



REPUBLIC OF KENYA



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**Nderu (Suing as administrator of the Estate of Gacheru Kanungu
- Deceased) v Babu (Environment & Land Case 270 of 2019)
[2024] KEELC 13817 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13817 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 270 OF 2019**

**JA MOGENI, J
DECEMBER 16, 2024**

BETWEEN

**AGNES WANJA NDERU (SUING AS ADMINISTRATOR OF THE ESTATE OF
GACHERU KANUNGU - DECEASED) PLAINTIFF**

AND

KIARIE BABU DEFENDANT

RULING

1. This ruling is in respect of two application filed one dated 27/03/2024 brought under section 3A of the [Civil Procedure Act](#) seeking the following
 - i. Spent
 - ii. An eviction order as against the Defendant/Respondent, his servants, agents and or assigns be issued for their immediate forceful removal together with all their belongings from land parcel L.R Dagoretti/Riruta/2064.
 - iii. The Officer Commanding Muthangari Police Station does provide escort and security to the Plaintiff/Applicant to allow access of the suit property, L.R Dagoretti/Riruta/2064 to evict the Defendant, his servants, agents and or assigns.
 - iv. The cost of the application be provided for.
2. The Application is based on the grounds on the face of it and is supported by the affidavit sworn by Agnes Wanja Nderi sworn on 27/03/2024.
3. The grounds of the Application is that this Honourable Court rendered its judgement in favor of the Applicant on 24th May 2023. Despite the judgment the Defendant/Respondent has refused to abide by the Honorable Court's pronouncement and vowed not to vacate the suit property despite demand



- and notice to vacate he continues to illegally occupy the suit property. The applicant avers that in order to avoid breach of peace, it is necessary to have the eviction order and offer security to the Plaintiff/Applicant and or appointed agent to execute the eviction order of this court.
4. The respondent did not file a response to the application instead he filed an application dated 3/07/2024 and which was amended on 11/07/2024 brought under Section 1A, 1B, and 3A, Order 8 Rule 1, Order 51 of Civil Procedure Rules and Article 159 of *the Constitution*.
 5. The applicant seeks the following:
 - a. That this Application be deemed as amended and adopted with its new amendments;
 - b. That there be a stay of Proceedings in this matter ELC Case No. 270 of 2019 pending the hearing and determination of the Defendant/Applicant's Application in the Court of Appeal Civil Application No. NAI E095 OF 2024
 - c. That there be a stay of the Plaintiff/Respondent Application dated 27th March 2024 and the entire proceedings in this matter pending hearing and determination of Civil Appeal No. E922 of 2023
 - d. That the contentious Security of Costs be transferred and admitted in the Appeal matter in the Court of Appeal Civil Appeal No. E922 of 2023
 - e. That any other orders that meets the ends of justice be issued.
 6. The Application is premised on the grounds on the face of the application that the applicant being dissatisfied with the decisions of this Honorable Court issued on 27/11/2023 has filed an appeal against the whole judgment. That whereas the court had granted the applicant a conditional stay predicated on the applicant raising Kshs. 250,000 to be held jointly in an escrow account, he failed to raise the security cost as ordered leading to the lapse of the stay.
 7. That Counsel for the Applicant/Defendant had erroneously misled the court when he appeared in court on 27/04/2024, that there was a stay granted by the Court of Appeal in this matter but this was not correct position. He further states that new facts have emerged in this matter from the Court of Appeal Civil Appeal No. E922 of 2023. That the security costs awarded in the instant matter be transferred to Civil Appeal No. E922 of 2023.
 8. That this amended Notice of Motion Application joins issues with the Defendant/Applicant's Replying Affidavit to the Plaintiff/Respondent's Notice of Motion Application dated 27/03/2024.
 9. The plaintiff/respondent filed a replying affidavit sworn on 11/07/2024 and stated that this Honourable Court delivered a ruling and issued an order for conditional stay of execution directing the Defendant to deposit Kshs. 250,000 to a joint interest earning account as security for costs within 30 days on 14/11/2023. The court stated that if no security for costs were furnished within the 30 days, the plaintiff/respondent would be free to execute.
 10. The plaintiff/respondent averred that the Defendant failed to furnish security for costs within 30 days as directed. That the Defendant made an application dated 1st February 2024 seeking enlargement of time but this Honourable Court ruled that the application had been overtaken by events.
 11. It is the plaintiff/respondent's contention that there is currently no stay of execution and therefore the plaintiff/respondent is free to execute and enjoy the fruits of the judgment. The respondent avers that the current application is merely an afterthought and a delay tactic to ensure that the respondent does



not enjoy the fruits of the judgment and that it is a disguise for a stay of execution which the Honorable Court already heard and determined.

12. That since litigation must come to an end it is only fair and just that the respondent is allowed to execute since the applicant has not established good grounds requiring stay of proceedings and the respondent sees the applicant as being a vexatious litigant and that the current application is an abuse of the court process.
13. The respondent prays that the application be dismissed for lacking merit. When the parties appeared in court on 4/07/2022 the court gave directions on disposal of the applications by way of written submissions. As at the time of writing this ruling only the plaintiff/applicant in the application dated 27/03/2024 had filed their submission to the said application.

Submissions

14. The plaintiff/applicant in the application dated 27/03/2024 as stated filed their submissions dated 4/07/2024 while the defendant did not file any submissions. At the same time the plaintiff did not file any submissions to the amended application by the respondent/applicant dated 11/07/2024. The plaintiff relied on the case of Arcadius Njora Chege vs Geoffrey Muchiri [2019] eKLR and submitted that the defendant had failed to vacate the suit property despite the judgement delivered by the court on 27/11/2023 and therefore sought that her application be allowed.

Analysis and determination

15. After considering both applications, replying affidavit and the submissions, the two issues that arise for determination are whether the plaintiff is entitled to the prayers sought in her application and whether the defendant/respondent's application dated 11/07/2024 is merited.
16. The defendant/respondent's application is a response to the application of the plaintiff's application as such in determining the first application which is the plaintiff's application this will settle the key issue in the defendant/respondent's application. I say this because the defendant/respondent avers that having filed an appeal and despite not getting orders to stay the judgment issued he believes that this court should stay not only the application dated 27/03/2024 but also the judgment delivered stating that he has a good case before the court of appeal.
17. The defendant/respondent was in essence seeking a stay pending appeal as averred to by the plaintiff which is an issue that has already been determined through the ruling dated 14/11/2023. Therefore, this court is functus on this issue.
18. The plaintiff is seeking for an order that the defendant be evicted from land parcel No L.R Dagoretti/Riruta/2064 and for the Officer Commanding Muthangari Police Station do provide escort and security to the Plaintiff/Applicant to allow access of the suit property, L.R Dagoretti/Riruta/2064 to evict the Defendant, his servants, agents and or assigns. I assume that this request is made for purposes of maintaining law and order during the exercise of eviction.
19. The defendant/respondent's application in opposing the plaintiff/applicant's application on the grounds that he had filed an appeal and had an arguable appeal. In his application he was actually seeking for a stay pending appeal and as I have already stated this is an issue that had already been determined.
20. From the court record, it indicates that judgement in the matter was delivered on 24/05/2023. The court in its judgment ordered the defendant to vacate land parcel No L.R Dagoretti/Riruta /2064 within 90 days of the delivery of the judgment failure to which the court would give an eviction order.



Annexed to the plaintiff's application is a demand letter dated 21/02/2024 written to the defendant by advocates of the plaintiff – Kituo Cha Sheria serving the defendant the court decree dated 27/11/2023 and marked as AWN1.

21. Since judgment in the matter was delivered on 25/05/2023, the defendant had 90 days to vacate the suit property. At the same time following an application for stay by the defendant, he was granted a conditional stay of 30 days following the application dated 14/11/2023 whereby he was given a conditional stay to where he was to furnish security of Kshs 250,000 within the 30 days failure to which the stay would lapse.
22. The defendant did not raise the security amount nor seek a substantive stay within the statutory time and therefore the stay lapsed and the period 90 days also lapsed. Therefore, it is now past the said 90 days plus 30 days period and the defendant is still in possession of the suit property. The defendant has indicated that he has filed an appeal although he did not obtain a stay from the Court of Appeal despite his Counsel misleading the court as already stated that the Court of Appeal had granted a stay. Only an order of stay of execution would have deterred this court from granting the instant application. There is none exhibited by the defendant.
23. That being the case there is no reason why this court should not issue an order that would enable the execution of judgment as sought by the applicant. I therefore find no merit in the application by the defendant respondent dated 11/07/2024 because the issue raised therein were already determined by this court which is now functus officio.
24. Given the foregoing it is my view that in this matter, the plaintiff/applicant is entitled to enjoy the fruits of her judgment and the application dated 27/03/2024 is therefore allowed as prayed. The application dated 11/07/2024 is unmerited and is therefore dismissed. The costs of both applications are awarded to the plaintiff/applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF DECEMBER 2024

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MOGENI J

JUDGE

In the presence of:

Mr. Ondabu for the Defendant

Ms. Nekoye holding brief for Ms. Njuguna for the Plaintiffs

Court assistant – Judith Adhiambo

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MOGENI J

JUDGE

