



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wanjala v Kong'ani (Environment and Land Miscellaneous Application  
E008 of 2022) [2023] KEELC 16613 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16613 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2022  
EC CHERONO, J  
MARCH 29, 2023**

**BETWEEN**

**JAMES MAKOKHA WANJALA ..... APPLICANT**

**AND**

**JUSTUS MARANGO KONG'ANI ..... RESPONDENT**

**RULING**

1. What is before me for determination is the notice of motion brought under certificate of urgency in which the applicant is seeking the following orders;
  1. (Spent)
  2. That this honourable court be pleased to set aside the impugned judgment and attendant decree in respect to Bungoma ELC Case No 89 of 2018
  3. That in the alternative, this honourable court stays the execution of its orders of May 26, 2021 pending intended appeal out of time
  4. That costs be in the cause.
2. The application is supported by the affidavit of the applicant sworn on December 8, 2022 and grounds apparent on the face of the application.
3. The application is opposed by the respondent vide a replying affidavit sworn on December 10, 2022 and filed in court on January 12, 2023. Both the supporting and replying affidavit are further supported by numerous annexures thereto. When the application came up for directions on January 13, 2023, the parties agreed to canvass the same by written submissions.



### **Applicant's Summary of Facts**

4. In his Affidavit, the applicant deposed that on May 26, 2021, the Chief Magistrate Court, Bungoma read a judgment and attendant decree against the applicant in ELC Case No 89 of 2018 (Bungoma). He stated that the lower court entertained the impugned Civil proceedings despite the existence of concurrent criminal case based on similar facts and circumstances. The applicant further stated that the decision to charge the plaintiff for the criminal offence of forgery was made by the DPP who is under a public duty to ensure that criminal offences are prosecuted and those culpable attended to as the law requires. He stated that the execution of the impugned judgment and decree is proceeding on the basis of a forgery and the plaintiff herein is now facing criminal charges in Criminal Case No 470 of 2019(Bungoma).
5. The applicant deposed that the decree holder through his agents has proclaimed, attached and sold his livestock in execution of the said decree and that he is now staring at an impending eviction and destruction of structures from the suit property.
6. The applicant further deposed that his Advocate on record never informed him that the civil proceedings had resumed in the pendency of the criminal case and that his failure to participate in the impugned civil proceedings and to file appeal out of time was not intentional but was as a result of an inadvertent omission on the part of his former advocate on record and that inadvertent error by his advocate ought not be visited upon him.

### **Respondent's Summary of Facts**

7. The respondent on his part stated that the said application is an abuse of the due process of the court, bad in law, incompetent and fatally defective. He stated that the application offends section 34 CPA.
8. The respondent further deposed that on December 9, 2016, he filed a suit against the applicant herein vide ELC No 157 of 2016 and that the same was transferred to the lower court for hearing and determination. He stated that the case was handled by Hon S O Magute who after hearing the case on merit delivered his judgment on May 26, 2021.
9. He deposed that in the judgment and decree issued by the trial court, the applicant was given 60 days to vacate his land. He stated that after the trial court granted him costs in the former suit, he initiated execution for the same where the applicant's moveable goods were attached and sold and he received Kshs 25000/=out of the sale. He stated that on August 23, 2022 the Auctioneer obtained an order for security in evicting and demolishing of the applicant's structures on his land. He further stated that the applicant has been awoken from slumber when the OCS Bumula Police Station advised him to vacate from the suit land peacefully.

### **Legal Analysis and Decision**

10. I have considered the notice of motion application dated December 8, 2022, the supporting affidavit, the replying affidavit, the annexures in support of the two affidavits as well as the rival submissions.
11. The first prayer in the application is for this honourable court to certify the said application as urgent and service be dispensed with in the first instance. When that application was placed before me on December 8, 2022, I declined to certify the same as urgent. That prayer is therefore spent. The second prayer is for an order to set aside the judgment and decree issued by the trial court in the former suit CM-ELC No 89 of 2019. I have looked at the Constitution and the relevant statutory enactments and find no power is given to this honourable court to set aside decisions or orders by subordinate courts and tribunals other than by way of appeal. The applicant has not cited any provisions of the law which



gives this honourable court power to interfere with the mandate of a court established under statute except as provided under the law. What the applicants want this court to do is to set aside the judgment and decree of Hon S O Mogute Chief Magistrate (CM-ELC 157 of 2016) delivered on May 26, 2021. That order is untenable

12. The third prayer by the applicant is for stay of execution pending appeal. An application for stay pending appeal is provided under order 42 rule 6(2) *CPA*. The law provides three conditions for stay pending appeal. First, an application for stay must be brought without undue delay. In this case, the impugned judgment was delivered on May 26, 2021 and this application was filed on December 8, 2022. It has taken the applicant more than one year since judgment was delivered. No explanation has been given for the delay for more than one year.
13. The second condition is that the applicant must show that he will suffer substantial loss unless stay of execution is granted. Substantial loss has been described in various decisions by superior courts. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR, the court held;

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal---the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."
14. The applicant has not stated in his application how he will suffer substantial loss unless stay of execution orders are granted
15. The last condition for the grant of stay pending appeal is the giving of security for the due performance of the decree that may ultimately be binding on the applicant. The applicant has not also given any undertaking to abide by any condition this honourable court may give.
16. Suffice to say that the applicant has not even sought leave to appeal out of time.
17. For all the reasons given hereinabove, I find the notice of motion application dated December 8, 2022 devoid of merit and the same is hereby dismissed with costs.

Orders accordingly.

**READ, SIGNED AND DELIVERED IN THE OPEN COURT AT BUNGOMA THIS 29<sup>TH</sup> MARCH, 2023.**

**HON. E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

1. Applicant /Advocate - absent
2. Respondent/Advocate - absent
3. C/A Lusweti

