



**South Eastern Kenya University v Ukambani Agricultural
Institute Ltd & another; Muli & another (Grievant) (Civil Appeal
465 of 2015) [2024] KEHC 9925 (KLR) (Civ) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 465 OF 2015

JN MULWA, J

JULY 31, 2024

BETWEEN

SOUTH EASTERN KENYA UNIVERSITY APPELLANT

AND

UKAMBANI AGRICULTURAL INSTITUTE LTD 1ST RESPONDENT

NATIONAL BANK OF KENYA LTD 2ND RESPONDENT

AND

STEPHEN NDAMBUKI MULI GRIEVANT

ERIC MUTINDA MUTISYA GRIEVANT

RULING

(On Motion Dated 22/09/2023)

1. By prayer number 3 of the Notice of Motion Application dated 22/09/2023 the applicants described as “grievants” Stephen Ndambuki Muli and Eric Mutinda Mutisya seek orders that:-
 - 2) Pending the hearing and determination of this application interpartes and or until any further orders of this court there be a stay of execution of the ruling and orders dated 29/09/2016 and 17/10/2018 and the consequential warrants of arrest orders issued against them.
 - 3) That this appeal be struck out for being frivolous and an abuse of court process and a delay to justice and all consequential warrants of arrest issued against the applicants.
2. Before I proceed with interrogation of the instant application, the applicants by their application dated 6/10/2022 sought similar prayers in particular prayer number 2 above.



3. By its ruling dated 11/05/2023, this court found no merits in the application, making a finding that the said application was Resjudicata and an abuse of court process and dismissed it with costs to the appellant. I therefore will not go back to the prayers sought at prayer No. 2 above as doing so would be in disregard to the orders I pronounced on 11/05/2023 which to the best of my knowledge are not subject to any appeal that may have been brought to the court's attention and add that it is gross abuse of courts process. Prayer number 2 is therefore struck out.

Prayer number 3.

4. The application is premised on grounds at the face of the application and supporting affidavit sworn by Eric Mutinda Mutisya the 1st grievant/applicant.
5. The application is opposed by a Replying Affidavit sworn on 26/10/2023; urging the court to decline audience to the applicants for their failure to comply with court orders issued on 29/09/2016 upon their Motion dated 4/12/2015 and by a Motion for contempt of court orders dated 13/02/2017 upon which the court by its orders of 17/10/2015 found the applicants guilty of contempt and issued warrants of their arrest. These orders are annexed as exhibits B1, B2 and B3.
6. Additionally, the Respondent avers that there is an ELC case No. 136/2009 at Nairobi, Milimani whose judgment was delivered on 1/05/2023 and is subject of Appeal in Court of Appeal Civil Appeal no. E533 of 2023- South Eastern University College V. Ukamba Agricultural Institute Ltd (EAB4) which the applicants have failed to disclose to the court being characteristic of the applicants disdain of court orders.
7. Applicants submissions on prayer No. 3 is that this appeal be struck out for being frivolous and abuse of court process. ELC No. 136/2009 judgment dated 11/05/2023 is annexed to the applicant's supporting affidavit as exhibit 2.
8. By their submissions dated 18/03/2024 the applicants urge that this appeal was lodged before the ELC case No. 136 of 2009, as well as the orders of the court also issued before the case was concluded, and therefore the appeal is against the subordinate court's decision on the ownership of the suit properties.
9. By the above submissions it is reasonable to conclude that the appeal herein and all orders consequential thereto are solely founded upon the question as to the rightful owner of the suit property. Additionally, it is submitted that continuation of the appeal herein places this Honourable court in a difficult position of making a decision that may contradict findings of the ELC Court in regard to ownership of the suit property.
10. The Respondents Submissions are dated 21/02/2024.
Upon stating the chronology of court orders in this appeal, the Respondents have urged that the applicants ought to be denied audience due to the disobedience of all the court orders including the contempt orders upon which warrants of arrest were eventually issued by the court.
11. It is submitted that this application is yet another attempt to have the appeal struck out, citing the case of *Hadkinson V. Hadkinson* 2 All E. R. 567 whereof Lord Denning Stated that:-

“Continued disobedience of court orders impedes the cause of justice making it difficult for the court to ascertain the truth or to enforce orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown”.



12. Additionally, it is submitted that the ELC judgment is subject of an appeal at the Court of Appeal which is yet to be heard and determined and therefore it is not the final judgment determining the rights of the parties.
13. On the issue of custody of the suit title documents it is urged that until an order for release of the said documents is granted by the court, the said documents ought to remain in the appellants possession.

Analysis and determination

14. The decision of in Nairobi ELC case no 136 of 2009 delivered on 11/05/2023 is on appeal vide Court of Appeal Civil Appeal no. E533 of 2023. Though the applicants have not found it fit or appropriate to provide a copy of the judgment to the court, it clearly touches on the ownership of the suit properly LR 209/10350.
15. The appeal to this court HCCA No. 465 of 2015 is against the Chief Magistrate's findings on ownership of the same property and all impugned orders thereafter are in respect of the same property.
16. The appeal was filed in 2015 whereas the ELC case no. 136/2009 was filed earlier. For one reason or another, the ELC case has now been heard and determined before the instant appeal is heard and determined. Once again, the decision is being challenged in the Court of Appeal.
17. Striking out the appeal and/or any pleading without clear and plain reasons is principally draconian, as ably held is numerous superior court decisions, notable when the pleading discloses no cause of action. See the case *Simon Kirima Muraguri & Equity Bank (Kenya) Limited & Another* (2021) eKLR, *Job Kilach V Nation Media Group Ltd Salaba Agencies Ltd Michael Rono* (2015) eKLR.
18. The appeal prima facie discloses a reasonable chance of success if heard on its merits and that is why it was admitted for hearing in the first instance. The mere fact that a court in another suit has pronounced itself on some of the issues therein does not in itself render the instant appeal devoid of merit nor does it strip it of its reasonable cause of action.
19. In any event, the ELC judgment is an appeal and until when the appeal at the Court of Appeal is heard and determined the said ELC judgment shall remain so, for further interrogated by the learned Judges of Appeal. That in my view does not make the appeal herein an abuse of court process nor is it frivolous- see holdings in *Co-Operative Merchant Bank Limited V. George Fredrick Wekesa* [Civil Appeal no. 54 of 1999], the court of Appeal rendered itself that striking out a pleading is a draconian act, which may only be resorted to in plain cases.
20. Additionally, the Court of Appeal in *Yaya towers Limited V. Trade Bank Limited* (in liquidation) Civil Appeal No. 35 of 2000 expressed itself that striking out pleadings ought to be exercised sparingly and only in exceptional cases.
21. Applying the above principles in the application before the court and being mindful that the dispute between the parties hereto and that which was before the ELC is before the Court of Appeal for further interrogation and determination, I am not persuaded that the appeal herein is frivolous or so hopeless that it ought to be struck out for the mere fact that the ELC court has found in favour of the plaintiff in the trial court and the respondent in the appeal.
22. The best that this court can do and for the ends of justice to be seen to be done, which I hereby do, is not to strike out the Appeal but to direct that further proceedings in this appeal be stayed to await hearing and determination of the Court of Appeal Civil Appeal No. E533 of 2023 that is between the same parties over the same suit property but filed in the two courts: this court as the first Appellate



Court and at the Environment and Land Court vide Nairobi ELC case No. 136 of 2009 in its original jurisdiction.

23. In regard to prayer No. 3 of the instant application, each party shall bear own costs of the application.
Orders accordingly.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 31ST DAY OF JULY, 2024.

JANET MULWA

JUDGE

