Koimburi v Gatungu (Environment & Land Case 97 of 2018) [2023] KEELC 16650 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16650 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 97 OF 2018

FO NYAGAKA, J

MARCH 27, 2023

BETWEEN

BONIFACE NDURA KOIMBURI .... PLAINTIFF

AND

DAVID MWANGI GATUNGU .... DEFENDANT

RULING

1. The Defendant filed under certificate of urgency an Application dated 16/01/2023. It would appear that while he was in that process on that date, the Plaintiff/ Decree holder was also busy closing the road of access which was passing through his parcel of land and which was the subject of this suit, and by the evening of that day, as noted from Annextures DMG 2 (a)-(d) of an Affidavit sworn by the Applicant on 20/01/2023, it as completely closed. The Court gave directions on how the Application would be canvassed.

2. However, before any further step could be taken in the Court file, the Applicant brought another Application dated 20/01/2023, it too under certificate of urgency, and was the one supported by the Affidavit sworn on 16/01/2023 referred to in the paragraph above. In it he prayed for the restoration of the status quo as it was on the 16/01/2023 before the earlier application was filed. This Court decided to have both applications heard at the same time for reason that if it found that the Application dated 16/01/2023 which was for stay of execution of the decree of this Court was merited, then the Respondent would at the same time be ordered to restore the status quo. If it is not, then the latter application dies as there would be no need to restore the status quo.

3. The Application dated 16/01/2023 was brought under Order 42 Rule 6 of the *Civil Procedure Rules*. It sought the following prayers:-

    1. ...spent

    2. ...spent

3. That upon the inter partes hearing and determination of the application herein, this Hon. Court be pleased to stay the enforcement of the judgment and decree of this Court, issued on the 19/12/2022 while pending the hearing and determination of an intended to the Court of Appeal against the said judgment.

4. That the costs of this Application do abide the results of the intended appeal.

4. The Application was based on seven grounds which are summarized hereafter. One, that the Applicant was aggrieved by the judgment of the Court and filed a Notice of Appeal on 22/12/2022 and served it on learned counsel for the Plaintiff on 23/12/2022 via email. He also requested for proceedings and judgment. Two, the application was brought without undue delay. Three, the Defendant had used the road of access for over 20 years to access the Kapenguria main road, and the closure of the access road would mean that the Applicant gets land-locked completely hence occasioning him substantial loss. Four, the enforcement of the judgment would render the appeal nugatory as the success of the appeal would serve no useful purpose of the road is closed. And five, that the Applicant was willing to give security for the due performance of the decree.

5. The Application was supported by the Affidavit of the Defendant/Applicant sworn on 16/01/2023. He reiterated the contents of the grounds summarized above. In addition, he annexed and marked as DMG 1 the copy of the judgment of this Court, DMG 2 & 3 copies of the Notice of Appeal and letter requesting for proceedings respectively, and DMG 4 copies of the email confirming service of DMG 2 & 3 and the acknowledgement thereof. He then argued then deponed that when he purchased land parcel No. Kitale Municipality/ Block 15/Koitogos/ 564 in 1994 the only road access to Kapenguria main road was the one is issue in the matter and that it even existed on the land before he purchased the said parcel of land. He then argued that there was no other road of access and if the judgment was implemented he would be completely landlocked and suffer substantial damage. He annexed as DMG 5 (a) and (b) photographs showing where PW2 the surveyor, the Applicant's road of access was supposed to pass through the next plot. He then annexed as DMG 6 a copy of the Memorandum of Appeal.

6. The Respondent opposed the Application vide a Replying Affidavit sworn by him on 26/01/2023. He deponed that the application was egocentric, malicious, misconceived, bad in law and an abuse of the process. Further, he stated that the judgment of the Court was delivered on 19/12/2022 and he annexed it as BNK-1. That the surveyor, PW2's, detailed and extensive evidence was the one that determined the truth over the matter.

7. He deponed further that the Court found that roads of access, including the one for the Applicant's land parcel No. 127, were provided for as shown by the Registry Index Map (RIM) while that claimed by the Applicant was unlawfully created by him. He deponed that an order of stay of execution was ordinarily directed at stopping or delaying an order having positive obligations of performance yet the relief granted herein was a negative one incapable of execution hence the judgment of the Court cannot be stayed. His contention was that the Applicant had not placed before the Court any material to warrant the grant of the orders sought and that the order was discretionary. Further, that an order of stay of execution of an appeal was designed in such a way as not to have any party in a worse off situation than before.

8. He then argued that the Court should weigh the rights of a successful litigant as against those of the losing party and the winner should not be deprived unnecessarily of the fruits of his judgment. He deponed further that the Court balances the interests of the parties while ensuring that an appeal is not rendered nugatory. He stated that the Applicant had not shown the kind of loss he would suffer which cannot be compensated by damages if the judgment was enforced. On the contrary he said that

the Defendant's activities had made him not use his land since he bought it and he continued to lose much without compensation.

9. He then annexed as BNK 2(a) and (b) copies of the Statement if Defence and witness statements to show that the Applicant had pleaded and stated that he never resided on the land but tenants did and that none of the tenants expressed difficulty in the event the orders sought were not granted. He annexed the Surveyor's report dated 12/01/2021 which showed that the Applicant's parcel of land had a road of access.

10. Turning to the draft Memorandum of Appeal, the Respondent deponed that it showed that the Applicant had no arguable appeal. He repeated the deposition that the Applicant ought to have demonstrated substantial loss that would result if the orders sought were not granted, and that while showing that the Application was brought without undue delay, the Applicant should have given security for due performance of the decree. He then repeated that the Applicant did not in any way demonstrate in the Memorandum of Appeal that he acquired an easement over the Respondent's land. He then deponed that the Applicant had since changed goal posts to claiming that he acquired an easement over the land while he claimed all along that he bought the road of access. He then deponed that the application was without merit and designed to waste the Court's time.

11. The Second Application was dated 20/01/2023 and filed on 23/01/2022. It was bought under Section 3A of the *Civil Procedure Act* and Section 3(1) of the *Environment and Land Act* (ELC Act). In the Applicant who was the Defendant herein sought the following orders:

    1. ...spent

    2. That pending the hearing and determination of this Application this Hon. Court be pleased to order the restoration of the status quo that was prevalent before the evening of 16/01/2023 by ordering the Respondent to re-open the road of access to parcel No. Kitale Municipality/ Block 15/ Koitogos/ 564 that he closed down on that day.

    3. That this Hon. Court be pleased to review the and revise the directions given on 16/01/2023 in regard to the Application dated 16/01/2023

    4. ...spent

    5. That costs be provided.

12. The Application was based on the grounds that judgment had been delivered on 19/12/2022 and on 16/01/2022 the Applicant filed an the first application above; that the decree had not been drawn in terms of Order 21 Rule 8 and no draft had been forwarded to his learned counsel for approval; no application for execution had been made under Order 22 Rule 6 of the *Civil procedure Rules*; no application had been filed seeking the execution of the decree before ascertainment of costs; that late afternoon on 16/01/2023 the Respondent closed the road of access, the subject matter of the instant suit; the closure of the road did not comply with the due process over the execution of decrees; the act of closing the road of access constituted one of stealing a match on the Applicant; and the appeal shall be rendered nugatory by the closure of the road.

13. The Application was supported by the Affidavit of the Applicant. It was sworn on 20/01/2023. He repeated the contents of the grounds thereof save that he added that he served the Application dated 16/01/2023 on 17/01/2023; that the Respondent closed the road of access on 16/01/2023 in the evening; the closure amounted to an abuse of the process of the Court and a technicality designed to defeat both the application dated 16/01/2023 and the intended Appeal; that the directions given by the Court had since been affected by the acts od the Respondent of closing the road. He then annexed

and marked as DMG 2(a)-(d) photographs showing the situation of the ground after the closure of the road of access.

14. The Respondent opposed the Application through an Affidavit sworn on 28/01/2023 by him and filed on 01/02/2023. In it he deponed that the Application was res judicata, inept, bad in law and an abuse of the process of the Court. In regard to the Application being res judicata he deponed that by the judgment of this Court delivered herein on 19/12/2022 the rights of the parties herein in respect of the suit property were determined. He then went on to state that law cannot permit a party to re-litigate on the same issue or subject hence the doctrine squarely applied to the present case. He repeated the finding of the Court that the Defendant did trespass onto his land by using the access road and issued a permanent injunction against him and his agents, servants and or assigns as the judgment decreed.

15. The Respondent then stated on oath that the injunction was a negative order incapable of execution. At paragraph 11 he seemed to attack the Applicant's reliance on Order 22 of the *Civil Procedure Rules*, but he did not explain the fact clearly. He then deponed that the only remedy available if the Applicant felt aggrieved by his actions was to seek compensation.

16. He repeated that the Applicant was misleading the Court on oath that he was landlocked while the Report dated 12/01/2021 prepared by the Surveyor in charge of Trans Nzoia clearly showed that he had a road of access other than the one which was the subject herein. He stated that the applicant had failed to place before the Court material sufficient to warrant the grant of the reliefs sought hence his Application was unmerited and that in any event he would not be prejudiced if the Application was disallowed.

17. The two Applications were disposed of by way of written submissions which were made in two sets of one document, one for each party. The Applicant filed his dated 09/02/2023 on 10/02/2023. The Respondent filed his dated 14/02/2023 on 15/02/2023. Starting with those of the Applicant he summarized the two Applications and the directions of the Court on them. Further, that after judgment of the Court he filed a Notice of Appeal against the judgment and requested for proceedings herein. He cited Order 42 Rule 6 of the *Civil Procedure Rules* and submitted that the essence of an application for stay of execution was to preserve the substratum of the appeal. He summed it that the Court has to balance the interests of the parties noting that an appellant has a statutory right of appeal. He referred to the Eldoret ELC Land Case No. 200 of 2012, *Jaber Mohsen Ali & Another -v- Priscila Boit and Another*.

18. He summed it that he filed the application within 28 days of the delivery of the judgment, which period, to him, was timeous. He repeated that the road of access had been in use for over 20 years and that he had acquired an easement over the Plaintiff's land. He argued that if the judgment was enforced the substratum of the appeal would be lost. He relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR. He submitted that about security, he was ready to abide by any condition this Court would give him.

19. About the Application dated 20/01/2023, he submitted that it was not controverted that the road of access was closed on the evening of 16/01/2023. By that time the decree of the Court had not been drawn and no application for execution had been made to allow execution of the decree before taxation was made. His view was that in closing the road of access the Respondent wanted to defeat the purpose of the appeal and render the appeal nugatory. He differed in contention with the Respondent that an order of injunction was a negative order incapable of stay since the Applicant had been ordered not to use the road. He prayed that the two applications be allowed.

20. The Respondent submitted by first summarizing the two applications. He then went on to give three issues for determination in the Applications. These were, whether the orders of stay of execution

could issue, whether the order for re-opening the access road could issue and who to pay costs of the Applications.

21. On the first issue he submitted that the judgment of the Court was a negative one and not one that required the Applicant to take action in which case it would have been a positive one requiring stay of execution. His view was that the instant decree was a negative one since it only required the Applicant to stop doing something. To him, that being the case, an order of stay could not issue. He relied on the case of *Milcah Jeruto v Fina Bank Ltd* [2013] eKLR wherein the Court held that stay of execution could not issue where negative orders had been given.

22. Regarding the second issue, he reproduced the part of the judgment where this Court directed as to the right of the Defendant over the Respondent's property, which was that only the road from the Applicant's land to the School was the only access road recognized by the survey and which he could lawfully use. His submission was that the Applicant was seeking to suspend the orders of the Court which were declaratory in nature and that cannot be allowed.

23. The Respondent submitted further that what was open for the Applicant to do was to file another suit and that even Section 34 of the *Civil procedure Act* could not come to his aid. He relied on the case of *Civicon Limited v Mulji Devraj & 2 others* [2021] eKLR.

24. Lastly, regarding the third issue, he relied on Section 27 of the *Civil procedure Act* to argue that they follow the event. He relied on the cases of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR and *Little Africa Kenya Litmied v Andrew Meiti Jason* [2014] eKLR. He submitted that having been drugged (sic) to court with incompetent applications he should be paid costs of that.

Issues, Analysis and Determination

25. I have considered both applications, the law on them, being statutory and case law both cited and not cited, the submissions bt both parties. I am of the view that I will determine the two Applications using the First in First Out method. This is because the second application was filed by virtue of the first having been filed, and it was meant to vary the directions emanating from the first one while also praying for status quo pegged on the situation as was obtaining when the first one was filed. And as will become clear when I consider the second application, some of the prayers in it would have been overtaken by events for reason of the determination of the first application. The issues that commend themselves to me for determination regarding the first Application, thus, are:-

    (a) Whether the applicant has satisfied the conditions for grant of an order of stay of execution pending appeal.

    (b) Who to bear the costs of the Application.

26. I begin with the first issue. The power of the Court in granting an order of stay of execution is discretionary one. In exercising it, the Court must act judiciously. To be judicious it means that the Court ought to act within the law and do so reasonably, considering all issues or facts and rendering a reasoned decision. The Court of Appeal, in *COI & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR, has stated as much. In Brian A. Garner (2019). *Black's Law Dictionary*, 11th Edition, Thompson Reuters, MN, the term "judiciously" is defined to mean "to use sound judgment." Thus, the Court ought to apply its mind to the circumstances of the case and the law as any reasonable (learned) person would and demonstrate it in its determination that it did so.

27. An order of stay of execution pending appeal serves the purpose of preserving the subject matter of the appeal. It means that if the subject is not maintained before the determination of the appeal then

the appeal would rendered nugatory or meaningless. Thus, in in *RWW v EKW (*2019) eKLR the judge held:

> "......the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

28. The law on applications for stay of execution pending appeal in as a result of any decision of the Court at this is Order 42 Rule 6 1(2) of the *Civil Procedure Rules*. It provides as follows:-

> "(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."

29. The provision imports three basic requirements to be fulfilled by an applicant in order for his Application to succeed. Additionally, issues about stay of execution pending appeal have been litigated on in courts many times without number. Therefore, there is a plethora of decisions this Court shall draw guidance from as it determines the instant Application One such is the Court of Appeal case of *Halal & Another -v- Thornton & Turpin [1963] Ltd* [1990] eKLR. In it their, Lordships held that:

> "....thus the superior court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.
>
> In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo v Straman EA Ltd* (2013) as follows:
>
> > "In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory."
>
> These two principles go hand in hand and failure to prove one dislodges the other."

30. The phrase sufficient cause has been defined to mean bona fide and more than inaction on the part of a party. In *Parimal v. Veena*, (2011) 3 SCC 545, the Supreme Court of India tried to define the terms by stating that:-

> "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view

point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".

31. Regarding the satisfaction of the three requirements by the Applicant, in the instant suit the Applicant was the Defendant herein. In the matter the Plaintiff sought the main relief as an injunction against him over the use of an access road that he allegedly created over the Plaintiff's land. The judgment of the Court was delivered on 19/12/2022. By the judgment, the Court granted the relied of an injunction to the Applicant against using the access road he had been using over the Plaintiff's land. The judgment was effective the date it was delivered. The Defendant not apply either orally or formally immediately to stay it. Instead he brought the instant application on 16/01/2023. Clearly as the record shows, he did so, 28 days after the judgment.

32. Comparing the time taken vis-à-vis the expectation that the Application should be brought without unreasonable delay, this Court is of the view that once a decision of the Court is delivered, the party seeking an order of stay of execution of the same should move the Court immediately. Indeed, as shown from annextures DMG 2 and 3 of the Affidavit sworn by the Applicant on 16/01/2023, the Applicant filed a Notice of Appeal against the judgment of this Court only three (3) days after delivery thereof. What is not explained by him is why it took him twenty-five (25) days afterward to bring the instant Application if he wished to seek stay of execution of the decree herein.

33. It is curiously coincidental that the same day he brought the instant application is the same date the alleged closure of the road of access was done. He argues that the closure of the road was done in the evening of 16/01/2023, purposely to defeat the application herein, yet he also deponed at paragraph 5 of the Affidavit he swore on 20/01/2023 that he served the Application and directions of this Court on 17/01/2023, which was a day after the closure. It is inconceivable that the Respondent could read the mind of the Applicant and close the road to defeat the Application before he could learn of the existence of the Application. Be that as it may, the point is that the Applicant brought this Application with undue delay which was not explained, at all in the supporting Affidavit or the grounds of the application.

34. The Court is alive to, and has considered the submissions by the Applicant, that the road of access was closed before a decree could be drawn or application for execution made to proceed with it before taxation of costs as Section 94 of the *Civil Procedure Act* requires. First, the Court record bears that the decree herein was extracted on 21/12/2022 and received by the Plaintiff's Advocates' representative on 22/12/2022, the same date when the Applicant filed the Notice of Appeal and applied for proceedings herein. Again, the Order 21 Rule 8 which the Applicant sought to rely on gives the process of extraction of a decree or order of the Court after its decision. This Courts that under Order 21 Rule 8(3) the Deputy Registrar of the Court is permitted to sign a decree or order where there is no concurrence and Order 21 Rule 8(7) provides for where the Court approve a decree or order at the time of delivering the decision. While these two are exceptions to the process of parties drafting and exchanging decrees or orders for approval before execution, there is no evidence in this matter that the parties brought themselves within the exceptions. However, there is no evidence whatsoever that the decree which was extracted herein without being exchanged bore any errors or discrepancies with the judgment of the Court as to prejudice the Applicant in any way during its execution. Article 159(2)(d) of the *Constitution* of Kenya was enacted to take care of such minor infractions of the law. All that the Court should look at is substantive justice and not mere technicalities, and each case is always looked at on its

own merits. Order 21 Rule 8 was not enacted to defeat or delay justice, and it should be so. Thus, this Court does not find the submission holding any water.

35. Besides the above finding, the Applicant raised the issue of Order 22 Rule 6 not having been complied with firsts before execution. Order 22 Rule 6 is to the effect that a party desiring to execute a decree of the Court should first apply to the Court before execution thereof. That is the fact in all cases where execution is being sought. But what happens when an order or judgment of the Court is self-executing? By self-executing this Court implies that it takes effect immediately after it is given? Should parties against whom it is given linger on the other end of the case or matter as if no such order has been given simply because an application for execution has not been made? Of what purpose then is the need to apply to stay the execution thereof. In my view some orders or judgments of the Court take effect immediately without the necessity of the application for execution or even the taxation of costs. The two events referred to are attendant to the substance of the order or judgment. They do not stop the effect of the order or judgment as long as it takes effect immediately. The law and execution of decrees and orders of the Court should be interpreted and applied holistically. Where lack of an application for execution or taxation of costs does not form the condition precedent for the effectiveness of the order or judgment, a party should comply with it forthwith unless there is an order staying the judgment or order.

36. Second, the Court notes that the failure to extract the decree first was not proffered as an explanation for the delay. In any event it could not have amounted to sufficient reason for the delay in bringing the instant application. Third, and of importance, the Applicant treated this Court to the submission that execution of the decree herein could not take place. I think not. For clarity purposes, this Court uses the facts of the instant case to explain the meaning and import of a self-executing order or judgment. In the instant case, the Court issued an injunction against the Defendant. The decree was extracted on 21/12/2022. Granted that it was served the same day or the following day or so soon thereafter but before an application for stay of execution was given, should the Defendant continue trampling and trivializing the decree simply because no application for execution was made? What execution was to be made apart from him stopping the trespass that he Court found him to have been doing? And even then, the Applicant was made aware of the judgment of the Court immediately after the delivery thereof that he was injuncted against using the access road and the injunction was effective forthwith. Why does he require the decree to be extracted and an application for execution be made and even taxation of costs be done. In my view a party who carries the import of the provisions of the law that far is one who deliberately proceeds on a trajectory to abuse the process of the Court and with impunity trivializes the orders of the Court and should be punished for contempt of Court.

37. Since the judgement was not stayed immediately after delivery of the judgment it means that with regard to its main relief granted, that is to say, injunction, it was effective immediately delivery was done.

38. Furthermore, while the Court does not support and will never breach of the law, this Court observes that on 19/12/2022 it found that the Defendant was a trespasser by virtue of creating a road of access over the Plaintiff's land, namely, Kitale Municipality/ Block 18/Bidii/238. Without the judgment being set aside on appeal or by way of review, that effectively settled the issue herein. Absent of an order of stay of execution having been granted immediately after judgment or so soon thereafter, and there having not been any order of the Court stopping the Respondent from changing the character of the subject matter, that is closing the road of access which the Applicant claims to have been in rightful use but the Court has found otherwise, the Respond had all proprietary rights over his private property, being land parcel No. Kitale Municipality/ Block 18/Bidii/238, including fencing it and or using it in the manner and within the limits provided by law. Painful as it may, it included fencing of the purported road of access on it.

39. This Court now turns to the second requirement, which is sufficient reason. First, it is worth noting and repeating that Order 42 Rule 6(1) of the *Civil Procedure Rules* provides in part that,

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order,..."

40. The provision is clear that it is not automatic that once a party has filed an appeal he/she is entitled to stay of execution or proceedings. There has to be sufficient reason for the Court appealed to or from to grant such an order. Sufficient cause has been defined above and I need not rehash the definition. In this case, the Applicant argued that he would be landlocked and that he had filed an appeal from the judgment of the Court. First, regarding the landlocking of his parcel of land, the Court has pronounced itself on that issue that he has another road of access. He is not explaining why he cannot respect and effect the survey as was done even before he bought the parcel of land that he argues entitles him to access the main road to Kapenguria through the Respondent's land. He better should remember that a bird in hand is worth two in the bush, and go for that which was lawfully granted by the surveyors in relation to his parcel of land. Thus, in my view no sufficient cause has been demonstrated by the Applicant.

41. Additionally, the Applicant ought to demonstrate substantial loss that he would suffer is the orders sought were not granted. The loss he argues is that he would be landlocked, which is not true. He has a road of access from his land to the main road but through to the School, as shown on the Registry Index Map. In any event, the Applicant never demonstrated to this Court that since the time of judgment when he was injuncted he continued using the access road and had no other access to the road until when he sought to orders of stay of execution. Much more is the imagination that can be that the Applicant and his tenants or agents have never moved from his land to the main road even after the road of access was closed on 16/01/2022. I find no substantial loss demonstrated by him.

42. About the intended Appeal here-from being rendered nugatory, I am of the view that it will not. The issue in this matter is a road of access over someone else's land. It is not denied that the Defendant was actually using the Plaintiff's land without his permission to create a road of access that was not lawfully recognized. He argued at first that he bought the same from the previous owner of the suit land. He did not provide any evidence thereto. Later he changed his assertions that he had been using the road for over 20 years hence acquired an easement thereof by way of prescription. He did not provide evidence of use of the same road for over that period. Even if he could have, since he testified that he was granted that permission, it goes without saying that the grantor had the right to withdraw it and prescription cannot arise. But those issues were settled in evidence. Should the appeal succeed, the road shall be re-opened. The appeal will not be rendered nugatory.

43. Regarding security for due performance of the decree, I find that more prejudice would be suffered by the Respondent who, by the continued use of his land as a road of access, without compensation whatsoever, than by the Defendant not using the road of access. Since the Defendant has not offered any security at all over the prayer, I find that his application fails on that limb also.

44. The upshot is that the Application dated 16/01/2023 is wholly unmeritorious and a perfect candidate for dismissal. I hereby dismiss it.

45. Regarding the Application dated, 20/01/2023, the prayers therein were specific. It was opposed on the main ground that it was res judicata. The argument was the issues therein were considered by the Court earlier and decided on and hence settled. Res Judicata is provided for under Section 7 of the

Civil Procedure Act. Under it, the parties must be the same or those through whom they claim must be doing so under the same title over the same issue which ought to be directly or substantially in issue as decided upon on merit by a court of competent jurisdiction. This Court does not agree that the issue of closing the road of access arose earlier on in this matter. What has been in issue which was decided upon was an order of injunction against the Defendant using the road of access.

46. That being the case, I now proceed to consider the application. First, the Applicant prayed for the application to be heard on a priority basis in relation to the one dated 16/01/2023. The Court directed that both be heard together. The other prayer was for the review of the directions of this Court of 16/01/2023. These were that the application be canvassed on a later date, being the 13/02/2023. That was been done exactly on that date hence the prayers was overtaken by events. The third prayer was that the road of access allegedly closed on 16/01/2023 be re-opened so that the status quo as at 16/01/2023 be maintained. While it was not indicated as to what the maintenance of the status quo was to be depended on, this Court is of the view that it could only be intertwined with the consideration and determination of the merits of the prayer for order of stay of execution. Since the Application on stay of execution has failed, this prayer in the latter naturally dies. As all the prayers except that of costs of the latter application have failed, the one of costs will not succeed either. I would therefore award the costs of the application dated 20/01/2023 to the Respondent.

47. The clear conclusion of the matter is that both Applications herein have failed. The respondents will have costs thereof.

48. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 27TH DAY OF MARCH, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE