



Omari (Suing on behalf of the Estate of Taabu Binti Yussuf also known as Tabu Yussuf Marigi (Deceased) v Kang’ethe (Environment & Land Case 1030 of 2013) [2023] KEELC 906 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1030 OF 2013
JE OMANGE, J
JANUARY 26, 2023**

BETWEEN

HAJI OMARI (SUING ON BEHALF OF THE ESTATE OF TAABU BINTI YUSSUF ALSO KNOWN AS TABU YUSSUF MARIGI (DECEASED)). PLAINTIFF

AND

EDWARD NJUGUNA KANG’ETHE DEFENDANT

RULING

1. The plaintiff/decreed holder’s application dated October 11, 2022 prays for orders that an order for eviction be issued against the defendant/ Judgement Debtor his servants, employees and any other person acting under him on Plot No. 36/1/133 Eastleigh Section 1 forthwith and in default the defendant and or such persons/s be forcibly evicted and vacant possession be given to the said plaintiff. The plaintiff prays that Okuku Agencies Auctioneers do effect and execute the eviction orders.
2. The application is brought on grounds that the Court of Appeal issued a ruling in Civil Appeal No E 092 of 2022 in which it gave stay of execution subject to various conditions. It is the contention of the applicant that the Judgement Debtor has failed to comply with the orders of the court hence the present application.
3. The application is supported by the affidavit of the applicant in which he depones that following the Judgement and the Court of Appeal Ruling, the parties herein have been engaged in negotiations which have not borne any fruit. The applicant contends that the orders given by the Court of Appeal have lapsed due to the failure of the Judgement Debtor to comply. Hence his application should be allowed by the court.



4. The defendant/Judgement debtor on his part avers that this application is premature. He concedes that the Court of Appeal did give conditional stay. He states that he has not filed the Record of Appeal as his advocate has informed him that the proceedings are yet to be typed.
5. In a further affidavit dated December 19, 2022 he avers that another court has issued restraining orders against the plaintiff herein on the application of a third party hence this court should not issue any orders that would contradict these orders.
6. Counsel for the applicant has filed submissions which the court has duly considered. Counsel for the Judgement Debtor did not file submissions within 14 days as from December 13, 2022. As at the date of writing this Ruling on January 17, 2023 submissions of the Judgement Debtor are still not in the file, hence have not been considered by the court.
7. From the application and affidavit filed by parties herein and the submissions of counsel for the Decree Holder the following are the issues for determination;
 - a. Is the application premature?
 - b. Does the injunction given in ELC Case No E382 of 2022 affect this courts powers to hear and determine the present application?
 - c. Lastly is the Judgement Debtor entitled to further stay so as to pursue his appeal?
8. It is not in dispute that the Judgment Debtor filed an application for stay pending appeal in the Court of Appeal following the issuance of a decree dated June 20, 2022. It is equally common ground that the Court of appeal granted Stay of Execution precedent on certain conditions. There is no serious contention that the Judgement Debtor has not complied with the court order. The averments by the Decree holder in this respect are uncontroverted in their entirety. In these circumstances it cannot be said that the Plaintiff/ Decree holder's application is premature. The Court of Appeal order was clear that in default of any of the orders, the Respondent who is the Decree holder was to be at liberty to execute the decree. In this application he has sought to enforce the Judgement of the court on the eviction order. Ordinarily, given that the court had already issued an eviction order in the Judgement, the Decree holder could have applied for Execution warrants which are usually issued by the Deputy Registrar. However, in this particular case given the initial stay orders and the period that has passed, I find that it is in order that the Decree holder has made this application so that the court can give directions on the process.
9. On the question of ELC E382 OF 2022, the application before this court is in respect of a Judgement where the plaintiff in E382 of 2022 was not a party. The decision given by the court in that matter cannot be used to prevent this court from making a determination on a matter that is before it.
10. The last issue that the court must determine is whether the fact that the Judgement Debtor is pursuing an appeal should be used to continue to deny thy Decree holder the fruits of his Judgement. I find that no material has been placed before me that would enable me exercise discretion in favour of the Judgement Debtor. Any frustrations the Judgement Debtor faced in complying with the order of the Court of Appeal should have been brought to the attention of the court in good time. This was not done.
11. In the circumstances I find that the plaintiff/ decree holders application has merit and is allowed in the following terms;



- a. an order for eviction be issued against the defendant/ Judgement Debtor his servants, employees and any other person acting under him on PLOT NO. 36 /1/133 Eastleigh Section 1 forthwith.
- b. That the orders are granted to Okuku Agencies to effect and execute the above eviction orders.
- c. That the OCS Pangani Police Station do furnish security in ensuring compliance of order a) and b) above.
- d. That a copy of this order be immediately extracted and served on any parties who may be affected by the eviction.
- e. The plaintiff/ decree holder is granted costs of the application.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF JANUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Maruja for the Plaintiff

Mr. Gachie for the Defendant

Steve - Court Assistant

