



Meru Water & Sewerage Services Registered Trustees v M’mbijiwe (Environment and Land Appeal 28 of 2012) [2023] KEELC 16149 (KLR) (15 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 28 OF 2012**

**CK NZILI, J
MARCH 15, 2023**

BETWEEN

**MERU WATER & SEWERAGE SERVICES REGISTERED
TRUSTEES APPELLANT**

AND

KINYUA M’MBIJIWE RESPONDENT

RULING

1. The application dated 19.12.2022 seeks for an order of inhibition to issue inhibiting any dealing over LR No Ntima/Igoki/2032 and for this appeal to be heard and determined on the basis of the incomplete record of appeal. The grounds are set out in the affidavit of Patrick Mugendi sworn on 19.12.2021. It is the applicant’s contention that the Water Appeals Board (W.A.B) decision dated 2.3.2012 awarded compensation to the respondent on account of alleged trespass and loss of user. This appeal was filed on 21.3.2012. That thereafter, a stay was granted on 13.3.2017 pending the hearing and determination of the appeal. That the Water Appeals Board has failed to forward its record to this court despite several letters and even a warrant of arrest against the legal officer. Despite this, the appellant says that they have found out that the respondent has clandestinely offered the suit land as collateral for a loan facility and the land is at the verge of being auctioned or alienated so as to steal a match against it and to dissipate the substratum of the appeal.
2. In a replying affidavit dated 16.1.2023 the respondent has termed the application as without merits for the appeal has taken 10 years without prosecution keeping him in the corridors of justice for no reason to age here while pursuing this matter like his late father. He admits that he took the loan in 2020 and that the applicant should be ordered to deposit Kshs 20 million in an interest-earning account as a condition for inhibiting the land, since the decreed amount has accrued over the years out of the award issued in 2008.



3. With leave of court, parties filed written submissions dated 19.1.2023 and 23.1.2023, respectively. The appellant submits the loan is not being serviced and that the suit land was at the verge of being auctioned which will make the substratum dissipate, yet it was a critical infrastructure serving the entire Meru town and its environs, with water.
4. On the delay in prosecuting the appeal, the applicant submitted that the delay was not attributable to it but the trial tribunal. Reliance was placed on Section 68(1) of the *Land Registration Act* 2012, since the subject land houses a massive water treatment plant at a great risk which this court should protect and preserve. Further, the applicant relied on *Joseph Kagiri M'Turuchiu v M'Mwirichia M'Iguatu & Cezerina Karoki M'Iguatu* (2021) eKLR, *Elly Jepkoech Limo v Susan Wangoi Kibe & another* (2020) eKLR citing with approval, *Joel Mugambi Mukira & others v County Government of Nyeri* (2019) eKLR on the proposition that an inhibition order preserves the property in dispute pending an appeal and therefore, in this case, there should be preservation of the land to forestall any disruption of water supply to Meru Township and its environs.
5. As to whether the appeal should be heard on an incomplete record of appeal, the applicant submitted that no attempts have been spared to seek the record, which attempts have all failed, leaving the only remedy as to allow and determine the appeal based on what was available for the interest of justice and fairness to prevail.
6. On his part, the 1st respondent submitted that the appellant has tried to frustrate the appeal and hence should offer security for the due performance of the decree. Reliance was placed on *Kipsang Chepkwony v David Kiptoo Chelgut & another* (2014) eKLR.
7. The court has gone through the application, the reply and written submissions filed by the parties. From the court record, the appeal was filed on 21.3.2012 whereof the 1st respondent entered an appearance on 30.5.2012. By an application dated 2.7.2015, the applicant sought for consolidation of appeals No's 30/2012, 31/12. In Misc. Application No 18 of 2013, the 1st respondent had sought for the adoption confirmation and execution of the decision and award by the WAB Similarly, by an application dated 2.2.2017 the appellant sought for a stay of execution of the award dated 2.3.2012. Another application dated 7.2.2017 was also filed by the 1st respondent seeking the dismissal of the appeals for want of prosecution. Later on, the initial 1st respondent passed on and an application dated 15.2.2018 was filed to substitute him.
8. The record indicates that the application dated 2.2.2017, was allowed in terms of prayer number 3 and the WAB ordered to transmit the original file. The Deputy Registrar wrote a letter dated 4.9.2018 calling for the file which letter was received by WAB on 12.10.2018. Warrants of arrest were also signed on 27.3.2017 against the legal officer. By consent dated 13.3.2017 the application dated 2.2.2017 was allowed. Consolidation of the appeals was also made with file no 20/2012 being the lead file and the County Government of Meru replacing the Municipal Council. As to the applications dated 2.2.2017 and 27.3.2012, the stay was allowed in terms of prayer number 3 of the application dated 2.2. 2013. The application dated 15.2.2018 was also allowed on 19.4.2018. The record shows that the Deputy Registrar made frantic efforts to get the WAB file in vain until this court issued a warrant of arrest against the legal officer on 27.3.2019.
9. Thereafter, on 19.11.2020 the court was told that the parties were pursuing a possible Alternative Dispute Resolution. When the matter came up on 9.4.2021, counsel for the 1st respondent told the court that he had found the tribunal proceedings and was awaiting certification of the same since the file was available. Come 22.9.2021, counsel for the 1st respondent changed tune and told the court that he was yet to obtain the proceedings. A warrant of arrest was once again issued against the legal officer



for the WAB There is, however, no evidence that the appellant extracted the same or proceeded to have it executed by the court bailiff.

10. With this background, the suit property as LR No Ntima/Igoki/2032 is alleged to have been given to the County Government of Meru by the 1st respondent in exchange of a commercial Plot No 51 Gakoromone now Block 11/299 Meru town, hence becoming a public utility property. From the judgment on page 24, it appears that the title deed for LR. No Ntima/Igoki/2032 was issued on 13.7.2010 following which the owner charged it with Barclays Bank Limited and later on with Agricultural Finance Corporation. It was ultimately discharged in 2006.
11. The WAB made a finding that the 1st respondent had not surrendered the title deed or formally accepted or taken possession of the alleged alternative plot No
12. Having set the background, this court is asked to issue inhibition orders while on the other hand, the 1st respondent urges the court to find the applicant should post security for the due performance of the decree equivalent to Kshs.20 million, since the decreed amount has accrued a lot of interest.
13. From the official search attached to the application, the land became registered in the name of Kinyua M'Mbijiwe on 8.6.2017. A title deed was re-issued on 10.1.2020 and a charge was registered on 2.5.2020 in favor of Resolution Savings and Credit Cooperative Societies Limited for Kshs.5 million.
14. The applicant has averred that the loan has not been serviced and that the property risks being auctioned to the detriment of the residents of Meru town and its environs, who rely on the land as a water source. Unfortunately, no material evidence has been placed before this court to support such serious allegations. The court cannot act on speculations or suppositions. Secondly, this court granted stay orders on 13.3.2017. There is no evidence that the said orders were served upon the respondents at the time they were issued. The applicant did not bother to seek for any injunctive orders against the subject land yet it was common knowledge that the property was housing crucial public facilities. It is not the first time that the applicant is realizing that the property is charged going by the record in this file.
15. The tribunal made a finding that the original title deed was always in the name of the 1st respondent since 2010 and had not been surrendered to the appellant if at all, there was an exchange of land with Plot Number 51. The appellant at the filing of this appeal never sought for inhibition orders against the title or sought to stop any prejudicial transactions over the suit land based on public interest before the property was transmitted to the 1st respondent, yet it was aware that the initial proprietor had passed on in 2017. The appellants for the last ten years have either ignored their rights or simply slept on them in order to safeguard whatever is alleged to be public interest over the suit land. The applicant knew since 2012 that the title deed herein was charged.
16. The purpose of inhibition orders is to safeguard the substratum of a suit for a period specified therein. There is no dispute that the appellant has been in possession of the suit land though it has been termed as a trespasser by the 1st respondent.
17. In *Mwongera Mugambi Rintari & another v Florence Imathiu* (2014) eKLR, conservatory orders of inhibition had been sought to stop any dealings or transactions over LR No Ntima/Igoki/943. The Court of Appeal found the application as incompetent since it was going to serve no purpose as the pending appeal was already heard and secondly, since the administrator of the estate was a mere trustee who was to administer the estate subject to the supervision of the High Court. Further, the court held that mere allegations of the wastage of the estate would not suffice to prove the same. In the case of *Alice Karuru Kithinji v Gideon Kithinji Limberia* (2017) eKLR, the Court of Appeal issued inhibition orders in order to give the wife to the respondent a measure of protection over a commercial property.



The trend flowing from the cited case law is that the preservation of the substratum of an appeal is a key purpose of an inhibition order. In this appeal, what is at issue is the award for damages assessed at Kshs.26,853,494/= dated 2.3.2012. In *Kabeere M'Mbijiwe v Tana Water services Board and 2 others* (2016) eKLR, the court adopted the award and the draft decree for execution and enforcement on 20.11.2016. This order was never appealed against or set aside. Even while aware of this order, the applicant has been inactive in prosecuting the appeal and blaming the delay on the alleged missing WAB file. This court issued warrants of arrest which the applicant has not caused to be executed.

18. As regards the record, counsel on record for the 1st respondent reported being in possession of the proceedings. The appellant never made a follow-up of this crucial lead. See *Lake Victoria South Water Services Board v Jicho Enterprises Ltd* (2021) eKLR.
19. In the case of *Malcon Bel v Hon. Daniel Toroitich Arap Moi & another*, the Supreme Court of Kenya held that the interest of justice was a critical cog in decision-making. Further, in *Eastern Produce (K) Ltd v Rongai workshop and Transporters Ltd and another* 2014 eKLR, the court held that a party must give reasons for the delay and that justice can still be done to the parties despite the delay.
20. In this application, the applicant blames the WAB for the delay. Order 42 Rule 15 of the *Civil Procedure Rules* provides that the court appealed against shall send with all practical dispatch all material papers in the suit called by the court to which such an appeal is preferred. Further, a party may on application and upon payment of the requisite fee obtain copies of such papers as aforesaid. Further, Order 42 Rule 2 *Civil Procedure Rules* requires an appellant to file a certified copy of a decree appealed against as soon as practically possible. In this application, the appellant has not been proactive enough to obtain and or supply at the very least the decree appealed against so that the appeal can be admitted. There is no evidence that the appellant has written a single letter to the Registrar of the WAB seeking for copies of the record.
21. In *Hassan Nyange Cabro v Khatib Mwashetani & 3 others* (2014) eKLR, the Supreme Court of Kenya was faced with a situation where the counsel had said that he had exercised all due diligence to obtain the trial court's proceedings to no avail, which unfortunately going by the last correspondence cast doubt on the assertion. The court considered whether it was in the interest of justice to turn away an applicant with a prima facie case who had exercised due diligence in pursuit of his cause but was impeded by the slow-turning wheels of the court's administrative machinery. The court held that though there was prejudice as to the representation of the people of Lunga Lunga constituency, the applicant could not suffer for no default on his part.
22. In this appeal, efforts have been made by the court to access the record from WAB though this effort has not been supplemented by the applicant. That notwithstanding, the court still finds it would not be in the interest of justice to hear the appeal based on an incomplete record.
23. Similarly, and as indicated above, stay orders are still subsisting to date, which ideally binds the 1st respondent not to deal with the subject land while the appeal is pending, going by the doctrine of lis pendens. On the issue of security for the due realization of the decree, again the 1st respondent cannot purport to derive benefit out of his inaction and lack of sincerity, more so, having told the court that he was in possession of the tribunal proceedings, which he appears to have deliberately withheld from the court. He has therefore equally contributed to delay in the hearing of the appeal.
24. In view of the foregoing the application dated 19.12.2022 is hereby dismissed.
25. The appellant is hereby ordered to file and serve the record of appeal within 30 days from the date hereof failure of which the appeal dated 2.3.2012 shall stand dismissed. The interim orders of stay of execution are hereby reviewed and shall only subsist for a period of 3 months since it is quite apparent



that the applicant has been indolent and complicit in persecuting the appeal. Mention on 15.5.2023 for further directions.

26 Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 15TH DAY OF MARCH, 2023

In presence of:

C/A: John Paul

No appearance

HON. C.K. NZILI

ELC JUDGE

