



**Kamuyu v Mutheki & another (Environment & Land Case
44 of 2014) [2022] KEELC 12805 (KLR) (4 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 12805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 44 OF 2014
FM NJOROGE, J
OCTOBER 4, 2022**

BETWEEN

TITUS NG'ANG'A KAMUYU PLAINTIFF

AND

JOSEPH GITAGIA MUTHEKI 1ST DEFENDANT

MUTHEKI MUCHONJORU 2ND DEFENDANT

RULING

1. This is a ruling in respect of two consolidated applications: plaintiff's notice of motion dated May 16, 2022 and the defendants' notice of motion dated May 30, 2022.
2. The first notice of motion dated May 16, 2022 seeks the following orders:
 - a. ...Spent
 - b. That the order (e) (ii) issued on May 7, 2020 be amended and/or rectified to read Officer Commanding Station (OCS) Kiungo Police Station instead of Officer Commanding Station (OCS) Bahati Police Station.
3. The application is supported by the affidavit sworn by Benjamin Kisoi Sila sworn on May 16, 2022 where he deposed that he is a licensed auctioneer practicing at Legacy Auctioneering Services; that he received an order dated May 7, 2020 from Ms Mutonyi, Mbiyu & Co for execution after which he visited the subject property in the company of the Plaintiff's son; that he later visited the OCS Bahati Police Station to serve the court order; that the OCS Bahati Police Station informed him that the subject property was located outside his jurisdiction and they could therefore not act on the said order; that the subject property was situated in Maili Sita area under the jurisdiction of OCS Kiungo Police Station.
4. The second notice of motion dated May 30, 2022 seeks the following orders:



- a. ...Spent
 - b. That the orders of stay of execution pending appeal granted by this court (Honourable Ohungo J) be extended and the same to subsist until hearing and determination of the appeal already filed in the Court of Appeal.
 - c. That cost of this application to abide the outcome of the appeal.
5. The application is supported by the affidavit sworn by Githui John sworn on May 30, 2022. The grounds on the face of the application and the supporting affidavit are that on September 11, 2019 he was instructed by the applicant to file an application seeking orders for stay of execution of eviction orders; that the court delivered its ruling on July 7, 2020 where it granted the stay subject to certain conditions; that he then filed a notice of appeal on behalf of the applicant and further served the record of appeal and also deposited in court costs that had been taxed; that since issuance of the order, two years have since lapsed and the court of Appeal has not set a date for the hearing of the appeal; that the purpose of the order was to preserve the integrity of the subject matter of the suit as the applicant pursues his right of appeal, that is to ensure that the applicant is not evicted since the order already lapsed but the appeal is still pending; that the respondent applied to court for an order of police protection as they evict the applicant; that the circumstances leading to the lapse of the order of stay of execution are beyond his control hence it only fair that the order be extended pending the hearing and determination of the appeal.

Response

6. The 1st defendant filed his replying affidavit dated June 14, 2022 in opposition to the plaintiff's first application dated May 16, 2022 where he reiterated word for word the contents of the supporting affidavit sworn by Githui John in the application dated May 30, 2022 for stay of execution. He only adds that that application dated May 30, 2022 is for extension of the order of stay and that it is being heard simultaneously with the plaintiff's application.
7. The plaintiff on the other hand in response to the application dated May 30, 2022 filed his replying affidavit dated June 18, 2022 where he averred that the said application was an afterthought being made after he applied to correct the order for eviction. He deposed that the application lacks merit and that there are no sufficient reasons advanced to extend the orders of stay.
8. The plaintiff averred that as advised by his advocates which information he believes to be true that the 1st defendant never took steps to ensure prosecution of the appeal other than file a notice of appeal. He further averred that if the 1st defendant's conduct was genuine he would have filed the application for extension before May 7, 2022.
9. He contends that the 1st defendant ought to have filed submissions under section 103 of the *Appellate Jurisdiction Act* or write to the Deputy Registrar to fix the appeal for directions. He further contends that he has been denied use of his land for 30 years and he believes that he should be granted possession pending hearing of the intended appeal.

Analysis and Determination

10. It is at this juncture clear that this court is now dealing with two diametrically opposed applications, one in which the plaintiff is taking the preparatory steps to enable him enforce his judgment and the other in which the 1st defendant is seeking to stave off the execution of that judgment.
11. This court has considered the applications and replying affidavits.



12. In dealing with the first application dated May 30, 2022, it is not in dispute that the ruling dated May 7, 2020 by Ohungo J granted stay of execution of the judgment and decree pending the hearing and determination of the appeal. However, there was a condition to the stay orders as provided under order (f) of the said ruling. The condition was that the stay orders shall remain in force for a period of only two (2) years from the date of the delivery of the said ruling. The defendants/applicants have now come before this court seeking an extension of the stay orders pending the hearing and determination the appeal.
13. The defendants contend that the reason for the delay of the hearing of the intended appeal is that the Court of Appeal is yet set a date for the hearing. The plaintiff on the other hand contend that the defendants never took further steps in prosecution of their appeal. This court takes cognizance of the reality that there has been some backlog in the hearing and determination of Court of Appeal cases in this region due to the previous circuit nature of the Court of Appeal sittings. It is also worthwhile to recognize that the station of Nakuru now has a permanent Court of Appeal which can now hear and determine with speed such appeals.
14. In the present case, it is a fact that two years have since lapsed since the ruling was made and therefore the stay orders have since lapsed. This court therefore finds that the stay orders ought to be extended for one (1) more year based on the above challenges to allow the defendants appeal heard and determined.
15. Going to the first application dated May 16, 2022, it is a fact that the ruling dated May 7, 2020 under order (e) the honourable judge clearly stated that in the event the notice of motion dated September 11, 2019 was dismissed in terms of prayer (d), then the order of eviction shall automatically issue.
16. It is not in dispute that the application dated September 11, 2019 was not dismissed in terms of prayer (d) since the defendants made a deposit of costs within twenty-one (21) days after taxation. The Deputy Registrar made a ruling on the costs on December 17, 2020 and had it taxed at Kshs 213, 584. The defendant on the other hand deposited into court on January 7, 2021 Kshs 231,584 being the total costs as ordered by the court. This was just one-day shy of the 21 days' period provided.
17. In view of the foregoing, this court is of the view that the defendants indeed complied with the provisions of prayer (d) of the said ruling and thus the application dated September 11, 2019 had not been dismissed in terms of prayer (d).
18. How then should this court deal with the prayer as sought by the plaintiff in his application dated May 16, 2022? Should the orders sought therein be deemed to be orders in vain merely because this court is on a trajectory to granting the prayer sought in the second application?
19. In this court's thinking, the utility of the first application dated May 16, 2022 is not to be limited to the need for immediate execution of judgment in this case by the plaintiff but should look into the future; it is an application to have the record corrected so that at any time, whether now or in the future when the plaintiff wishes to execute, he may do so without hindrance. I have considered the fact that though the application for stay dated May 30, 2022 has merit, in the event the appeal by the defendant fails the plaintiff may still need to execute the judgment. In that case he would still need to lodge a fresh application that is on all fours with the application under consideration if I dismiss his present application. I find that it would be unfair under those circumstances to dismiss the application dated May 16, 2022. Rather, I should grant it under certain conditions to bar immediate execution in order to protect the defendant who at the present moment by his opposing application also dealt in this ruling has ably demonstrated that he deserves a stay of execution order.
20. In the upshot, this court makes the following orders:



- a. The plaintiff's application dated May 16, 2022 is hereby granted in terms of prayer no 2 thereof subject to order no (b) issued herein below.
- b. The order of stay of execution pending hearing and determination of the appeal granted by this court on May 7, 2020 is hereby extended for a period of 1 year only from the date of this ruling.
- c. Each party shall bear the costs of their application.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 4TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.

