether the tribunal infringed upon her constitutional right to fair hearing as guaranteed under Article 50 of the *Constitution* of Kenya.; whether the Defendants' right to equality and freedom from discrimination as enshrined in Article 27(1) was infringed; whether the right to equal protection and equal benefit of the law was violated; whether her right to property as enshrined in Article 40 of *the Constitution* of Kenya was violated by the tribunal in conferring unlawful title to the suit property to the Plaintiff.
15. The Applicant urged the Court to order stay of execution against the Plaintiff to enable her ventilate the above constitutional questions.
16. The Motion is opposed by the Plaintiff/Respondent vide a Replying Affidavit sworn on 17/5/2022 wherein he states that the application for stay is frivolous, vexatious and incompetent in view of the Ruling of the Court delivered on 23/7/2020. That the said Ruling has not been appealed, vacated and or set aside.
17. That the application is intended to evade the cause of justice. Interalia, that the issues raised by the Defendants are allegations that were investigated by the Director of Criminal Investigations in 2018 out of which no action has been taken to date against the Plaintiff. The deponent urged this Court to dismiss the Defendant's application with costs.

The Written Submissions

18. The Plaintiff filed written submissions on 26/1/2022 wherein he relied in his earlier submissions filed on 23/7/2020, the Ruling of this Court delivered on 23/7/2020 the Indenture of conveyance dated 13/6/2000, the decree of this Court issued on 7/4/2015 in CMCC No 1 of 2020 at Kiambu, letter dated 28/9/2021 authored by Wanjiru Nganga & Co. Advocates and addressed to the Director of Criminal Investigations.
19. The Plaintiff submitted that parcel Nos. LR No 76/748 and 76/259 were purchased by his parents in early 1970's when he was still a minor. (See annexed TCK 2a/b receipts). That the titles to the suit



lands were issued to him in the year 2000 by Thindigua Company Limited he averred that the said company is still in existence and its Directors are available. He stated that the orders of the Court issued on 7/4/2015 were declared valid by this Honourable Court.

20. He submitted that the 2nd Defendant namely Teresia Wanjiru complied with the said order and subsequently moved out of the land suit No 76/748 to the land she currently occupies. That the 1st Defendant has adamantly refused to comply with the said orders and instead has resulted to using the Director of Criminal Investigations (DCI) to implicate that his documents are forgeries. That he has personally written to the DCI through his lawyers to restrain them from interfering with this matter that is pending in Court. Finally, he urged this Court to dismiss the application dated 27/7/2021.
21. The firm of Ndetto & Co. Advocates filed written submissions on behalf of the 1st and 2nd Defendants with respect to the Motion dated 27/7/2021. The Defendants submitted that the Ruling sought to be executed was not attached to the documents served upon them. That the ownership of the suit and its consequent registration in the name of the Plaintiff is a matter that is highly contested. That the title in the name of the Plaintiff is impeachable on the strength of the new findings contained in the forensic document examiners report dated the 6/9/2021, a copy of the said report is annexed and marked as EWM 3.
22. The Defendants further submitted that according to the said report Wambui Chege the legitimate owner of the suit land has accused the Plaintiff of forgery contrary to Section 345 as laid together with Section 349 of the *Penal Code* for obtaining land by false pretence contrary to Section 320 of the *Penal Code*. The basis of the complaint is the forged signatures of the former Chairman of Thindigua Company Limited. The report is conclusive of the signatures on the Share Certificate were forgeries. These findings were obtained on 30/10/2021 passed the delivery of the Judgment.
23. It was further submitted that the discovery of new evidence contained in the forensic report which point to a case of fraud can only be canvassed in a full trial. In the meantime the Court was urged to order status quo for the preservation of the suit property to allow the parties to be heard on merit. To buttress that point the Defendants relied on the case of *Ali Kitsao Katana v Kassim Mohammed Omar & 5 Others* [2018]eKLR where the Court stated as follows:-

“It is better to safeguard and maintain the status quo for a great justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case find that a greater injustice has been occasioned. The overriding objective is that the Court should do justice to the parties before it and their interest must be put on scale.”
24. Further the case of *Mawjj v International University & Another* [1976-1980] KLR 229 was relied on and where the Court held as follows:-

“It would be a poor and insufficient system of justice, unethical to contemplate if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceeding on the same suit or by fresh suit if the property in dispute is transferred to a third party. The Court must therefore maintain status quo.”
25. In conclusion, the Court was urged to lean on provisions of Section 1A, 1B and 3A of the *Civil Procedure Act* in order to do justice to the parties.



Analysis and Determination

26. Having read the applications, the rival affidavit evidence, the written submissions of the parties, the entire record of the Court and all the material placed before the Court, the key issues for determination are as follows;
 - a. Whether the applications are meritorious.
 - b. Costs of the applications
27. Given the orders sought I find it necessary to determine the application of the Defendants first because if successful, it has the possibility of overtaking the one of the Plaintiff.
28. The Defendant has in the main sought two orders; injunctive orders restraining the Plaintiff from trespassing onto the suit land with unnamed potential purchasers with the intention of disposing the suit land; stay of execution of the orders of the Court issued on the 7/4/15 and 30/5/18.
29. With respect to the first prayer, the Court notes that this prayer was canvassed extensively in the Motion filed by the Defendants against the Plaintiff dated the 2/12/2018 in which they sought orders restraining the Plaintiff from entering trespassing leasing selling alienating and in any way interfering with the suit land Thindigua 76/748, land belonging to the Defendants.
30. In the Ruling delivered on the 23/7/2020 the Court found that the prayer was not merited in view of the subsistence of the Court orders adjudging the Plaintiff as the owner of the suit land which judgement had not been set aside vacated and or appealed.
31. The Court finds that this prayer was heard and determined by a competent Court in the Ruling cited above which Ruling has not been set aside, appealed and or vacated. Besides, the Defendant has not satisfied the Court that it has proprietary interests in the suit land, seeing that the judgment of the Court delivered on the 7/4/15 is still in force, the same having not been set aside, vacated and nor appealed. This prayer is therefore resjudicata and it is hereby disallowed.
32. On the 2nd issue of stay of execution of the orders dated the 7/4/15 and 30/4/15, I find it necessary to reproduce the said orders for emphasis and easy flow of the Ruling;

Orders of the 7/4/15

“It Is Hereby Ordered:-

1. That LR 76/748 belongs to the claimant Thedrous Chege Kinuthia, who is the rightful owner.
2. That the Objectors Ruth Wambui & Teresia Wanjiku are trespassers on this land, and they should vacate the land within the next 90 days of this Judgment.
3. That the Objectors should collect their title deeds from the Company Officer and also get a Surveyor to show them their rightful parcels according to the correct map which they should move to.

Given under my hand and seal of this Court this 7th day of April, 2015.

Issued at Kiambu this 10th day of April, 2015.”

Orders of 30/5/18

“It Is Hereby Ordered:-



1. That the eviction order be enforced by the Court Bailiff in strict accordance of the Law.

Given Under my hand and the seal of this Court at Kiambu this 30th day of May, 2018.

Issued At Kiambu this 5th day of June 2018.”

33. The legal provisions governing stay of execution are anchored in Order 42 rule 6 of the *Civil Procedure Rules* as follows;

“ 6. Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and

(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

34. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the Application and the furnishing of security.

35. Further to the above, stay may be granted for sufficient cause and that the Court in deciding whether or not to grant the stay in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

36. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

37. The application for stay of execution has been filed in 2022 seeking to stay the orders of the Court issued in 2015 and 2018. The application has been filed 8 years later. Our procedural laws require that



an application of this nature should be filed without unreasonable delay. Although the law does not spell out what unreasonable delay is, it is left to the discretion of the Court. For the Court to exercise its discretion, consideration is given to the explanation for the delay in filing the application rendered by the Applicant. It is the satisfactory explanation that opens the flow of discretion in favour of the Applicant. I find that in the absence of an explanation for delay, the granting of this prayer remains doubtful.

38. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules*. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

39. The Court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

40. It is the Defendants case that the Plaintiff is in the process of trespassing onto the land for purposes of disposing it and interalia evicting them from the suit land which they allege belongs to them. They aver that there are issues of fraud and constitutional violations to the right to property, right to be heard, the right to equal protection and benefit of the law which have not been tried by the Court. In particular, the Defendants have alluded to a forensic report in support of the evidence of fraud in the manner in which the Plaintiff acquired the land. They therefore seek stay of execution of the orders aforesated to allow them ventilate the above issues.
41. It is not in dispute that this matter was heard and determined and judgement issued on the 7/4/15 so much so that the suit is now at the execution stage. There are therefore no proceedings subsisting on record. It is noted that the Court disallowed the prayer to reopen the case in its Ruling of the 23/4/2020. This Ruling is still in force.
42. The Defendants have not shown any evidence that they have appealed against the Ruling nor that there are appeal proceedings pending to warrant stay of execution of the orders.
43. The Court finds that no substantial loss has been demonstrated and this ground is disallowed.



44. As for the security of costs, it is trite that the same is granted in exercise of the discretion of the Court. In this case, the application having substantially failed I see no necessity to determine this limb.
45. In the upshot the application is found unmerited.
46. Now I shall determine the application of the Plaintiff. As stated above the Court granted orders in favour of the Plaintiff adjudging the Plaintiff as the owner of the suit land on the 7/4/15. Subsequently orders of eviction were issued on the 30/5/18. These orders have not been set aside, vacated and or appealed. The orders having been issued by a competent Court, I find that the application of the Plaintiff is now moot.
47. In the upshot the application is unmerited. It is dismissed.
48. Final orders for disposal
 - a. The Plaintiffs application dated the 27/7/2021 is unmerited. It is dismissed.
 - b. The Defendants application dated 22/12/2021 is unmerited. It is dismissed.
 - c. Each party to bear their own costs.
49. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 8TH DAY OF JUNE, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of

Plaintiff – Absent but date taken in his presence

Ndettoh for 1st and 2nd Defendants

Court Assistants – Kevin & Lilian

