



**Ng'era (Suing as personal Representative of Joseph Boro Ng'era - Deceased) v Sunbird Lodge Ltd
(Environment & Land Case 75 of 2017) [2023] KEELC 16696 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16696 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 75 OF 2017
FM NJOROGE, J
MARCH 30, 2023**

BETWEEN

**SAMMY NGUGI NG'ERA PLAINTIFF
SUING AS PERSONAL REPRESENTATIVE OF JOSEPH BORO NG'ERA -
DECEASED**

AND

SUNBIRD LODGE LTD DEFENDANT

RULING

1. This is a ruling in respect of two consolidated applications: plaintiff's notice of motion dated January 23, 2023 and the defendant's notice of motion dated February 9, 2023.
2. The first notice of motion seeks the following orders: -
 - a. spent.
 - b. the court do issue warrants/orders to M/S Nasioki Auctioneers to execute the decree herein dated September 27, 2022.
 - c. the court do order that the officer commanding police station, Gilgil do provide security to the said Nasioki Auctioneers while executing the said decree.
 - d. the costs of this application be borne by the defendant.
3. The application is supported by the affidavit sworn by Esther Gathoni Mwangi sworn on January 23, 2023. She deposed that the suit was finalized *vide* the court's judgment dated May 30, 2022 and a decree dated September 27, 2022 issued; that the defendant made an application for stay of execution which was dismissed on January 19, 2023; that the plaintiff now wishes that M/S Nasioki auctioneers



be issued eviction warrants and carry out the eviction; that to also avoid breach of peace, she requests that the OCS Gilgil do provide security for the said evictions.

4. The second notice of motion dated February 9, 2023 seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That this honourable court be pleased to review its ruling dated January 19, 2023 and grant stay of execution pending the hearing and full determination of the appeal filed and preferred against the judgment dated May 30, 2022 delivered by this honourable court.
 - e. That in the alternative to the above prayer(s), the applicant be allowed 120 days to fully comply with this honourable court's judgment dated May 30, 2022 by removing the full lodge owned by it which essentially comprises of the fixtures and the buildings on the leased land.
 - f. That the costs of this application be in the cause.
5. The application is supported by the affidavit sworn by Richard Corcoran sworn on February 9, 2023. He deposed that the instant suit was heard and determined and judgment delivered on May 30, 2022 nullifying the subject lease and ordering the defendant to be evicted from the suit land within 90 days from the date of the said judgment; that they filed an application seeking stay of execution pending appeal but the same was dismissed; that the plaintiff has since filed an application seeking orders/warrants to be issued to M/S Nasioki Auctioneers to execute the decree and that the OCS Gilgil do provide security; that the defendant is now exposed to imminent substantial financial loss and if this court does not urgently review the terms of its ruling dated January 19, 2023 and issue stay of execution, the defendant's appeal stands to be rendered nugatory; that one of the prayer's in the plaintiff's application is rather vague.

Response

6. The defendant filed its replying affidavit dated February 9, 2023 in opposition to the application dated January 23, 2023. He deposed that the application was brought in bad faith and seeks to introduce road blocks in their path to pursue justice.
7. He stated that for the defendant to fully comply with this court's judgment it has to fully remove its developments and fixtures then surrender the suit land. He deposed that eviction can only occurred when the defendant moves out with all that it owns and has developed.
8. The plaintiff on the other hand in response to the application dated February 9, 2023 filed their replying affidavit dated February 14, 2023 sworn by Esther Gathoni Mwangi. She averred that there was no mention of the removal of the buildings as they form part of the land. She further averred that the agreement between the parties had expressed that the buildings would be left on the land.
9. She averred that it was surprising that the defendant never mentioned the meeting, consents and correspondences that took place between January 19, 2023 to February 6, 2023. She added that the application is incompetent, res judicata and only brought to buy more time.
10. The defendant filed a further affidavit in response the plaintiff's replying affidavit above. He deposed that the meeting ended prematurely and that it was their position that regarding the permanent developments, they ought to be compensated at an agreed value.



11. He added that the issue of ownership of the developments and structures is unsettling and this court has to revisit it and give a proper consideration bearing in mind that the plaintiff did not contribute anything to its construction. He stated that the doctrines of *res judicata* and *functus officio* have no place in opposing and application for review. He added that during hearing of the main suit, the plaintiff did not claim as to the ownership of the developments on the suit land, and that the claim it has been conceived of at this latter stage post judgment of review.

Submissions

12. The plaintiff filed his submissions dated February 17, 2023 on the same day where on the first issue he submitted that the defendant ought to move out of the suit land. He added that from the consent and correspondences there were no permanent buildings to be removed and that the defendant is bent on delaying their exit from the suit land hence the need to involve the auctioneers.
13. He submitted that from the consent the three issues for discussion were the peaceful exit of the defendant from the suit land, modalities on movable assets and costs of the suit. The plaintiff argued that there was no mention of discussions on immovable properties permanently affixed to the land since they form part of the land.
14. On the second application dated February 9, 2023, he relied on section 7 of the [Civil Procedure Act](#) and submitted that the application is *res judicata*. He argued that the defendant seeks to reopen a case that was heard and finalized through an application for review of a ruling for stay of execution. He submitted that there is nothing new discovered after the ruling to warrant a review and that the application is only meant to delay execution.
15. In conclusion, he submitted that the defendant had over 9 months to move out but has refused and the only recourse is to have it evicted from the suit land.
16. The defendant on the other hand filed her submissions dated March 21, 2023 on the same day. It gave a background of the case and identified four issues for determination. One, whether the defendant's application dated November 23, 2021 is merited. It submitted that its instant application raises new and substantial issues and evidence not present at the time the court rendered its ruling on January 19, 2023. It relied on the case of [Nub Nassir Abdi v Ali Wario & 2 others](#) [2013] eKLR and section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#). It submitted that the prayers sought in the application dated February 9, 2023 are not similar to the application dated February 21, 2023.
17. The second issue is whether the defendant will suffer loss and damage in the event the court does not review and/or vary its ruling dated January 19, 2023. It submitted that the plaintiff may execute this court's judgment dated May 30, 2022 rendering its appeal nugatory and that it stands to suffer substantial financial loss. The third issue is whether the defendant's application dated February 9, 2023 contradicts section 7 of the [Civil Procedure Act](#) and whether this court lacks jurisdiction to grant orders prayed for in the said application. It reiterated the contents of its replying affidavit dated February 9, 2023 and submitted that the application is not *res judicata*. It relied on article 159 (2) (d) of the [Constitution](#) and submitted that this court is well seized with jurisdiction to hear and determine their application.
18. The final issue, according to the defendants, is whether the defendant's application dated February 9, 2023 is bad in law, vexatious and/or an abuse of the court process. The defendant submitted that their application is merited and should be allowed so that it may not be denied its right to appeal. It relied on a number of cases including [Martha Wangari Karua v Independent Electoral and Boundaries](#)



Commission & others Nyeri civil appeal No 1 of 2017. It urged the court to allow it exit the suit land within 120 days by removing the full lodge it owns comprising fixtures and building on the suit land.

19. In conclusion, it urged the court to allow its application and dismiss the plaintiff's application dated January 23, 2023.

Analysis and Determination

20. This court has looked at the two applications and it is clear that it is dealing with two diametrically opposed applications, one which the plaintiff wants to take steps to enable him enforce his judgment and the other which the defendant is seeking to stop the said execution.
21. In dealing with the first application dated January 23, 2023, it is not in dispute that on May 30, 2022 judgment was entered in favour of the plaintiff and a decree dated September 27, 2022 issued. The defendant made an application for stay of execution pending hearing and determination of an appeal which was dismissed on January 19, 2023. The plaintiff desires that M/S Nasioki Auctioneers to be issued with eviction warrants and carry out the eviction as the defendant is yet to vacate the suit property.
22. The second application dated February 9, 2023, the defendant herein seeks review of the ruling dated January 19, 2023 and in the alternative it be given 120 days to vacate the suit property by removing the full lodge owned by it. It averred that in the event stay of execution is not granted, the defendant's appeal stands to be rendered nugatory.
23. The application by the defendant seeking review of the ruling dated January 19, 2023 is based on the ground that it raises new and substantial evidence which were not present at the time this court as rendering its ruling. The defendant contends that it discovered the intent of the plaintiff to execute after the plaintiff had filed their present application despite the fact that it had lodged a notice of appeal.
24. I find that the defendant's application seeking review of the ruling on the ground of discovery of new evidence is rather misplaced. It is a fact that this court dismissed the defendant's application seeking stay of execution pending appeal on the ground that it failed to establish the substantial loss it was likely to suffer. Stating that it has discovered the intent of the plaintiff to execute does not constitute discovery of new evidence in the context of the impugned ruling.
25. It is on record that the parties had a meeting February 6, 2023 to explore a peaceful exit from the suit property by the defendant but it seems the said meeting was not fruitful. The plaintiff's application dated January 23, 2023 had been held in abeyance pending the said meeting. It is this court's view that the main issue of contention between the parties is the peaceful exit of the defendant from the suit land which the two parties seem not to have come to a common agreement upon.
26. This court is also of the view that from the judgment issued on May 30, 2022, the defendant was given 90 days to vacate the suit property from the date of the judgment. It has filed the present application but failed to give reasons as to why it never took steps to vacate the suit property yet its application for stay of execution pending appeal was dismissed on January 19, 2023.
27. I find that the defendant is only seeking to buy time by staying in the suit property pending the hearing and determination of its appeal. The defendant seems to be cloaking the said delay of vacating the suit property with the claim that it requires time to remove its lodges comprising of fixtures and permanent buildings. That can no longer be allowed to continue as it unreasonably keeps the judgment debtor away from enjoying the fruits of his judgment.



28. I therefore find that the defendant's application dated February 9, 2023 lacks merit and the same is hereby dismissed with costs to the plaintiff.
29. The plaintiff on the other hand seeks to enjoy the fruits of his judgment and this can only be achieved by allowing him proceed with execution of the decree. Having found the defendant's application herein before mentioned as lacking in merit, there is therefore nothing in the record to bar this court from granting the orders sought in the plaintiff's application.
30. In view of the foregoing, the plaintiff's application dated January 23, 2023 is hereby allowed. The defendant shall bear the costs of the said application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

