



Kihara v Gachiku (Suing as the administrator of the Estate of Anthony Kihara Gicheru) (Environment & Land Case 1275 of 2014) [2024] KEELC 6399 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6399 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1275 OF 2014
LN MBUGUA, J
SEPTEMBER 26, 2024**

BETWEEN

HANNAH WAMBUI KIHARA APPLICANT

AND

CATHERINE GACHIKU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ANTHONY KIHARA GICHERU) RESPONDENT

RULING

1. Judgment was entered for the plaintiff in this matter on 2.3. 2018. Subsequently, the plaintiff moved the court for an eviction order towards enforcement of the said judgment, which order was granted vide a ruling delivered on 27.2.2020.
2. 6 years after the said judgment, the defendant has filed the Notice of Motion application dated 11.3.2024 seeking a stay of execution of the aforementioned judgment.
3. The application is based on grounds on its face and on the Defendant’s supporting affidavit sworn on 11.3. 2024. She avers that neither her advocates nor herself were served with the Plaintiff’s application which led to the ruling of 27.2.2020, thus her right to be heard and her right to a fair trial were infringed. That the plaintiff took an unreasonably long time to serve her with an eviction notice issued vide the said ruling. She points out that despite the order being issued by the Deputy Registrar on 2.5.2020, it was served to the assistant chief on 16.1.2023 and on her on 2.3.2024 through her grandson’s WhatsApp platform.
4. She avers that she had instructed her previous advocates to pursue an appeal on the judgement issued herein, but despite requesting for typed proceedings vide a letter dated 5.3.2018 and which proceedings and judgment they obtained, they did not pursue an appeal.



5. She avers that she has lived on the suit parcel for over 30 years where she has established her tea farms, built a permanent homestead and buried 4 of her kin, thus should the plaintiff execute the eviction order, her family will be rendered destitute.
6. In her submissions dated 7.7.2024, the defendant argues that eviction should be carried out in accordance with Section 152 G of the Land Act, 2012 if the eviction notice is upheld. The court is also urged to be guided by the holding in Atik Mohamed Omar Atik & 3 Others v Joseph Katana & Another [2019] eKLR as well as the case of Mitubell Welfare Society v Attorney General & 2 Others Petition No. 164 of 2011 [2013] eKLR.
7. The application is opposed by the Plaintiff vide her Replying Affidavit dated 16.4.2024. She terms the application as an abuse of the court process as the judgment sought to be stayed was rendered 5 years ago and no explanation has been proffered for the delay.
8. In her submissions dated 28.6.2024, the plaintiff argues that Order 42 Rule 6 of the Civil Procedure Rules relates to stay of execution pending appeal, but there is no evidence that a notice of appeal was filed in the matter. That Rule 75 of the Court of Appeal Rules provides that a notice of appeal shall be lodged within 14 days from the date of the decision against which the appeal is sought.
9. It is also submitted that the orders of 27.2.2020 placed an obligation on the defendant to vacate the suit property, but she has not done so to date, thus she is in contempt of this court's orders and she should not be heard until she purges the contempt.
10. I have considered all the arguments raised herein. The defendant seeks a stay of execution of the judgment delivered on 2.3.2018 and the ruling delivered on 27.2.2020. While this court has discretion to grant a stay, the same is fettered by conditions set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010, namely:- sufficient cause, Substantial loss, the applicant must furnish security and that the application must be made without unreasonable delay. See Elena Doudoladova Korir v Kenyatta University [2014] eKLR.
11. There is no Notice of Appeal on record. The defendant has not demonstrated that she has filed an application to file a notice of appeal out of time either, since judgment was entered herein 6 years ago.
12. Further, contrary to the defendant's assertion that her right to be heard has been infringed in the matter, the record indicates that she fully participated in the trial and even testified as DW1. When judgment was rendered on 2.3.2018, she was represented and 3 days later, her advocates sought typed proceedings and a copy of the judgment vide a letter dated 5.3.2018.
13. Before rendering its ruling of 27.2.2020 in which this court issued an eviction order against the defendant from Kiamburu/Gtamaiyu/2419, the court was satisfied that the defendant was served thus she must comply with the said orders.
14. In totality, the defendants application has no merits, the same is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Odera for Plaintiff



Achilla for Defendant

Court assistant: Joan

