



Kimene (Being sued on behalf of the Estate of Isaac Kimene Nabea alias Isaac Gituma Nabea) v Murithi alias M’Inoti Kiautha (Environment and Land Appeal E021 of 2023) [2024] KEELC 4816 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E021 OF 2023
CK NZILI, J
JUNE 12, 2024**

BETWEEN

PATRICK KIMENE (BEING SUED ON BEHALF OF THE ESTATE OF ISAAC KIMENE NABEA ALIAS ISAAC GITUMA NABEA) APPELLANT

AND

STEPHEN MURITHI ALIAS M’INOTI KIAUTHA RESPONDENT

RULING

1. Before the court are two applications. The first one is dated 17.5.2024 seeking an order to maintain the status quo or stay execution of orders made on 22.11.2023 in Meru CMC ELC 264 of 2018 with respect to LR No Nyaki/Kithoka/334, pending the hearing and determination of an intended appeal at the Court of Appeal.
2. The reasons are contained on the face of the application and in the supporting affidavit of Patrick Kimene, sworn on 17.5.2024. The applicant avers that this court delivered its judgment dismissing his appeal on 8.5.2024, which he intends to challenge at the Court of Appeal.
3. As a result of the dismissal of the appeal, the applicant says the effect is that the decree-holder shall execute the judgment of the lower court, more so the orders granted on 22.11.2023 through eviction from the land.
4. During the pendency of the appeal, the applicant avers that the respondent destroyed his trees on the suit land, and he has filed a Meru CMC No 11 of 2024 for damages of Kshs 415,451.
5. The applicant avers that the respondent is threatening to execute the order dated 22.11.2023, to give vacant possession or in the alternative, a court bailiff or auctioneer to put him into possession of the land.



6. Further the applicant avers that as a condition precedent of stay, he had submitted the original title deed with the court as well as a deposit of Kshs 50,000/= as security.
7. The applicant says that unless the status quo is maintained, he will lose a land he has occupied for 30 years. Further, the application says that there is tension and bad blood between the two families, for the respondent was awarded the costs of the appeal, yet there is a suit for tree destruction and damage, as alluded to above, pending before the lower court. Therefore, the applicant states that it is in the interest of justice to stay the lower court decree pending the appeal at the Court of Appeal.
8. In the second application dated 14.5.2024, the respondent (decree holder) seeks orders that;-the names of Michelle Kendi Kimene and Patrick Kithinji Kimene, the children of the respondent in the appeal, be canceled by the land registrar from the register for LR No Nyaki/Kithoka/334, for the land to revert to his name to enable execution of the decree herein, for the release of Kshs 50,000/= deposited in court as security for costs, and lastly, for the executive officer of the court to be authorized to sign all the transfer documents on behalf of the respondents.
9. The grounds are set out on the face of the application and in the affidavit of Stephen Murithi sworn on 14.5.2024. The applicant avers that the respondent's appeal, though the appeal was dismissed, is unable to execute the decree because the respondent's children have changed the names of the respondents to their names while the case was pending. He has annexed a copy of the title deed as an annexure marked S.M. "1".
10. By an application dated 17.12.2019, the trial court appears to have been asked to replace the appointed Patrick Kimene, now the appellant, after the initial defendant had passed on during the pendency of the suit, attached to the affidavit was a limited grant issued in Meru H.C succession Cause No 18 of 2019, where the grant of letters of administration was issued to Lucy Michelle Kendi Kimene and Patrick Kithinji Kimene as legal administrators of the estate of the late Isaac Kimene Nabea the owner of LR No Nyaki/Kithoka/334 as per a copy of the record filed alongside the plaint dated 20.5.2018.
11. By an order dated 29.1.2020, the trial court allowed for the replacement of the deceased with Patrick Kimene alone, as a bonafide legal representative of the estate of the initial defendants. The respondent proceeded with the matter and produced a copy of the record as P. Exh No (1).
12. Similarly, the appellant herein testified as DW 1 and relied on the green card produced as P. Exh No 1. He did not produce any letters of administration or describe himself as a legal representative.
13. The suit proceeded, and a judgment was delivered leading to the appeal herein. Through the ruling of this court dated 31.5.2023 the court on top of a security of Kshs 50,000/= ordered for the title deed to be deposited with the Deputy Registrar.
14. In a replying affidavit sworn on 21.9.2023 at the lower court, a copy of the title deed was attached as an annexure marked PX1, showing that it was issued on 21.9.2023.
15. These are facts that the decree-holder was aware of even as he made the application dated 11.9.2023 for vacant possession and obtained an order dated 22.11.2023, which he now tells this court that he is unable to execute due to the changes in the title register.
16. In the first application, the applicant deliberately withheld the information that he became the registered owner alongside his sister, of the suit land during the pendency of this suit after the grant of letters of administration were issued to them. Doing so was against the doctrine of lis pendens. This court, therefore would be sanctioning an illegality and or putting a stamp of legality to illegal acts.



17. Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules gives this court the power to grant orders of stay pending a second appeal. The parameters to apply were laid out in Kenya Shell Ltd v Kibiru & another (1986) eKLR 410. The court said a party must demonstrate substantial loss if to refuse it will render the appeal nugatory, the balancing of the two parallel propositions or competing rights. The court further said substantial loss was the cornerstone of the jurisdiction and must be demonstrated through evidence, being that what has to be prevented from happening for a successful party should not be deprived of the fruits of his judgment without a just cause. See Samvir Trustee Ltd v Guardian Bank Ltd Nairobi Milimani HCCC 795 of 1997.
18. In NIC Bank Ltd v Aquinas Francis Wasike & another (2006) eKLR, the court said that the legal duty is on the appellant to prove the allegations that an appeal would be rendered nugatory.
19. Applying the preceding principles to the first application, the applicant has not placed before the court what substantial loss he will suffer if the title register is reversed for on appeal it can be reversed.
20. Secondly, the applicant has laid no material on what developments he had made on the suit land. The pendency of a tree damage suit is not proof of substantial loss.
21. Additionally, the security which the court had ordered was up to the hearing and the determination of the appeal. That event has already occurred, and therefore, the applicant ought to have sought such release once the judgment was delivered; otherwise, the Deputy Registrar is at liberty to release it to the depositor.
22. Coming to the second application, the court has already pronounced itself on the appeal. The applicant, as demonstrated above, was aware of the changes to the title register but did not apply for the amendment of his pleading before the trial court rendered its judgment or, at the appellate stage, file a cross-appeal or conduct due diligence during the hearing of the suit before the trial court or on appeal, seek to inhibit the title register or at the very least conduct an official search. The court is functus officio as regards prayer number 2 of the application dated 14.5.2024.
23. The court, while perusing the lower court file has come across an amended decree dated 17.5.2024, authorizing the removal of the two names from the register of the title. If the applicant in the second application has already obtained a decree to that effect at the lower court, it is curious why he would obtain such a sealed decree at the lower court and, on the same day, move this court for an order to that effect. The upshot is that I find the two applications lacking merits.
24. The same are dismissed with no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 12TH DAY OF JUNE, 2024**

In presence of

C.A Kananu

Igweta for applicant

HON. C K NZILI

JUDGE

