



**Kasoka v Muli & another (Environment and Land Appeal  
E016 of 2022) [2023] KEELC 16598 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16598 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E016 OF 2022  
A NYUKURI, J  
MARCH 23, 2023**

**BETWEEN**

**MUTISYA KIKWA KASOKA ..... APPELLANT**

**AND**

**JOSEPH MUNYAO MULI ..... 1<sup>ST</sup> RESPONDENT**

**DAVID MUSOYA KIKWA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the entire judgment and decree of the court delivered on  
22nd July 2021 by Hon. E. H. Keago, CM in Machakos Civil Suit No. 871 of 2012)*

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated February 28, 2023 filed by the Appellant seeking the following orders;
  - a. Spent.
  - b. That this Honourable Court be pleased to issue a release order for the Applicant who has been committed into civil jail pending the hearing and determination of this application unconditionally.
  - c. That this Honourable Court be pleased to grant the Applicant cash bail/bond pending hearing and determination of this application.
  - d. That this Honourable Court be pleased to issue an order for stay of execution of the lower court judgment, decree and certificate of costs pending hearing and determination of the appeal.



- e. That this Honourable Court be pleased to issue an order setting aside the warrant of arrest, decree and judgment of the lower court in CMCC No 871 of 2012 at Machakos pending hearing and determination of the Appeal.
  - f. Any other order the Honourable Court may deem fit and just to grant.
  - g. Costs be provided for.
2. The application is premised on the grounds on its face as well as the affidavit sworn by the Applicant on February 28, 2023. The Applicant's case is that he was joined to Machakos CMCC No 871 of 2012, six years after the suit had been filed and that judgment was entered against him by the lower court. Further that although he did not enter into a sale agreement with the Respondents, the lower court granted the Respondents his land registered in his name and known as Machakos/Kaliluni/694. He also stated that he had contested the damages awarded to the Respondents by the lower court which he believes is too high.
  3. The Applicant also averred that he is old and sickly with scheduled regular visits to a physiotherapist, due to swollen legs and is therefore in need of urgent medical care. He also stated that he had never been served with notice to show cause. According to him, he will suffer irreparable loss and damage and his medical condition will worsen unless he is set at liberty from civil jail.
  4. The application was opposed. The 1<sup>st</sup> Respondent, Joseph Munyao Muli filed a replying affidavit sworn on 6<sup>th</sup> March 2023. It was the 1<sup>st</sup> Respondent's case that the Applicant had not made any attempt to offer security as is required in law. Further, the 1<sup>st</sup> Respondent asserted that the court lacked jurisdiction to grant prayers (b), (c), and (e) herein above as that was the preserve of the trial court.
  5. The 1<sup>st</sup> Respondent stated that a similar application was made and a ruling delivered on May 4, 2022 dismissed the application for stay of execution pending intended appeal and that therefore this court is *functus officio*. He denied the Applicant's allegation that he joined the Appellant to the suit in the lower court after six years of filing suit and alleged that it is the 2<sup>nd</sup> Respondent who was joined to the suit later as the Appellant was the only one who had been sued at the institution of suit.
  6. According to the 1<sup>st</sup> Respondent, the Appellant participated in the sale agreement subject to this matter as he was a witness to the agreements in respect thereof. He faulted the treatment notes of the Appellant and stated that the Appellant had failed to produce stamped medical notes or a medical report.
  7. The Respondent stated that on February 22, 2023 when the Appellant was committed to civil jail, he never raised the issue of having ill health and that the allegation that his health will suffer was meant to mislead the court. The 1<sup>st</sup> Respondent maintained that the Appellant was lawfully committed to civil jail because he failed to offer proposal of settlement of the decree. His position was that the application is prejudicial as it will scuttle his enjoyment of the fruits of his lawfully obtained judgment. He stated further that the Appellant had been indolent as he had never followed up on this matter since May 11, 2022, and that the application was an afterthought. No response was filed by the 2<sup>nd</sup> Respondent.

### **Analysis and determination**

8. I have carefully considered the application and the response. The issues that arise for determination are;
  - a. Whether orders of stay of execution of judgment pending appeal should issue.
  - b. Whether this court should set aside warrants of arrest, decree and judgment of the lower court pending the hearing of the appeal.



9. It is not in dispute that the Appellant is aggrieved with the decision of the Chief Magistrate in Machakos CMCC No 871 of 2012, which led to the filing of this appeal. The appeal is yet to be heard, as no record of appeal has been filed and no directions have been made in regard to the hearing of the appeal. Therefore, it will be irregular, unprocedural and contrary to the tenets of fair hearing to set aside the judgment of the lower court before the appeal is heard on merit. Therefore, the prayer to set aside judgment of the lower court is declined at this stage.
10. Jurisdiction to grant stay of execution pending appeal is provided for in Order 42 Rule 6 of the Civil Procedure Rules which grants the court the power to grant stay of execution pending appeal where the Applicant demonstrates the following conditions;
  - i. That he stands to suffer substantial loss if stay is not granted.
  - ii. That security for the due performance of the decree has been given by the Applicant; and
  - iii. The application is made without unreasonable delay.
11. In the instant suit, the Applicant states that his health is at risk as he has been sickly and needs medical attention. He attached medical notes from Machakos Level 5 Referral Hospital. The notes shows that on February 17, 2023, the Applicant who is aged 79 years visited the said hospital with severe knee sprain and therefore needs weekly physiotherapy exercises. The Applicant is currently in civil jail at Machakos GK Prison for failure to settle the decree in which the trial court ordered payment of Kshs 500,000/- for general damages, Kshs 210,100/- for special damages for damaged crops and trees on the suit property measuring 1.5 acres. In the appeal, the Applicant has faulted the judgment inter alia on the sums awarded by the trial court. I have considered the memorandum of appeal and I am convinced that the Appellant has raised arguable grounds.
12. While the 1<sup>st</sup> Respondent has judgment in his favour, the Appellant has a right of appeal which he has exercised by filing the appeal and therefore the interests of both parties herein ought to be protected. The 1<sup>st</sup> Respondent's contention that this court is functus officio for declining an application for stay pending intended appeal, which application was made in Machakos ELC Miscellaneous Application No E060 of 2021, is not applicable in the circumstances of this case as at the time of the said application, there was no pending appeal upon which a stay would be granted and the court stated as much in paragraph 14 of that ruling. I therefore find and hold that this court is not functus officio on the question of stay of execution pending appeal. As the Applicant has stated his health is at risk, being aged 79 years, I find that he stands to suffer substantial loss if stay of execution is not granted.
13. In the premises, the application dated 28 February 2023 is allowed only to the extent that this court hereby grants orders of stay of execution of the judgment and decree in Machakos CMCC No 871 of 2012 pending hearing and determination of this appeal on condition that the Appellant deposits in court security for the due performance of the decree a sum of Kshs 300,000/- in 45 days. The Applicant shall forthwith be released from civil jail for 45 days. In default on the part of the Applicant, execution to proceed in whatever manner the 1<sup>st</sup> Respondent deems fit.
14. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23<sup>RD</sup> DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**



Mr. Mukula for 1<sup>st</sup> Respondent

Appellant in person – present

Ms Josephine – Court assistant

