



**Nyamai & 291 others v South Eastern University College (Environment & Land
Case E001 of 2021) [2023] KEELC 17200 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E001 OF 2021**

LG KIMANI, J

APRIL 27, 2023

BETWEEN

WILLIAM NYAMAI & 291 OTHERS PLAINTIFF

AND

SOUTH EASTERN UNIVERSITY COLLEGE RESPONDENT

RULING

1. The plaintiff/applicant filed the notice of motion dated December 14, 2022 seeking the following orders:
 1. Spent
 2. That this honourable court do stay/set aside its orders issued on the December 6, 2022 pending the hearing and determination of this application.
 3. That this honourable court do stay/set aside its orders issued on the December 6, 2022 pending the interparty hearing of the applicants application.
 4. That the costs of this application be provided for.
2. The grounds in support of the application are that there is an intended eviction of the applicants by the respondent which will greatly prejudice the applicants and their suit. The applicants state that they are being harassed by the respondents because of the existence of the decision of the court. In the supporting affidavit, the 1st applicant deposed that the applicants have been on the suit property for a period in excess of 25 years without the consent or authority of the defendants and have carried out extensive developments thereon. Their complaint is that the court's ruling of December 6, 2022 is tantamount to granting the respondents an order of eviction without affording the applicants an opportunity to be heard.



3. The applicants' position is that a court cannot give absolute adverse orders without following the due process of the law as happened in this case. They claim that the area police have commenced the process of evicting families from the suit properties based on the said decision and therefore they seek a stay of the court's decision until the court is seized of all the relevant and actual facts as they exist on the ground.
4. The respondent filed grounds of opposition dated January 10, 2023 opposing the said application on the following grounds:
 1. That the application is vexatious, frivolous and scandalous and serves the purpose of delaying an expeditious disposal of the matter whereof money and time would be saved and so, it ought to be dismissed with costs.
 2. That the orders issued through the ruling of the court on December 6, 2022 were issued after careful consideration and determination of the applicants' application dated June 27, 2022 and so, the court cannot therefore set aside and/or stay its own ruling. Instead, the applicants ought to have appealed against the same to a higher court if they felt aggrieved by this court's decision as per the law.
 3. That the application is utterly untenable and unsustainable in view of the preceding proceedings and events.

The Applicants' Submissions

5. Counsel for the applicants submitted that the application is anchored on the fact that the respondent commenced the process of evicting the applicants without following due process of the law as required contrary to sections 152c, 152d and 152e of the Land Act 2012. They relied on the case of Julius L. Marten v Caleb Arap Rotich (2021) eKLR while stating that the question of ownership is disputed and is a matter that is still pending determination.
6. They pointed out that the respondent's conduct is tainted with malice as the attempted eviction is illegal and was in utter disregard to the provisions of the Land Act and is an attempt at destroying the applicant's available evidence, thus denying justice to the applicants. They urged the court to maintain status quo in the matter.

The Respondent's submissions

7. Counsel for the respondent submitted that the genesis of this application emanated from the applicants' application dated June 27, 2022 which the court, after careful consideration of all the issues at hand, proceeded to dismiss the application with costs.
8. The 1st respondent also noted that they were served with a draft of intended appeal but were never served with a notice of appeal. It is their submission that appeals lie to a higher court as provided under order 43(1) (a) of the Civil Procedure Rules. They therefore submit that the court cannot be tasked to set aside its own orders made after considering all the facts and merits surrounding the application.

Analysis and Determination

9. The applicants have sought an order to stay/set aside its orders issued on the December 6, 2022 pending the hearing and determination of this application. The order issued by the court on the December 6, 2022 is "The amended notice of motion dated October 19, 2021 and amended on June 27, 2022 lacks merit and the same is hereby dismissed with costs to the respondent."



10. From the court record the applicant filed a notice of appeal is indicative of the applicants' intention of filing an appeal against the ruling of December 6, 2022. It is not clear if the appeal itself was filed since the applicants have not alluded to it in their application. All they have mentioned is that the area police have commenced the process of evicting families from the suit property. The applicants have also not indicated that they seek stay of execution pending appeal or whether they seek to stay/set aside/vary the ruling and orders issued by the court on December 6, 2022.

11. Under order 42 rule 6(2) of the Civil Procedure Rules (2010) the court may stay execution of its decision pending appeal. However, in this particular case there is nothing to stay since the court did not make any order that is capable of execution. In the case of Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR the Court of Appeal stated as follows in an application for stay of execution pending appeal where the suit/application had been dismissed by the trial court;

“With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated July 30, 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR where the learned judges stated thus:

“what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, it is so ordered.”

12. Consequently, the prayer for stay of execution must fail and the same is hereby dismissed.

13. With regard to the prayer to set aside the courts orders, the court notes that there are several instances in which the court is empowered to set aside and/or vary its decision and the same are set out under the Civil Procedure Rules and/or other provisions of the law. However, the applicants have not cited or specified the provisions of the law their prayers are anchored save for stating that they are in danger of being evicted from the suit land.

14. The application herein seems to indicate that the applicants were dissatisfied with the orders of the court issued in the ruling of December 6, 2022. They state that subsequent to the application under consideration in the ruling, the respondents have started the process of evicting them in contravention of the provisions of the Land Act on evictions. One of the prayers in the amended notice of motion dated October 19, 2021 and amended on June 27, 2022, the subject of the ruling dated December 6, 2022, was for an order of injunction restraining the respondent from evicting the applicants pending hearing and final determination of the suit herein. With regard to the entire application the court stated;

“On the face of the documents supplied by all the parties the respondent has shown that the suit land is likely public land under article 162 (1) (b) of the Constitution of Kenya 2010 for the reason that the respondent is a public body or authority utilizing the suit land for a public purpose. I also find that on the face of it the land is subject to the provisions of section



42 of the *Limitation of Actions Act*. I therefore find that the applicants have not established a *prima facie* case with a probability of success.”

15. Having been dissatisfied with the final order of the court dismissing the application, the applicants ought to have preferred an appeal to the Court of Appeal since as stated earlier they did file a notice of appeal.
16. In my view the orders sought by the applicants are not available to them and the application dated December 14, 2022 has no merit and the same is hereby dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 27TH DAY OF APRIL, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

Ruling read virtually and in open court in the presence of-

Musyoki C/A

Kalwa Advocate for the Plaintiff/Applicant

M/S Wambui Advocate for the Respondent

