



Theuri v Mochama (Suing as the Legal Representative to the Estate of Mochama Ong'ondo – Deceased) & 2 others (Environment and Land Appeal 6 of 2021) [2023] KEELC 16688 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 6 OF 2021
MN KULLOW, J
MARCH 22, 2023**

BETWEEN

JAMES W THEURI APPELLANT

AND

**TERESA NYABOKE MOCHAMA (SUING AS THE LEGAL REPRESENTATIVE TO THE ESTATE OF MOCHAMA ONG'ONDO – DECEASED) 1ST RESPONDENT
LAND ADJUDICATION OFFICER OLOLCHANI 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

(The decision by Onyango J in Kisii ELC No 918 of 2016)

RULING

1. By Notice of Motion dated March 8, 2021, the Appellant/ Applicant sought for the following orders: -
 - a) Spent.
 - b) Spent.
 - c) That pending the hearing and determination of this Appeal, this Honorable Court be pleased to issue an Order of Stay of Proceedings before the Subordinate Court, vide Kilgoris Magistrate ELC Case No 24 of 2020, and suspend the taking of effect and implementation of the Court Order dated the 18th day of February 2021, which orders have the efficacy of evicting the Appellant from his own land registered in his name and has been decreed in his favor as against the family of the 1st Respondent by three different courts, inclusive the Court of Appeal
 - d) Costs of the suit and costs of this Application be borne by the 1st Respondent.



2. The application is premised on the 17 grounds thereof, the Applicant's Supporting Affidavit sworn on even date with annexures marked "JWT" 1 – 9 and the Supplementary Affidavit sworn on June 28, 2021. The applicant avers that he is the owner of the suit property LR No Transamara/ Ololchani/863; pursuant to the adjudication process which was never challenged nor appealed against.
3. It is his contention that the 1st Respondent has since mounted a fresh suit before the Magistrates Court against him whereas the dispute between the parties over the same subject matter had already been litigated upon from Kilgoris Magistrates' Court vide Kilgoris PMCRS No 863 of 2010, to Kisii ELC Court vide Kisii ELC Case No 260 of 2012 through to the Court of Appeal vide Court of Appeal Civil Appeal No 3 OF 2017. That the decisions of all the three courts were on final determination on merit, of the issues sought to be relitigated upon in the instant suit hence the instant Appeal.
4. The effect of the said decisions by the ELC court and the Court of Appeal over the subject matter herein was to dismiss the 1st Respondent's claim over the suit parcel and ordered for the eviction of Mellen Mbera who is the daughter of the 1st Respondent and who was claiming on behalf of the estate of the 1st Respondent. The Applicant now contends that the suit and the proceedings in the Magistrate's Court are an attempt to appeal against the decisions of the Kisii ELC Court and the Court of Appeal through the back door.
5. He maintained that the fresh suit at the Magistrate's Court is res judicata, the claim having been pursued and determined with finality by the Kisii ELC Court and the Court of Appeal and thus the Magistrate's Court is devoid of jurisdiction to entertain and adjudicate the same claim, between the same parties over the same subject matter. Further, the orders and decree issued pursuant to the said decisions in his favor has since been executed.
6. He further claims that the injunctive orders issued by the trial court on the February 18, 2021 in favor of the 1st Respondent, has the effect of preventing his use/ dealings on the land and evicting him from the suit land and consequently restoring the same to the 1st Respondent contrary to the Orders of the Court of Appeal and the Kisii ELC court. He contends that should the matter be allowed to proceed to full hearing he stands to suffer prejudice, mental anguish and irreparable loss as he has all along been using the suit land as his main source of livelihood. He urged the court to allow the Application in the interest of justice.
7. In his Supplementary Affidavit, he denied being in contempt and stated that the Court of Appeal and ELC Court in Kisii expressly ordered for the eviction of the 1st Respondent's daughter from the suit land. He further reiterated that the issues raised in the trial court were res judicata and thus the said court was not vested with the requisite jurisdiction to entertain or adjudicate the matter.
8. The application was opposed; the 1st Respondent filed a Replying Affidavit sworn on April 19, 2021, together with annexures marked "TM 01 & 02". It was her contention that trial court in issuing the orders of February 18, 2021, invoked the provisions of section 13 of the ELC Act for purposes of preserving and conserving the suit property pending the hearing and determination of the suit. It is further her claim that the Applicant in total disregard of the interim orders of injunction granted by the trial court, proceeded to demolish the developments on the suit property with the intention of defeating justice. That the filing of the instant Application and Appeal was to avoid the consequences of disobedience of the said orders by the court.
9. She averred that owing to the said disobedience of the court orders, the Applicant as a contemnor is required to purge the said contempt before seeking any other remedy before the court. She maintained that the injunction orders issued by the trial court remains valid until the same are set aside and/or vacated.



10. On the issue of res judicata on account of the matters before the Kisii ELC court and the Court of Appeal; it was her contention that she was not a party neither was the estate of her deceased husband subject to the said proceedings and the purported eviction did not constitute a demolition of the developments made by her deceased husband.
11. She deposed that the matter was not res judicata as alleged by virtue of Article 40 of the Constitution, where a title was obtained fraudulently. She maintained that no determination had been made affecting the estate of her deceased husband. She thus urged the court to dismiss the instant application and for the Applicant to obey the orders of injunction granted by the trial court.
12. The Application was canvassed by way of written submissions. Both parties filed their respective submissions which I have read and taken into consideration in arriving at my decision.
13. Having reviewed the Application, responses thereto and the rival submissions, the issues that arise for determination are as follows;
 - i. Whether the Applicant herein is in contempt of the Orders issued by the trial court in Kilgoris Magistrate’s Court ELC Case No 24 of 2020 on February 18, 2021.
 - ii. Whether the Applicant has met the conditions necessary for the grant of stay of proceedings.

I. Whether the Applicant herein is in contempt of the Orders issued by the trial court on February 18, 2021

14. The 1st Respondent maintains that the Applicant is a contemnor who has refused and/or failed to purge the contempt before seeking the audience of the court. It is his contention that the Application was a guise to avoid being punished for the lawful disobedience of the orders of the court issued on the February 18, 2021 by the trial court in Kilgoris Magistrate’s Court ELC Case No 24 of 2020. It is his claim that the applicant is a contemnor who is undeserving of the reliefs being sought in the instant Application and should therefore be denied audience before this court.
15. The Applicant on the other hand denied being in contempt and relied on various decisions by the Court of Appeal and ELC Court in Kisii, which expressly ordered for the eviction of the 1st Respondent’s daughter from the suit land. He maintained that the trial court was not vested with the requisite jurisdiction to entertain the suit as filed.
16. The Court in Kenya Union Of Post Primary Teachers & 3 Others v Njeru Kanyamba [2018] eKLR cited with approval the decision of Gikonyo JA in the case of Rose Detbo v Ratilal Automobiles Ltd & 6 Others, CA No 304 of 2006 (171/2006 UR): where it was held that: -

“Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt...and whether the court will hear the contemnor is a matter for the discretion of the court depending on the circumstances of each case.”
17. I have looked at the various decisions of the High Court, ELC and the Court of Appeal, all touching on the subject matter in the present case and I am of the considered opinion that the Applicant’s actions complained of and/or perceived as being in contempt of lawful court orders; the same were pursuant to the various orders issued by superior court and in particular the decision by Onyango J in Kisii ELC No 918 of 2016, which directed the eviction of the Respondent from the suit land. The Applicant in my view is not guilty of any lawful disobedience as alleged by the Respondent and therefore the requirement to purge the contempt before seeking audience of the court does not apply in the present



case. I see no good reason as to why the applicant should be denied audience and I will proceed to determine the remaining issues.

II. Whether the Applicant has met the conditions necessary for the grant of stay of proceedings.

18. Stay of proceedings is a grave and draconian interruption of a party's fundamental right in prosecuting his case, it impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent. The court must thus exercise its discretionary power sparingly/ judiciously by considering the facts and circumstances of each case.
19. Order 42 Rule 6(1) of the Civil Procedure Rules provides the legal framework which governs the stay of proceedings. Further, this court has powers to stay proceedings under its inherent jurisdiction reserved under section 3A of the Civil Procedure Act. In *Jadva Karsan vs Harnam Singh Bhogal* [1953] 20 (1) EACA 74 it was held that: -

“It is true that there is a wider power under section 97 [now 3A of the Civil Procedure Act] to stay proceedings where the ends of justice so require or to prevent an abuse of the Court process.”

20. The principles to be considered in an Application for Stay of Proceedings were discussed by Ringera J (as he then was) in *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No 43 of 2000 where he stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”. (emphasis mine)

21. Guided by the above decision; the 3 conditions to be met are; arguable appeal, sufficient cause and that the Application was filed timeously.
22. The Applicant must demonstrate that he has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal would be rendered nugatory. I have looked at the Memorandum of Appeal and I note that the Appeal is basically founded/ premised on the issue of Res Judicata. It is his claim that the subject matter in the trial court Kilgoris Magistrate's ELC Case No 24 of 2020 has been heard and finally determined on merit by the High Court Kisii, the Court of Appeal in Kisumu and ELC Court in Kisii. He thus contends that the suit is res judicata and the trial court is not vested with the requisite jurisdiction to entertain the same.
23. This court is mindful not to delve into the merits of the Appeal at this juncture, however I have looked at the various decisions annexed to the Application herein and I note that if the Appeal is allowed then its effect would touch on the jurisdiction of the trial court to entertain the suit before it. Therefore, if the proceedings are not stayed and the Appeal is allowed, the same would amount to a waste of judicial time and an academic exercise.



24. In *Niazsons (K) Ltd v China Road & Bridge Corporation (Kenya)* [2001] e KLR, Onyango-Otieno, J (as he then was) held that: -

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

25. As regards delay in filing the Application, the Order and Proceedings sought to be appealed against were made on 18/2/2021 while the instant Application was filed on the March 8, 2021, that is within 18 days. Accordingly, I find that the Application was filed timeously and without inordinate delay.

26. Having looked and considered the facts and circumstances in the instant case critically; it is my considered opinion that it is in the interest of justice to exercise this court’s discretion in favor of the Applicant and grant stay of proceedings as sought, pending determination of the instant Appeal. I am therefore satisfied that the Applicant has demonstrated to the satisfaction of the court, that he has a sufficient cause and an arguable Appeal to warrant issuance of the orders being sought.

Conclusion

27. In the upshot, I accordingly find that the Application dated March 8, 2021 is merited and I hereby proceed to allow the same on the following terms: -

- i. An Order of Stay of Proceedings be and is hereby issued in Kilgoris Magistrate Elc Case No 24 of 2020, and further the Court Order dated the 18th day of February 2021 is hereby suspended from taking of effect and implementation, pending the hearing and determination of the Appeal.
- ii. That the Appellant is hereby directed to file the Record of Appeal within 45 days from the date of this ruling.
- iii. Costs of the Application to abide the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 22ND DAY OF MARCH, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. O.M. Otieno for the Applicant/ Appellant

Mr. Okemwa for the Respondent

Court Assistant- Tom Maurice/ Victor

