



REPUBLIC OF KENYA



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**Mwaura v Nyaguthi & 2 others (Environment and Land Appeal
E033 of 2023) [2024] KEELC 1004 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E033 OF 2023
JG KEMEI, J
FEBRUARY 22, 2024**

BETWEEN

NYAKARI MWAURA APPELLANT

AND

ELIZABETH NYAGUTHI 1ST RESPONDENT

ANNE WANJIKU 2ND RESPONDENT

SERAH WANGUI NJAU 3RD RESPONDENT

*(Appeal from the Ruling of Hon Kibet Sambu (SPM) ELC
Case No. E039 of 2023 - Kiambu delivered on the 16/8/2023)*

RULING

1. The Appellant/Applicant filed the instant Motion dated 22/9/2023 expressed under Sections 1A,1B, 3A and 63 (e) [Civil Procedure Act](#) and Orders 40, 42 and 51 [Civil Procedure Rules](#) seeking Orders THAT;
 - a. Spent.
 - b. Spent.
 - c. There be stay of execution of the Ruling delivered in the lower Court, in Kiambu Chief Magistrate Court ELC Case No. E039 of 2023 and any other consequential orders pending the hearing and determination of this Application and appeal.
 - d. The Respondents whether by themselves, their servants, agents or any other person whomsoever acting on their behalf be restrained by an Order of this Honorable Court from evicting or attempting to evict the Applicant from the suit property known as Komothai/



Kiratina/1132 in any manner interfering with the Applicant's occupation and use of the said property pending the hearing and termination of this Application and Appeal.

- e. Costs of this Application be provided for.
2. The Application is based on the grounds on that the Applicant (Defendant in the trial Court case) is dissatisfied with the impugned Ruling as it exposes her to eviction from the parcel of land Known as Komothai/Kiratina/1132, (hereinafter the suit land). That the place of burial of the Applicant's late husband is yet to be determined in Kiambu MCELC N0 E039 of 2023 but the Respondents have served her with eviction notice hence the Application.
3. The Application is further supported by the Applicant's Affidavit of even date reiterating the grounds in the motion above. Copies of the impugned Ruling and eviction notice are annexed as NM1 and NM7 respectively.
4. The 3rd Respondent Sarah Wangui Njau swore her Replying Affidavit on 10/11/2023 on behalf of the 1st and 2nd Respondents as well. She deponed that they are the beneficial owners of the suit land and biological children of the late Njau Kanyoge who was holding the suit land in trust for them as evidenced by annexure SWN1 - copy of official search dated 29/9/2023. That as such the Applicant cannot lay any claim over the suit land that was held in trust for them and by Njau's demise, the said trust automatically lapses by operation of law. That in any event the Respondents had filed Kiambu ELC Case No. 8 of 2023 against their late father to terminate the said trust and have their names registered on the Title as absolute owners of the suit land. She further averred that the issue of eviction was not an issue for determination in the trial Court consequently it cannot be introduced at the appeal stage since the Notice of eviction is a result of the grant of the prayer for injunction against the Applicant.
5. The Application was argued orally before Court on 14/11/2023.
6. The Appellant through her Learned Counsel Mr. Mitiambo submitted that she is aggrieved by the trial Court orders issued on 16/8/2023 and has accordingly filed her appeal which she believes has high chances of success. That the Respondents have started the process of eviction; the Respondents are not the registered owners of the suit land; the deceased Njau Kanyonge was the registered owner of the suit land as a trustee for the Respondents which trust he was in the process of terminating.
7. In rebuttal, Advocate Njehu for the Respondents argued that the deceased was holding the suit land in trust for the Respondents as shown by SWN1; that the Appellant has no interest in the suit land; that the issue before the trial Court was about the deceased's burial which was determined and the issues of ownership and eviction were not in contest. That there is another matter in Kiambu Court ELC 8 of 2023 on termination of the said trust and that the matter was filed before the deceased's demise. That the order granted in the trial Court are pending the hearing and determination of the suit. He also indicated that the Appellant had no objection with the burial plans.
8. In a rejoinder, Counsel Mitiambo maintained that there is an existing order obtained in the lower Court as per para. 5 of the impugned Ruling for an Application to terminate the trust. That the trial Court matter is thus not spent as the Applicant is on the suit land.
9. The main issue for determination is whether the Application is merited.
10. The legal provisions for stay of execution are anchored in Order 42 rule 6 of the [Civil Procedure Rules](#) that;

“6. Stay in case of appeal [Order 42, rule 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.
- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and
 - (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

11. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss, timely filing of the Application and the furnishing of security.
12. The Applicant has appealed against the impugned Ruling of the trial Court. It is her case that she is facing eminent eviction from the suit land vide the eviction notice (NM7) served upon her by the Respondents. That if the eviction takes place, she and her children will suffer irreparable loss since they are in occupation of the suit land. On timeous filing, the Applicant submitted that the Application was promptly filed upon receipt of the copies of the Ruling and Order.
13. Does eviction on its own constitute substantial loss? The ingredients of substantial loss were well captured by , Kuloba J (as he then was) in the case of *Machira T/A Machira & Company Advocates v East African Standard (No 2)* 2002 2 KLR as follows: -

“If the Applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the Applicant’s business (e.g. appeal or intended appeal).”



14. The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence Another common factor in favour of the Applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the Appellant or intended Appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not granted, save in exceptional circumstances.”

15. A reading of the trial Court Ruling specifically at para. 5 states;

“ 5. It is not in dispute or contestation on account of the arguments and counter arguments brought forth by the parties herein that the Plaintiffs/Applicants are the biological daughters of the Deceased, Njau Kanyose and with their surviving mother Miriam Wairimu Wanjohi. It is equally on record that the deceased, prior to his demise, cohabiting with the Defendant/Respondent herein.

The only issue in controversy between the parties and so hold and find it as to where the Deceased’s remains ought to be interred on the subject suit land property known as Komothai/Kiratina/1132, which land property as demonstrated by the Plaintiffs/Applicants annexure marked SWN1 on official search obtained from the Lands Registry was registered in the name of Njau Kanyose to hold in trust of the Applicants/Plaintiffs herein.

The Deceased during his lifetime as demonstrated by the Respondents annexure marked NM6 had moved the Court vide Kiambu CMC Misc Application no. 79 of 2022 seeking to determined and/or terminate the registered first in respect of the suit land property.

It is equally on record, as demonstrated by the Applicants further Affidavit that they had filed Kiambu ELC Case no 8 of 2023 seeking to terminate the first trust in respect of the trust land parcel no. Komothai/Kiratina/1132 and to have the names registered on the title as absolute proprietors, which case, as at the time of installation of the present Application and prior to the demise of the deceased is still pending before Court for determination.”

16. Flowing from the above, it is therefore not correct as submitted by the Respondent that the issue in the trial Court was solely about the burial of the late Njau. It is clear that the issue of the Applicant’s occupation of the suit land was alive as acknowledged by the Court and from the pleadings before it. Further that the issue of termination of the trust registered over the suit land was also highlighted by both parties as pending before Court. In my view therefore, the parties having agreed that the burial of the deceased was being finalized (if not already undertaken), I am of the considered view that the instant Application succeeds in terms of suspending the eviction notice, NM7, dated 30th August 2023 served upon the Applicant by the Respondents pending the determination of this Appeal.

17. Regarding costs, the parties herein being related, the commendable order would be each party to bear their own costs.

18. Orders accordingly.



DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mitiambo for the Appellant

Njehu for 1st, 2nd and 3rd Respondents

Court Assistants – Phyllis/Oliver

