



Case Number:	Environment and Land Case 26 of 2014
Date Delivered:	04 Mar 2016
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Ruling
Judge:	Lucy Nyambura Gacheru
Citation:	Peter Githiu Komu v Peter Chege Ndua [2016] eKLR
Advocates:	Mr Mbona for the Respondeen
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 26 OF 2014**

**PETER GITHIU KOMU.....APPELLANT/APPLICANT**

**=VERSUS=**

**PETER CHEGE NDUU.....RESPONDENT**

**RULING**

The Appellant /Applicant herein ***Peter Githiu Komu*** filed this Notice of Motion dated ***17<sup>th</sup> September 2014***, and sought for various orders. The application is premised under ***Order 40 Rule (1) (A) and Order 51 of the Civil Procedure Rules, Sections 1A, 1B and 3 A of the Civil Procedure Act, Cap 21 Laws of Kenya*** and all other enabling provisions of the Law. The Orders sought are;-

i. ***That the Court be pleased to issue orders of injunction restraining the Respondents whether by themselves ,agents, servants, family members ,workers or anybody claiming under them from trespassing ,alienating, encroaching ,charging, cutting down trees, harvesting crops planted in land parcel No.Kiganjo/Gatei/50 or evicting the appellant from the suit premises – Kiganjo/Gatei/50 or interfering whatsoever with the appellants quiet living in the above mentioned land pending the hearing and determination of the Appeal filed herein.***

ii. ***That the O.C.S Gatundu Police Station be directed to reinforce the orders issued herein.***

iii. ***That the cost of this application be provided for.***

The application is supported by the grounds stated on the face of the application and the supporting Affidavit of ***Peter Githiu Komu***. These grounds are:-

a. ***That the appellant was given leave to file his intended appeal by this Court on 31<sup>st</sup> July 2014, and he filed the same and served the memorandum of appeal and record of appeal to the Respondents.***

b. ***That the Respondent after being served, invaded the suit premises destroying crops, cutting down planted trees and destroying the appellant's matrimonial home.***

In his supporting affidavit the applicant ***Peter Githiu Komu*** averred that he was given leave to appeal out of time against a Judgement delivered on ***21<sup>st</sup> August 1997***, as evidenced by annexures ***PGK 1***. He further averred that he duly filed the memo and records of appeal as directed by the Court. The Respondents were served with the same on ***25<sup>th</sup> August 2014***, and upon receiving the aforesaid documents, the Respondents invaded the suit property ***Kiganjo/Gatei/50***, where they destroyed crops planted therein and cut down trees and also destroyed his residential houses as per annexures ***PGK 3,4,5 and 6***. Further that the Respondents are violent persons who can attack him and his family any time of the day. He urged the court to allow the orders as prayed.

The application is opposed and ***Peter Chege Ndua*** filed his Replying

Affidavit and averred that the Eviction Warrant, was issued against the Applicant/Appellant on the strength of a decree dated ***21<sup>st</sup> August 1997***, and a court order dated 21<sup>st</sup> March 2014, as per annexure marked 'A'. Further that the appellant was personally in court in Thika Chief Magistrate Civil Case No. 247 of 1994, where he was ordered by the court to vacate the subject property. He further averred that the appellant failed to vacate hence the ***Eviction Warrant*** which was acted upon by the Court Bailiff. That the ***Eviction Warrant*** was explained that the Court Bailiff was to remove the appellant from the suit property and the Court Bailiff completely complied with the said warrant and returned the same to the lower court as evidenced by annexure marked "***B***".

He further contended that at the time of eviction, the appellant had no orders of stay of execution of the said order and there is still no of stay of execution pending appeal. He also contended that upon the appellant being evicted, he went to the suit property and damage structures erected by the Respondents and he was thereafter arrested and charged with the offence of malicious damages to property. It was his contention therefore that the applicant has come to court with dirty hands. He therefore denied that he is a violent person and urged the Court to dismiss the instant application as it is unmeritorious.

The appellant /applicant filed a further affidavit and averred that the advocate for the Respondents was aware of High Court Case ***No. 656 of 2000***, which was in court on ***14<sup>th</sup> January 2014***, and a hearing date was for ***30<sup>th</sup> March 2014***. However, the said advocate rushed to Thika Court and disregarded the Appeal at the High Court and sought for eviction orders. Further that his house was demolished on 3<sup>rd</sup> April 2014 by one ***Phyrus Njuguna T/A Fantasy Auctioneers*** and there is no auctioneer known as ***Phyrus Njuguna*** and therefore the order of eviction was executed by unlicensed Auctioneer.

The parties canvassed this Notice of Motion by way of written submissions which I have carefully considered. I have also considered the annexures thereto and the court records. There is no doubt that a Judgement was entered against the appellant herein by a Thika SPM Court on 1997. There is also no doubt that the appellant/applicant herein was granted leave to file his Appeal out of time by ***Nyamweya J*** on ***31<sup>st</sup> July 2014***. There is also no doubt that in the application for leave to file appeal out of time, the applicant had sought for injunction order and ***status quo*** order pending the determination of the Appeal. The Court noted that since the applicant had not filed the memo and records of appeal, the said

application was premature. However, the Court directed that the applicant /appellant was at liberty to apply for other prayers upon filing of the Appeal.

There is also no doubt that an eviction warrant was issued by the Thika Court in 26<sup>th</sup> March 2014, and allegedly executed on 3<sup>rd</sup> April 2014. This application was filed in Court on 17<sup>th</sup> September 2014. There is also no doubt that the applicant and Respondents are relatives and the suit property herein is an ancestral property which was initially registered in the name of **Kiarie Githiu**, the parties grandparent.

The applicant has sought for injunction against the Respondents under **Order 40 Rule 1 (A) of the Civil Procedure Rules**. However, since the applicant is seeking for injunction pending the hearing and determination of the appeal, this application ought to have been premised under Order 42 Rule 6(2) of the Civil Procedure Rules. However, the court has noted that the applicant has also based his application under **Sections 1A, 1B and 3A of the Civil Procedure Act** **Sections 1A and 1B** deals with the overriding objective of the **Civil Procedure Act** and **Section 3A** grants the court the power to issue such order that may be necessary for the end of justice to be met and also to prevent abuse of the Court process.

Further the applicant has based his application under **Order 51 of the Civil Procedure Rules** and **Order 51 Rule 10(2)** provides that:-

**“ No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.**

The Court is also guided by the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010 which provides that:-

**“ In exercising judicial authority the courts and tribunals shall be guided by the following principles ...justice shall be administered without undue regard to procedural technicalities”.**

Though the Respondents have submitted that the appellant's application is misconceived and bad in law for having been brought under **Order 40 Rule 1** instead of **Order 42 Rule 6(2)**, the Court finds that the said omission has not affected the substance of the application and this application shall not be defeated because of that technicality.

The applicant has sought to stay any actions by the Respondents pending the hearing and determination of the appeal. It is evident that this application ought to have been brought under **Order 42 Rule 6(2) of the Civil Procedure Rules** which provides that:-

**2) No order for stay of execution shall be made under subrule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

The applicant needed to satisfy the court that substantial loss may result unless the orders sought herein are made or granted. There is no doubt that the Respondents did obtain an Eviction Warrant from Thika Law Courts. Applicant has alleged that this has been his ancestral home where he grew up and has lived with his family. If the Respondents are allowed to proceed and complete the Eviction process, then the

applicant stands to suffer substantial loss before the appeal is heard and determined.

On the second condition of security, the Court finds that the appellant herein and the Respondents are related and they have lived on this suit land all their lives. It will not injure or prejudice the Respondents in any way if they are to wait for the determination of the appeal before carrying out execution of the Judgement and the Decree herein. For the above reasons, the Court finds no need to order the applicant to deposit security herein.

The upshot of the foregoing is that the applicant/ Appellant herein is deserving of orders for stay of execution of the judgement and Decree herein issued by Thika Senior Principal Magistrate's Court on **21<sup>st</sup> August 1997**, and subsequent Eviction Warrant issued by the same court on 26<sup>th</sup> March 2014. Further the applicant is entitled to the injunction order as prayed in prayer No.2 of his Notice of Motion dated **17<sup>th</sup> September 2014**.

The Court further directs that the OCS Gatundu Police Station do ensure that the Orders issued herein have been enforced. The applicant is also entitled to costs of this application.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 4<sup>th</sup> day of March, 2016**

**L.GACHERU**

**JUDGE**

In the presence of

L Gacheru : Judge

Hilda: Court Clerk

Peter Githiu Komu Applicant/ Appellant in person

M/s Muhuhu holding brief for Mr Mbona for the Respondent

**Court:**

Ruling read in open Court.

**L.GACHERU**

**JUDGE**



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