



**Chutha & 3 others v Kurgat & another (As Personal Representatives of the Estate of the Late Loyce Kurgat) (Environment & Land Case 175 of 2017) [2025] KEELC 44 (KLR) (21 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 44 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 175 OF 2017  
MAO ODENY, J  
JANUARY 21, 2025**

**BETWEEN**

**STEPHEN WACHIRA CHUTHA ..... 1<sup>ST</sup> PLAINTIFF  
PAUL RUGI MUKUHA ..... 2<sup>ND</sup> PLAINTIFF  
SIMON KANYINGI GACHOKA ..... 3<sup>RD</sup> PLAINTIFF  
STEPHEN WAITHAKA GIKONYO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**JOHN KIPTUI KURGAT ..... 1<sup>ST</sup> DEFENDANT  
WINNIE MUGHO ..... 2<sup>ND</sup> DEFENDANT  
AS PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE LOYCE  
KURGAT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 18<sup>th</sup> March, 2024 by the Defendants/Applicants seeking the following orders:
  - a. That this Honourable Court do hereby vacate the Orders for stay of execution of Decree pending Appeal issued on 5<sup>th</sup> December 2022.
  - b. That this Honourable Court be pleased to grant orders of eviction against the Plaintiffs/ Respondents, their tenants, servants and agents from the Deceased's property, Loyce Kurgat, being Land Reference Number: Nakuru/Municipality Block 29/291 (Ronda) and the delivery of vacant possession of the property to the Applicants.



- c. That upon grant of prayer 2 above this Honourable Court be pleased to issue an order authorising the Applicants to demolish the structures erected on Land Reference Number: Nakuru/Municipality Block 29/291 (Ronda).
  - d. That the Officer Commanding Rhonda Police Station Nakuru (OCS) be and is hereby ordered to offer security to the Applicants authorized agents, Court bailiff or auctioneer appointed by the Applicants in carrying out the eviction and demolition exercise and to maintain law and order.
  - e. That the costs of this Application be provided for.
2. The application was supported by the affidavit of John Kiptui Kurgat, one of the Defendants/Applicants sworn on 18<sup>th</sup> March, 2024 who deponed that the court heard and determined this case where judgment was entered in favor of the then Defendant, the Late Loyce Kurgat where the Plaintiffs/Respondents were declared trespassers and ordered to vacate the suit property.
  3. It was the Applicant's case that the Plaintiffs filed an application dated 7<sup>th</sup> July, 2022 seeking orders of stay of execution of the decree pending hearing and determination of the Appeal and a ruling was delivered on 5<sup>th</sup> December, 2022. In the said ruling the court granted the Plaintiffs stay of execution of judgment and decree on the condition that they file and serve the record of Appeal and deposit Ksh 100,000/= as security for costs in an interest-earning account opened in the joint names of both counsel in a reputable bank within 60 days of the order in default the stay order would automatically lapse and be deemed vacated. He deponed that the Plaintiffs have failed to comply with the unequivocal orders set forth by this Honourable Court.
  4. Counsel for the Plaintiffs, Duncan Mindo Advocate filed a Replying Affidavit sworn on 27<sup>th</sup> May, 2024 where he deponed that on 7<sup>th</sup> December 2022, he wrote to the Defendant's advocates whereby he suggested that an account be opened at Equity Bank Othaya Branch and by 15<sup>th</sup> December 2022, he had not received a response. He deponed that on 19<sup>th</sup> December, 2022, the said advocates sent him an email stating the bank account should be opened in Nakuru without giving the name of the Bank. It was counsel's further disposition that on 1<sup>st</sup> February, 2023 Account No 0020183851708 was opened at Equity Bank Nairobi by himself and Rodah Kirui and that it is not clear from the pleadings whether the administrators of the deceased estate have been made parties to this suit to allow them to prosecute this suit as well as the appeal.
  5. In response the Defendant/Applicant, John Kiptui Kurgat filed a further affidavit sworn on 30<sup>th</sup> September, 2024 and deponed that the Plaintiffs only filed a Notice of Appeal on 15<sup>th</sup> March 2022 but they have neither filed a Record of Appeal nor a Memorandum of Appeal at the Court of Appeal more than two years since filing the Notice of Appeal. He deponed that the Advocates opened a joint account on 1<sup>st</sup> February 2023 and the Plaintiffs deposited the Security for costs.

### **Defendants/Applicants submissions**

6. Counsel for the Defendant/Respondent filed submissions dated 15<sup>th</sup> October, 2024 and identified the following issues for determination:
  - a. Whether the Plaintiffs complied with express Court Orders?
  - b. Whether the Plaintiffs should be evicted from the suit property?
7. On the first issue counsel submitted that the requirements to open a joint Bank account and to file a Record of Appeal were two distinct conditions for the grant of the Orders for a stay of execution by



this Honourable Court and the disobedience by the Plaintiffs to file the Record of Appeal within 60 days without reason was in contempt of this court's unequivocal orders. Consequently, the stay order issued automatically lapsed and the same would be deemed vacated.

8. Counsel submitted that the Plaintiffs failed to institute an appeal more than two years from the date of the Judgment and hence do not intend to file a Record of Appeal to frustrate the Defendant in executing her decree. Counsel submitted that the Late Loyce Kurgat passed away while the Plaintiffs were still in occupation of her property and deriving benefits from the same by collecting rent from the tenants therein and relied on the case of *Salim Peter Murithi vs Kasiwa Gona Kirao* [2021] eKLR Mombasa High Court Civil Appeal Number 198 of 2017.
9. On the second issue counsel submitted that the administrators of the late Defendant's estate should proceed with the execution of the Decree which involves the eviction of the Plaintiffs and their tenants/servants from the suit property. Counsel submitted that courts have held that it is not mandatory to substitute a deceased decree holder and cited the provisions of Order 24, Rule 10 of the Civil Procedure Rules.
10. Counsel submitted that the late Loyce Kurgat passed away on 14<sup>th</sup> October, 2022 after the judgment was delivered in her favour and that the decree and the Notice to vacate were issued to the Plaintiffs and their tenants in July 2022 before the passing of the deceased. Counsel submitted that the personal representatives of the deceased obtained a grant of letters of administration to her estate and the Plaintiffs/Respondents have not settled the damages of Kshs 1,200,000/= and urged the court to allow the application as prayed.

#### **Plaintiffs/Respondents' Submissions**

11. Counsel for the Plaintiff/ Respondent filed submissions dated 24<sup>th</sup> October, 2024 and submitted that the Applicant has not applied to be substituted as parties to the parent suit. It was counsel's further submission that a Notice of Appeal dated 8<sup>th</sup> March, 2022 was filed on 15<sup>th</sup> March 2022 and a copy thereof was served upon the Defendant's advocates on 16<sup>th</sup> March 2022. Counsel also stated that no address for service has been given up to date and a Memorandum of Appeal was filed and served.
12. Counsel submitted that the filing of the Record of Appeal is governed by the Rules of the Court of Appeal and therefore the judge of the High Court could not make orders in respect of actions in the Court of Appeal, and urged the court to dismiss the application.

#### **Analysis And Determination**

13. The issue for determination is whether the Applicants are entitled to the orders sought in the application, and whether there was a need to substitute the decree holder for purposes of execution.
14. By a ruling dated 5<sup>th</sup> December, 2022 the court pronounced itself as follows:

“I find that the application dated 7/7/2022 has merit and I grant prayer No 1 thereof, that is, a stay of execution of judgment and decree in the instant case on condition that the applicants shall file and serve their Record of Appeal and also, that they shall deposit Kshs 100,000/= as security for costs in an interest earning account opened in the joint name of both counsel's advocates in a reputable bank within 60 days of this order, in default of which the stay order hereby issued shall automatically lapse and be deemed to be vacated.”
15. The order was conditional upon satisfying the two limbs failure to which the stay order was to lapse. The Defendant/Applicant in his further affidavit deponed that the Advocates opened a joint account



on 1<sup>st</sup> February 2023 and the Plaintiffs deposited the Security for costs which was within the stipulated timeline.

16. The second limb was that the Plaintiffs were to file a record of Appeal within the said period which to date has not been filed and counsel for the Plaintiff has admitted the same. No tangible explanation has been given for not filing a record of Appeal two years down the line.
17. Secondly, counsel for the Plaintiff's argument that the conditions given by the court on the filing of the record of Appeal fall within the jurisdiction of the Court of Appeal, with due respect to counsel, this argument is a bit outrageous. If counsel was of such view, then he should have filed for review of the order or an appeal in the Court of Appeal. The Respondent benefited from the said order of the court but did not want to comply with it. At the time of writing this ruling, there was no valid order of stay of execution, as the conditions had not been met.
18. The other issue that needs to be mentioned is counsel's assertion that they filed a Notice of Appeal and a Memorandum of Appeal but did not have an address for service. Just the way they have been serving the affidavits and processes in this case is how they were supposed to continue doing so unless advised otherwise. There is no evidence that they had attempted to serve and the service was rejected or bounced back. This is not an excuse for not complying with the court order to file a record of Appeal and serve.
19. Counsel for the Respondents also submitted that the defendant was supposed to be substituted before execution. It is on record that the defendant passed away when the judgment and decree had already been issued by the court and was just awaiting execution.
20. Order 24 Rule 10 provides as follows:

“24. (10) Nothing in order 3,4 and 7 apply to proceedings in execution of a decree or Order”.
21. Order 24 Rule 3 deals with the death of a Plaintiff or Plaintiffs and Rule 4 deals with the death of a Defendant or several Defendants therefore it follows that Order 24 Rule 10 removes the necessity of substitution of a legal representative in proceedings in execution of a decree or an order.
22. In the case of *Agnes Wanjiku Wang'ondu v Uchumi Supermarket Ltd* [2008] eKLR, the Court held that:

“..that the requirement for substitution does not apply to proceedings in execution of an order. That while Order 30 Rule 1 (now Order 31 Rule 1) states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit. The Court cited the case of *Dhulla Harichand vs Gulam Mohu-Udin and Aziz Din s/o Gulam Mohu-Udin*, [1940] KLR Vol. XIX at page 6 where the Court held as follows;

“No doubt, there is no express provision for substitution of the name of a representative of the deceased decree holder during the pendency of the execution proceedings but, as is apparent from a number of cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from O. XXII r. 12 read with rules 3 and 4 that an execution proceeding



does not abate on the death of the decree holder. If so, there is no bar to the execution continuing at the instance of his representative.”

23. The deponent filed succession Cause and was issued with Letters of administration for the Estate of the Defendant hence able to proceed with the execution of the decree which had been issued before the death of the defendant. If the matter was to proceed for hearing of the Appeal then, it would be prudent to substitute the defendant with a legal representation. The case before me is for execution therefore it is not mandatory to substitute.
24. Similarly, in the case of *Mueni Kiamba v Mbithi Kimeu Kimolo* [2017] eKLR the court stated that:

“I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties (emphasis mine). This goes a long way in ensuring the overriding objective of the *Civil Procedure Act* and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit...”
25. I have considered the application, the submissions by counsel and find that it has merit as the order of stay of execution had lapsed upon failure by the Respondents to comply with the conditions attached to the stay. Nothing stops the Applicant from proceeding with the execution as per the judgment delivered by the court.
26. The Officer Commanding Rhonda Police Station Nakuru (OCS) shall offer security to the Applicant’s authorized agents, Court bailiff or auctioneer appointed by the Applicants in carrying out the eviction and demolition exercise and to maintain law and order. The eviction to be carried out during the day in a humane manner. Costs of this application shall be borne by the Plaintiffs/Respondents.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF JANUARY 2025.**

**M. A. ODENY**

**JUDGE**

