



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 614 OF 2016**

**EDWARD NJUGUNA KANGETHE ..... PLAINTIFF**

**=VERSUS=**

**JOEL KIEMA MUTINDA .....1ST DEFENDANT**

**VIOLET NDANU MUTINDA ..... 2ND DEFENDANT**

**BOARD OF TRUSTEES**

**NATIONAL SOCIAL SECURITY FUND .....3RD DEFENDANT**

**RULING**

1. On 22/9/2017, this court [Kemei J - sitting as a Service Week Court at Milimani Environment and Land Court] rendered a judgment in this suit in favour of the plaintiff in the following terms:

*a) An order for specific performance directing all the three defendants jointly and severally to transfer the suit premises known as LR No 12948/266 (registered as IR No 63124) situate at Mountain View, House No. 81 in the City of Nairobi, to the plaintiffs.*

*b) The 1st, 2nd, and 3rd defendants jointly and severally deliver the following documents to the plaintiffs forthwith:*

*(i) A consent to transfer from the Commissioner of Land or equivalent.*

*(ii) Original documents of title of the property.*

*(iii) Fully paid City Council Rate Clearance Water and electricity bills and land rent receipts.*

*(iv) Discharge of Charge (if any).*

*(v) Copies of 1st and 2nd defendants' identity cards and PIN cards.*

*(vi) Passport size photographs of the 1st and 2nd defendants.*

*(vii) Duly executed but undated transfer of the property in favour of the purchaser or as directed by the purchaser.*

*(viii) A statement from the Fund showing how the Kshs 8.3 million was arrived at.*

*(ix) Any other documents reasonably required by the purchaser or his advocates to effect registration of the transfer and all documents of title relating to the property in the 1st and 2nd defendants' or NSSF possession.*

*c) In default of (a) above, the Deputy Registrar be and is hereby directed to sign the transfer to the suit premises to the plaintiff.*

*d) A permanent injunction to restrain the defendants jointly and severally, their agents, servants and or employees from breaching the said agreement and further from selling alienating in any manner offering for sale advertising mortgaging charging assigning and or otherwise dealing with the suit premises known as LR No. 12948/266 (registered as I.R No 63124) situate at Mountain view, House No 81 in the city of Nairobi.*

**e) The claim of Kshs 80,000 per month being rental income loss is dismissed.**

**f) The counterclaim is hereby dismissed.**

**g) The 1st and 2nd defendant to bar the costs of the suit**

2. Subsequent to that, the 1st and 2nd defendants (the judgment debtors) brought a notice of motion dated 27/9/2017, seeking orders of stay of execution and review of the said judgement. This court [Eboso J] heard the application and on 28/6/2018, rendered a ruling on the application. The court rejected the plea for review of the judgment on the ground that the judgment debtors having elected to appeal against the judgment, the review mechanism was no longer available. On the plea for stay of execution, the court granted the 1st and 2nd defendants [the two judgment debtors] conditional stay in the following terms:

**a) There shall be conditional stay of execution of the decree made herein for a period of twelve (12) months during which time the 1st and 2nd defendants are expected to prosecute their appeal in the Court of Appeal.**

**b) The 1st and 2nd defendants shall deposit in court a monthly sum of Kshs 120,000 payable on the 5th of every month effective from the date of this ruling. In default of remittance in any single month, the stay order granted herein shall stand vacated; and**

**c) Unless expressly ordered by the Court of Appeal, the stay order granted herein shall automatically lapse upon expiry of twelve (12) months from the date of this ruling.**

**d) Costs shall be in the cause**

3. Early this year, the plaintiff brought a notice of motion dated 22/1/2021, seeking an eviction order against the 1st and 2nd defendants [the two judgment debtors]. Further, he sought an order enjoining the Police to grant assistance and maintain law and order during the eviction. The said application is the subject of this ruling.

4. The application was supported by the plaintiff's affidavit sworn on 22/1/2021. He deposed that the two judgment debtors had failed to satisfy the judgment rendered by the court in 2017. He added that the two judgment debtors had similarly failed to comply with the terms of the order of stay of execution granted to them in June 2018. He added that the stay order which was to be in force for 12 months had lapsed and there was no order from the Court of Appeal staying execution of the judgment. Lastly, he deposed that the two judgment debtors had not taken any serious step to prosecute the appeal.

5. The two judgment debtors opposed the application through a replying affidavit sworn on 4/2/2021 by the 1st judgment debtor, Joel Kiema Mutinda. He deposed that they filed in the Court of Appeal Nairobi Civil Appeal No. 173 of 2019, challenging the judgment rendered in this suit. He added that the Court of Appeal had given directions on the Appeal and their advocates had filed written submissions. He contended that what was pending was the judgement of the Court of Appeal. He added that the application under consideration was intended to preempt the judgment of the Court of Appeal. He further deposed that this court's records would bear them witness that they had been complying with the conditions set by the court when it granted them a stay order. He exhibited the front page of the record of appeal and a copy of an email dated 21/9/2020 from the Registrar of the Court of Appeal, inviting the parties to file written submissions. He urged the court to dismiss the application.

6. The application was canvassed through written submissions dated 13/5/2021, filed through the firm of *M/s Gachie Mwanza & Company Advocates*. Counsel for the plaintiff submitted that the issue falling for determination in the application was whether the court should issue eviction orders as against the two judgment debtors. Counsel submitted that the two judgment debtors had continued to occupy the suit property despite the fact that the conditional stay granted by this court had lapsed. Counsel added that Order 42 rule 6 (1) was categorical that an appeal did not operate as an automatic stay of execution and that it was the duty of the two judgment debtors to specifically move the relevant court for an order of stay. Counsel argued that without an order of stay, the judgment of the trial court reigned supreme and the plaintiff would be stopped from proceedings with execution. Counsel for the plaintiffs added that the makers of the law did not intend to have an appellant blatantly abuse the order of stay pending appeal at the detriment of a successful decree – holder.

7. Counsel for the plaintiff added that besides the fact that the conditional stay lapsed long time ago, the two judgment debtors had continued to occupy the suit property without bothering to apply for extension of the stay or comply with the conditions stipulated in the stay order. Counsel submitted that the last remittance by the judgment debtors was made in February 2020. Counsel added that the plaintiff having been adjudged to be the rightful owners of the suit property, and there being no stay order in place, notwithstanding the appeal, the plaintiff ought to be allowed to enjoy his legal right of ownership and possession of the suit property. Counsel urged the court to allow the application.

8. The two judgment debtors filed written submissions dated 8/6/2021 through the firm of *B M Musyoki & Company Advocates*. Counsel for the judgment debtors identified the following as the two issues falling for determination in the application: (i) Whether the applicant had met the threshold for grant of eviction orders; and (ii) Whether the plaintiff stood to suffer prejudice if the orders sought were not granted.

9. On whether the applicant had met the threshold for grant of eviction orders, counsel submitted that the plaintiff did not adduce evidence to support their contention that the judgment debtors had not complied with the conditions set out in the stay order since February 2020. Counsel added that what was pending in the Court of Appeal was the judgment of the Court of Appeal and that the plaintiff should have waited for the appeal to be determined before bringing the present application. Counsel for the two judgment debtors added that the Court of Appeal was superior to the Environment and Land Court and as such, the latter could not pronounce itself on the present application before the Court of Appeal rendered its judgment on the appeal.

10. On whether the plaintiff stood to suffer prejudice if the orders sought were denied, counsel submitted that there was no prejudice to be suffered by the plaintiffs because the judgment debtors had "been complying with all the court directions since the order of stay of execution

pending appeal was granted.” Counsel urged the court to reject the application.

11. I have considered the application, the response to the application, and the parties’ respective submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in this application is whether the plaintiffs, as decree holders, are entitled to enforce the award of the court in terms of the prayers sought in the application.

12. The tenor and legal ramifications of an appeal on the successful party’s right to enforce a court award is contained in Order 42 rule 6(1) of the Civil Procedure Rules which provides as follows:

**“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.”**

13. This court’s understanding of the framework in Order 42 rule 6(1) is that, whenever a party aggrieved by an award of the court elects to pursue the appeal mechanism, the filing of an appeal in itself does not operate as a stay of execution. The party pursuing the appeal mechanism is obligated to move either the trial court or the appellate court for an order of stay of execution pending the hearing and determination of the appeal. Order 42 rule 6(2) stipulates the criteria which the appealing party must satisfy before procuring a stay order. The Court of Appeal Rules similarly contain a clear framework on the criteria that must be satisfied.

14. In the application under consideration, judgment was rendered against the defendants on 22/9/2017. The 1st and 2nd defendants [judgment debtors] subsequently brought an application for stay of execution. This court rendered itself on that application and granted the two judgment debtors a conditional stay for a period of 12 months from 28/6/2018. The condition was that the two judgment debtors were to deposit in court on or before the 5th day of every month, a sum of Kshs 120,000 as security.

15. By simple arithmetic, the stay lapsed on or about 27/6/2019. There is no evidence of any formal attempt by the two judgment debtors to seek an extension of the stay order in this court or to procure a fresh stay order in the Court of Appeal. The import of their decision to do nothing about the lapsed stay is that they elected to ignore the mandatory obligation placed on them by Order 42 rule 6(1).

16. Secondly, it does emerge from the evidence presented by the plaintiff that the last deposit made by the two judgment debtors was effected in early March 2020. The import of this is that the two judgment debtors elected to continue occupying the suit premises without tendering any form of security. The judgment debtors contended in their response to the application that they had all along been complying with the requirement for security. They did not, however, back that contention with evidence. Instead, their advocate faulted the plaintiff for not proving that the judgment debtors had failed to provide the security. That part of counsel’s submissions is what perhaps captures the strange attitude the judgment debtors have taken towards the requirements of the law on stay of execution.

17. The totality of the foregoing is that, by the two judgment debtors’ own choice, there is no order of stay and there is no evidence of any formal attempt by the two judgment debtors to procure any order of stay. In the circumstances, no court of law abiding by the law of the land and acting conscientiously would deny a successful party the right to enforce a court award. In the circumstances, this court allows enforcement of the award of the court in tandem with Order (d) of the judgment dated 22/9/2017. The court accordingly allows the notice of motion dated 22/1/2021 in the following terms:

***a) In the absence of any order of stay of execution or order setting aside the judgment herein, the plaintiffs, through duly authorized court bailiffs, shall take possession of the suit property, Land Reference Number 12948/266 situated in Mountain View, Nairobi County.***

***b) The National Police Service Officer Commanding the local Police Station shall ensure maintenance of law and order during the taking of possession.***

***c) Execution of the judgment in this suit shall abide by the Civil Procedure Rules and the requirements relating to recovery of costs of the suit.***

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON**

**THIS 10TH DAY OF NOVEMBER 2021**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

B M Musyoki for the 1st and 2nd Defendants

Court Assistant: Lucy Muthoni

**NOTE:**

*The relevant application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.*

**B M EBOSO**

**JUDGE**