



REPUBLIC OF KENYA



**Njagi v Mwangi & another (Environment & Land Case 252 of 2014)  
[2023] KEELC 22088 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22088 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 252 OF 2014  
A KANIARU, J  
OCTOBER 11, 2023**

**BETWEEN**

**JULIETA MARIGU NJAGI ..... PLAINTIFF**

**AND**

**VIRGINIA NJOKI MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**JOHN NGARI NGUGI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling on a Notice of Motion dated 23.09.2022 and filed on 27.09.2022. It is expressed to be brought under Order 9 Rule 9(a) & 10, Order 10 Rule 11, Order 22 and Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010; Section 1A and 3A of the [Civil Procedure Act](#); the Inherent Jurisdiction of Court and any enabling provisions of the law. The Applicant – Julieta Marigu Njagi was the plaintiff in the main suit while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents - Virginia Njoki Mwangi & John Ngari Ngungi – were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively. The prayers sought are as follows:
  - i. Spent
  - ii. That the court be pleased to make an order that the Defendants, their relative or agents to vacate land parcel no. Nthawa/Riandu/450.
  - iii. That the court be pleased to make an order that the caution lodged on Nthawa/Riandu/450 by the 2<sup>nd</sup> Defendant be lifted, deleted or removed.
  - iv. The OCS Siakago Police Station do enforce compliance of the orders above.
  - v. The costs of this application be provided for.
2. The application is premised on the grounds that the applicant was adjudged to be the legal owner of the parcel of land known as Nthawa/Riaundu/450 which she transferred to a 3<sup>rd</sup> party. That party was



not a party to the main suit. She transferred the land after completion of the case and she said that the respondents failed to appeal against the decision. That the 2<sup>nd</sup> respondent lodged a caution on the register of the said land after the sale and transfer which was after the expiry of the period to file an appeal. That the two year stay of execution period issued by Hon. Justice Y.M Angima on 23.05.2019 has lapsed and the respondents are still in occupation of the suit land. That finally, litigation must come to an end.

3. The 2<sup>nd</sup> respondent filed a replying affidavit in response to the application on behalf of the respondents on 07.10.2022. The affidavit is dated 5.10.2022. The respondents case is that currently there is an appeal pending in the court of appeal in Nyeri where dates were unavailable as there were no judges. That the non-conclusion of the Appeal in Nyeri is not of their own making but due to the courts diary and previous lack of judges. They urge the court to dismiss the applicant's application.
4. It was agreed that the Application be disposed of by way of written submissions. The applicant filed her submissions on 03.11.2022. They were dated 27.10.2022. The applicant submitted that despite the court order directing that there was to be a stay of execution for 2 years or until the hearing and conclusion of the intended appeal, whichever was earlier, more than three years later, no appeal was filed and if it was filed, she was never served with a memorandum of appeal and that the appeal number is unknown to her. She submitted that the court made strict orders on timelines and how the stay should operate and that the two year period for stay of execution or conclusion of the intended appeal has lapsed.
5. It was her submission that what the respondents should have done upon expiry of the two year stay period was to move the court for an extension of the stay period, which they never did. Further, it was her position that the caution placed by the respondents on the suit land be removed since the court had previously denied them orders of inhibition regarding the suit land. She said further that a separate suit to have the caution removed would create a multiplicity of suits.
6. The respondents on the other hand filed their submissions on 02.02.2023. The submissions are dated 01.02.2023. In their submissions, they reiterated the content of their replying affidavit and added that the applicant was seeking orders through an advocate who was irregularly on record. They urged that the orders no. 2, 3, 4 and 5 as sought in the application ought to be struck out as they were being sought by an unauthorized party who in this instance appears to be the advocate being said to be irregularly on record.
7. However, I think it is necessary to point out at this stage that both parties entered into a consent recorded in court on 18.10.2022 and agreed to allow the plaintiff's application regarding prayer no. 1 thus granting leave to the current advocate on record to come on board on behalf of the applicant. The Plaintiff's application therefore is properly before this court and it has been brought by an authorized party.
8. The respondents further submitted that if the applicant had transferred the suit land to another party during the pendency of this suit and with the appeal now pending in Nyeri Court, then the applicant has no interest in the parcel of land. Therefore she will not suffer loss or prejudice if the orders sought are not granted.
9. They submit further that the other 3<sup>rd</sup> Party who is not a party to this suit is now the owner of the subject land and that if there is a caution and the land has been transferred to another party, then what loss has the applicant suffered to seek the orders sought in the application? It was their position that the applicant lacks the locus standi to bring the application and urged that the same be struck out or dismissed with costs.



10. Again, it is worth pointing out that the court already pronounced itself on the issue of the applicant's locus standi to bring this application in its ruling dated 23.03.2022 where it held thus;

“The plaintiff has brought this application seeking to execute the judgement. I note that she has sold the property to a third party who is already the registered owner of the suit parcel of land. The judgment however is in her favour and though she states to have sold the property to a third party, she remains the judgement creditor, being that the registered owner is not a party to this suit. In my view, the right to enforce this judgement is only conferred on the judgement creditor or their legal representatives. I find that it is within the plaintiff's legal right to execute the judgement in such capacity.”

I therefore do not wish to dwell on the said issue any longer.

11. That said, after considering the application, the response made, and submissions by the parties, I find that the following issues are for determination;

- i. Whether the respondents, their relatives or agents should vacate land parcel no. Nthawa/Riandu/450.
- ii. Whether the court should make an order that the caution lodged on Nthawa/Riandu/450 by the 2<sup>nd</sup> respondent should be lifted, deleted or removed.
- iii. Whether the court should make an order for the OCS Siakago Police Station to enforce compliance of the orders above.
- iv. Who bears the costs of the application.

12. On the first issue, the trial court in its judgement of 20.09.2018 gave the following orders;

“The defendants shall have a grace period of 60 days within which to voluntarily vacate the suit property. In the event of their failure to vacate within that period, any process of eviction shall be conducted strictly in accordance with the applicable laws including the Land Laws (Amendment) Act 2016.”

13. The respondents thereafter moved the court through an application dated 06.11.2018 seeking for a stay of execution of the above referenced judgement and for leave to appeal. The court heard the parties and in its ruling dated 23.05.2019 directed that there shall be a stay of execution of the judgement and decree for a period two years or until the hearing and conclusion of the intended appeal, whichever was to come earlier. (emphasis mine). The court further directed that the respondents be furnished with copies of proceedings, a certified copy of the decree and any other necessary documents for purposes of the appeal within 30 days from the date of the ruling.

14. It is noteworthy that since then, the respondents have not taken any steps in furtherance of the appeal. They filed a Notice of Appeal on 1/10/2018 and again on 6/11/2018. They also applied for copies of proceedings for purposes of filing an appeal. It is now over five years since that time and from the record, there is no Record of Appeal filed nor is there a Memorandum of Appeal. This makes one wonder if the Respondents are really desirous of pursuing an appeal. They claim that the Court of Appeal in Nyeri has not been operational until recently but in my opinion, they ought to have approached the court and brought that to its attention. They should also have sought to extend the period given for stay of execution. That has not been done to date. There is some bit of laxity or indolence here.



15. Again, if the court has recently started being operational, the Respondents ought to have filed their Memorandum and Record of appeal by now since it is clear that the documents required to file the same are already prepared. The notice of appeal filed is not an appeal by itself. It is only a notice to the other party that they intend to file an appeal and therefore as it stands now, there is no appeal filed. I find that there is no justification that has been given by the Respondents as to why the court's orders of 20.09.2018 should not be enforced. The court gave specific conditions for stay of execution of its judgement which conditions have not been complied with. No plausible explanation has been given for non-compliance. I agree with the applicant that court orders are not made in vain and are meant to be complied with. It is on this basis that I am persuaded to uphold the court orders directing that the respondent do vacate the suit property.
16. I am guided by the case of *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* [2018] eKLR as cited in the case of *Republic v County Government of Kitui Ex parte Fairplan Systems Limited* [2022] eKLR where the Court made the following observations;
- “ 30. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.”
17. On the issue of whether the court should make an order that the caution lodged on Nthawa/Riandu/450 by the 2<sup>nd</sup> respondent be lifted, deleted or removed, the provisions of section 73 (1) of the *Land Registration Act* empowers this court to remove cautions and provides as follows;
- (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
- Therefore a caution may be removed in three ways: That is if the cautioner removes it, or it is removed by an order of the court or finally by an order of the Registrar. In this case, the applicant has moved the court for orders of removal. The question that the court has to ask itself while making a determination on whether the caution should be removed or not is whether there is any justification for the caution to remain in place.
18. This matter proceeded to full trial and the court, having heard all the parties, and after evaluating the evidence brought before it, made a determination on 20.09.2018 that the applicant was the legitimate owner of parcel of land no. Nthawa/Riaundu/450. That determination has not been properly or convincingly challenged by the respondents and as of now, the applicant is the legitimate owner of the suit land. This is regardless of the fact that the land has been disposed of to a third party. In addition to this, the two year period given for stay of execution of the trial court's judgement pending appeal lapsed on 23.05.2021. The said period was never extended. This means that currently there is no stay of execution in place. The respondents have clearly slept on their right of appeal and the law is very clear that equity aids the vigilant, not those who sleep on their rights. It is for the foregoing reasons I find that there is no justification given by the respondents for the caution to keep subsisting on the Land register.



19. In *Christian Wafula Omusolo & 2 others v Pauline Jerotich & another* [2019] eKLR as cited in the case of *Jane Wanjiku Mwangi & another v Nathan Ndegwa Njeru* [2020] eKLR the court observed as follows;

“.....the Applicant is entitled to the removal of the caution as it does not serve any purpose judgment having been delivered dismissing the Plaintiff’s originating summons. I therefore allow the application and direct that the Land Registrar removes the caution lodged on L.R. No. Uasin Gishu/Kimumu/107. Each party to bear their own costs.”

20. Similarly in the case of *Kithu Mucamo v Edward Kagame Kagoce* [2019] eKLR as also cited therein Angima J sitting on Appeal held that:

“The Court has considered and re-evaluated the entire material on record and the reasons tendered by the trial Court in its ruling dated 14th July 2016. The Court has also considered the circumstances of the case and the nature of the application before the trial Court. The Court finds no error of law on the part of the trial Court. The reasons given for allowing the application for removal of a caution were perfectly plausible. The Respondent had succeeded in the suit. He had a decree in his favour against the Appellant. There was no pending application for setting aside the judgement. There was no order for stay pending Appeal in force at the time. There was surely no plausible reason why the application could not be allowed. Emphasis mine.

21. Ultimately, I find the application dated 23.09.2022 merited and allow it. I will proceed to make the following final orders:

- i. That the Land Registrar do remove the caution lodged on Nthawa/Riandu/450.
- ii. An eviction order be and is hereby issued directed to the respondents, their servants, agents and/ or any other persons whatsoever in occupation of the property known as Nthawa/Riandu/450.
- iii. The Officer Commanding Station (OCS) of Siakago Police Station do oversee the enforcement of the said eviction order.
- iv. Each party shall bear their own costs for this application.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023.**

In the presence of Njeru Ngare for Kahuthu for defendant/respondent, Kimanzi for Muchangi G. for plaintiff/Applicant.

Interpretation: English/Kiswahili

Court assistant: Leadys

**A.K. KANIARU**

**JUDGE**

**11.10.2023**

