



Ewaso Ngiro Development Authority v Leparsukuta & another (Suing as legal representatives of the Estate of Sampoe Lelparsukuta) (Civil Appeal E007 of 2022) [2023] KEHC 18323 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E007 OF 2022
AK NDUNG'U, J
MAY 31, 2023**

BETWEEN

EWASO NGIRO DEVELOPMENT AUTHORITY APPLICANT

AND

NKODIMA LEPARSUKUTA 1ST RESPONDENT

NOUSURWAI LABU LAPLASUKTA 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF SAMPOE
LELPARSUKUTA**

RULING

1. This ruling concerns the notice of motion herein dated 03/12/2022 and filed on 16/12/2022. The application is brought under Order 42, Rule 6 of the [Civil Procedure Rules](#), 2010 and seeks stay of execution of decree in Nanyuki CMCC 92 of 2020 pending appeal. In its judgement the trial magistrate awarded the Respondents a sum of Kshs.1,272,407/- as damages together with costs and interests. Temporary orders of stay were granted on 20/12/2022 by Hon. F. Muchemi (J).
2. In the supporting affidavit, the Applicant deponed that the judgement was passed on 13/04/2022 and the Applicant was dissatisfied with the trial court decision on liability and quantum. That the Applicant was granted 30 days stay of execution which have since lapsed and that the Respondents have issued a notice of proclamation with intention of execution of the decree. The Applicant deponed that it is necessary for order of stay be granted as the instant appeal is well grounded with chances of success, that the same will be rendered nugatory unless stay orders are issued, that the Respondents have no known assets and if the amount is paid to them, it will be not recoverable if the appeal succeeds.
3. The Application was opposed. The Respondents filed a replying affidavit dated 19/04/2023 in which it is deponed that the Applicant is undeserving of the orders sought since the instant application was



filed eight (8) months after the judgment was delivered, that the instant application was served upon the Respondent's advocates on 10/03/2023 when the auctioneers went to attach, that the Applicant has been giving empty promises on settling the decretal sum, the Respondents' advocate has not been served with memorandum of appeal and the Applicant is yet to file record of appeal. The Respondents further deponed that the Applicant has not demonstrated that it is unable to deposit the entire amount to the court and that the Applicant has not demonstrated that the Respondents are not in a position to refund the decretal sum if the same is paid out to them.

4. The Applicant in response to the Respondent's replying affidavit filed a further affidavit and deponed that the intended appeal raises substantial matters of law, that the Respondents will not suffer any prejudice and that it is the Applicant who stands to suffer substantial loss if the orders sought are not granted, that the Applicant is a government agency and cannot miss out on its judgment unlike the Respondents who have not proven how they will repay the decretal amount, that the delay was necessitated by the Applicant's previous advocate, that the Applicant is ready to furnish security by way of bank guarantee and that the appeal will be rendered nugatory if the orders sought are not granted.
5. The application was argued orally. The Applicant's advocate failed to attend court on 08/05/2023 when the matter was set for hearing but however, sent an advocate to hold her brief who did not have instructions to proceed with the hearing. The Respondents' counsel main argument was that there was undue delay in filing the application since the same was filed eight (8) months after the delivery of the lower court judgment.
6. I have considered the Applicant's application and response by the Respondents. I have also perused the court file and I have noted that the Applicant herein had filed a similar application on 22/08/2022. The previous application which is word for word with the instant application is dated 19/08/2022. The application proceeded Ex parte during recess in August 2022 before Hon. Richard Mwongo (J) at the High court sitting at Keruguya . The Applicant concealed this information to the Respondents and to this Court.
7. The Application was before the Honourable Judge on 24/08/2022 and the Judge declined to grant orders for stay. The Honourable Judge observed as follows;

“I note that the lower court judgment was delivered on 13/04/2022, and that the 30 day stay granted lapsed on 13/06/2022. The applicant has not indicated which action he timeously took since the grant of stay; nor has he filed any documentation evidencing or explaining the reasons for the delay since June in filing the present application. It is also noted that according to the warrant of sale issued on 17/08/2022, the Applicant's attached property would be sold after 15 days' notice from the date of the warrant which days have not elapsed.

Further, nowhere has the applicant indicated that he is willing or able to provide security for the decretal sum.

In the circumstances, the reasons for urgency are not duly demonstrated and stay of execution cannot be granted.

- i. Orders are that the application is not certified;
 - ii. Liberty is granted to the applicant
 - iii. Orders accordingly.”
8. After refusal by the Honourable Judge to grant stay orders, the Applicant neither appealed nor sought to have the dismissal order reviewed perhaps because of the comments made by the learned judge on



the inadequacy of the applicant's application before him. The Applicant then brought the instant application which as earlier stated, was word for word with the earlier application save for ground 7 which had been added to the new application and the change of advocates.

9. My view is that the instant application is an abuse of the court process. To adopt a procedure where a party files an application and a court declines to grant the orders sought and then proceed to file a similar application before the same court is like playing lottery with judicial process. This is barred by principles of *res judicata* under section 7 of the [Civil procedure Act](#) which provides as follows: -

“No court shall try any suit or issue in which the matter directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been substantially raised and has been heard and finally decided by such court.”

10. In [Uburu Highway Development Ltd – Vs – Central Bank of Kenya & 2 others](#) (1996) eKLR the Court of Appeal stated;

“That is to say, there must be an end to Applications of similar nature, that is to further, under principles of *Res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or [Civil Procedure Act](#) caters for.”

11. In [Kennedy Mokuu Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende](#) [2022] eKLR. the court held that;

“The Respondent, by bringing application after application on the same issue at different times one after another is hell bent to frustrate the Appellant from realizing the judgment as awarded by the lower Court and unless something is done, the Appellant will forever be left babysitting his barren Decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of Article 48 of the [Constitution](#) which enjoins the state to ensure access to justice for all persons.”

12. It therefore follows that the present application is not only mischievous but an abuse of the process of the court. It is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 31ST DAY OF MAY 2023

A. K. NDUNG’U

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

