



**Gituma v Thambo (Environment and Land Appeal E121 of 2021)
[2023] KEELC 18664 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18664 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E121 OF 2021**

**CK NZILI, J
JULY 12, 2023**

BETWEEN

MATHEW GITUMA APPLICANT

AND

COSMAS MURUNGI THAMBO RESPONDENT

(Hon Justice CK Yano on March 15, 2023)

RULING

1. This ruling follows directions by Judge Hon Justice CK Yano on March 15, 2023, remitting this file to determine the application dated July 29, 2022 and September 15, 2022 and a preliminary objection dated August 19, 2022, where parties had been directed to file and serve written submissions within 14 days from September 29, 2022 and 14 days from September 29, 2022 and 14 days, after that for the respondent upon service by the applicant by November 24, 2022. Only Cosmas Murungi Thambo, the respondent, had complied through written submissions dated October 12, 2022.
2. Perhaps a brief history of this matter would suffice to contextualize the application and the preliminary objection. On December 8, 2021, this court determined an application by the appellant seeking a stay of execution against a lower court judgment dated November 9, 2021. The court found no merits in the application for stay. The appellant filed a notice of appeal dated December 23, 2021 against the ruling and sought certified copies of the proceedings and the ruling by a letter dated December 17, 2021. Similarly, this court called for the lower court file by a letter dated April 21, 2022. A mention date before the deputy registrar was fixed for February 3, 2022. Meantime the court admitted the appeal for hearing on July 28, 2022 and determined the record of appeal be filed within 60 days for mention before E & L Court No. 1 on September 29, 2022.
3. By an application dated July 29, 2022, the respondent sought temporary orders, which Hon. Justice PM Njoroge on August 5, 2022, as the duty judge certified urgent and directed the parties to appear



- before the court on August 17, 2022. The respondent had sought for the appellant to be compelled to deposit Kshs 42,000/= monthly in the joint account of the parties as rent receivable with effect the date of judgment in the lower court or to deposit Kshs 2.5 million, as security for costs or in the alternative to vacate the suit land.
4. The respondent duly served the application upon the appellant and filed an affidavit dated August 15, 2022.
 5. In the absence of the appellant's objection and attendance, the court ordered that the rent arrears said to be Kshs 420,000, be deposited within 14 days from the date thereof with a mention of September 29, 2022 before ELC Court No. 1.
 6. Through a certificate of urgency dated September 15, 2022, the respondent sought for the appellant to give vacant possession of the suit premises, in default of which eviction orders to issue. The grounds on its face and the supporting affidavit sworn by Cosmas Muriungi Thambo was the deposit of Kshs 420,000/= ordered by the court within 14 days had not been deposited; hence the appellant was in contempt of court, who should purge it by depositing Kshs 380,000 before the court and continuing to pay Kshs 42,000 monthly rent. He attached an affidavit of service and preliminary objection dated August 19, 2022 showing service and confirmation of disobedience of the court orders. He also urged the court to order the respondent's eviction from the suit premises.
 7. In a replying affidavit sworn on September 28, 2022, Mathew Gituma, the appellant, opposed the application for being frivolous and unmerited since it would defeat the cause of justice, considering a record of appeal had been filed. He deposed that the suit property was subject to a High Court Succession Cause No. 288 of 2000 due for hearing on November 17, 2022 with status quo orders in place. Further, he deposed that the grant he held had been revoked by a ruling dated October 15, 2009 but was seeking its reinstatement after investigations were finalized by DCIO Meru, who found no fraud on the part of the appellant. Further, the appellant averred that the respondent was on a forum shopping business since he was aware of the status quo orders at the high court. Additionally, the appellant termed the order extracted from the application dated July 29, 2022 as confusing and made without evidence establishing if the rent receivable was Kshs 42,000/=.
 8. Lastly, the appellant averred that any rent accruing was being received by a third party who was not a party to this appeal. In his written submissions filed on October 11, 2022, the appellant urged the court to find that the respondent was unfairly and illegally earning a gain from the suit premises since the determination of the suit and dismissal of the application for a stay. Instead, the appellant submits that the respondent has resorted to reviving a dormant succession cause, seeking the same orders as those dismissed to hold the decreed property by all means possible. He urged the court to grant the reliefs sought.
 9. The decree appealed against is contained on page 90 of the record of appeal dated August 4, 2022. It declared the respondent the rightful Plot No. 69B Mikinduri Market owner.
 10. The second relief granted was an eviction of the appellant from the suit premises, while the third relief was a permanent injunction, restraining the appellant from entering the decreed premises.
 11. Following the dismissal of the application dated November 22, 2021 seeking to stay the execution of the decree, nothing stops the respondent from executing it. While aware of the dismissed application, the respondent returned to this court through the application dated July 29, 2022 and sought for the rental income of Kshs 42,000/= to be deposited in the joint account of the two parties.
 12. The court allowed the rental income to be deposited in the joint account of the two parties within 14 days. This would have benefitted the appellant who had earlier on lost an opportunity on stay of



execution. Instead of embracing the same, the respondent seems to look the other way. There was no compliance with the order dated August 22, 2022. It became inoperational through the effluxion of time. Neither the appellant nor the respondent has sought review or an extension of time to comply with the said order.

13. The court, having dismissed the application for stay and the subsequent order having become spent, has no jurisdiction to issue the prayers sought since a decree from the lower court in similar terms exists. The application is seeking superfluous reliefs which are already in existence. Moreover, if the appellant has obstructed any execution process of a lawful decree, Order 22 of the [Civil Procedure Rules](#) is available to the respondent before the executing court.
14. As to the pendency of a succession cause, the appellant did not file the appeal and the suit at the lower court as a legal representative of any deceased person's estate. If there was a revocation of any grant, the respondent lacks the capacity in this appeal to purport to act for a suit property belonging to an estate of a deceased person.
15. Be that as it may, no order of maintenance of status quo has been attached from a superior court stopping the execution of the decree, which this court declined to stay.
16. The upshot is that I find the application lacking merits. It is dismissed with costs. Parties are directed to appear before the court on October 2, 2023 for directions on the disposal of the appeal.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 12TH DAY OF JULY 2023

In presence of

C.A John Paul

Appellant

Respondent

HON. CK NZILI

ELC JUDGE

