



Mwitiki v Minister of Lands (Through the District Commissioner Mukaa Sub-County in Appeal No 89 of 2015) & 3 others; Musyimi (Interested Party) (Environment and Land Judicial Review Case 12 of 2018) [2023] KEELC 18170 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 18170 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 12 OF 2018
TW MURIGI, J
MAY 31, 2023

BETWEEN

PAUL NZOMO MWITIKI APPLICANT

AND

MINISTER OF LANDS (THROUGH THE DISTRICT COMMISSIONER MUKAA SUB-COUNTY IN APPEAL NO 89 OF 2015) 1ST RESPONDENT

DIRECTOR OF LANDS ADJUDICATION 2ND RESPONDENT

CHIEF LANDS REGISTRAR - NAIROBI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

DAVID MUTOKO MUSYIMI INTERESTED PARTY

JUDGMENT

1. Before me for determination is the Notice of Motion dated 16/09/2022 brought under Sections 1A, 1B, & 3A of the [Civil Procedure Act](#) and all other enabling provisions of the Law in which the Applicant seeks the following orders:-
 - a. Spent.
 - b. That the Notice to show cause dated 08/07/2022 why execution should not issue against the applicant Paul Nzomo Mwitiki be stayed pending the hearing and determination of this application.



- c. That the Notice to show cause why execution should not issue as aforesaid be stayed pending the hearing and determination of ELC Petition No. E003 of 2022; Paul Nzomo Mwitiki Vs - The Minister of Lands & 4 Others.
 - d. That the costs of this application be in the cause.
 - e. That costs be in the cause.
2. The application is premised on the grounds appearing on its face together with the affidavit of Paul Nzomo Mwitiki sworn on even date.

The Applicant's Case

3. The Applicant averred that consequent to the judgment delivered on 29th September 2019, a Notice to Show Cause was issued against him to show cause why he should not be committed to civil jail for failure to pay costs of Kshs. 156,373.33/=.
4. He further averred that he filed Petition No. E003 of 2022 which raises critical issues on the disappearance of Plot No. 1557 Kilome Adjudication Section which was unlawfully merged with Plot No 131 Kilome Adjudication Section. The Applicant contended that it is in the interests of justice that the Notice to Show Cause be stayed pending the hearing and determination of ELC Petition No. E003 of 2022. Finally, the Applicant argued that the Respondent will not suffer any prejudice if the orders are granted because any inconvenience suffered can be compensated by way of costs.

The Interested Party's Case

5. Opposing the application, the Interested Party filed grounds of opposition dated 9th October, 2022 on the following grounds:-
 1. The application is bad in law, without basis and is not premised on any known law, practice or judicial precedent. It is unprecedented.
 2. The application, being an application to stay proceedings in a suit, different from stay of execution, has failed to meet the stringent test as stated by Gikonyo J in *Kenya Wildlife Service v James Mutembei* (2019) eKLR.
 3. The application has no merit in that the Notice to Show Cause emanated from a judgment in this case which has neither been appealed against nor challenged in any other forum and the same is therefore final and this court cannot sit on appeal in its own judgment.
 4. That the fact that the court did not make a finding as to ownership of Plot No. 1557 Kilome Adjudication cannot be a ground to stay proceedings because a determination of ownership was not and is not a function of a Judicial Review court and indeed that was the ratio decidendi in dismissing the application with costs to the Interested Party leading to bill of costs, now unpaid.
 5. The Applicant, having not challenged the taxation of the bill of costs under paragraph 11 of the *Advocates Act*, cannot in law thereafter seek to set aside the taxation.
 6. The jurisdiction of this Court has not been properly invoked to challenge the result of a bill of costs properly taxed by a taxing master in accordance with the *Advocates Act*.



7. Whether or not Makueni ELC Petition No. E003 of 2022 is meritorious is irrelevant to the execution of costs awarded in this cause and therefore to present an application for stay of proceedings and (not execution) is completely ill advised.
 8. The application is an affront to and a violation to the very provisions of the law that it is expressed to be premised viz Section 1A, 1B & 3A of the Civil Procedure Act, and there must be an end to litigation.
 9. By not challenging the procedure and process of executing the decree herein, the application before the court is doomed to fail.
6. The parties were directed to canvass the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

The Applicant's Submissions

7. The Applicant's Submissions were filed on 5th December 2022. Counsel for the Applicant submitted that the genesis of the dispute arose out of the merger of the Applicant's plot with that of the Interested Party possibly with the active participation of the Interested Party and some rogue officers in the employment of the other Respondents. That it is a matter of law and common sense for a disputed parcel of land under adjudication to retain such identity until the dispute is determined by the Minister.
8. Counsel further submitted that the Honorable Justice Mbogo made a finding of fact that he could not make a decision on Plot No. 1557 as someone had caused it to disappear from the records as the same was merged with the Interested Party's Plot No. 131. Counsel argued that the Applicant filed Makueni Petition No. E003 of 2022 to assert that indeed, Plot No. 1557 disappeared from the records and was unlawfully merged with Plot No. 131 belonging to the Interested Party.
9. Counsel further submitted that the instant application is grounded on unique and special circumstances where the Applicant is asking the court to stay the execution of the Notice to Show Cause pending the hearing and determination of High Court Petition No. E003 of 2022. It was submitted that the Applicant is ready and willing to deposit in court the amount in the Notice to Show Cause pending the hearing and determination of the Petition. To support this argument, Counsel relied on the Court of Appeal case of Butt v Rent Restriction Tribunal (1982) KLR 417 quoted in Amal Hauliers Ltd v Abdulnasir Abubakar Hassan (2017) eKLR.
10. While citing the case of Global Tours & Travels Ltd Nairobi HC Winding Up Cause No. 43, Counsel contended that establishing a prima facie case and filing the application expeditiously are principles upon which an order of stay of proceedings may be granted.

The Interested Party Submissions

11. The Interested Party's submissions were filed on 11th February 2023. Counsel for the Interested Party submitted that the judgment delivered by Honourable Justice Mbogo has neither been appealed against nor challenged in any other forum hence the same is final. Counsel further submitted that this court cannot sit on appeal in its own judgment.
12. Counsel argued that Order 42 Rule 6 of the Civil Procedure Rules is inapplicable in the present application as no appeal is pending before the court. Counsel contended that the Applicant ought to have challenged the taxation of the bill of costs instead of filing the instant application. To buttress this argument, Counsel relied on the case of Kenya Wildlife Service v James Mutembei (2019) eKLR.



13. Finally, Counsel submitted that the Applicant has not demonstrated exceptional circumstances to warrant stay of the Notice to Show Cause. Counsel contended that Makueni ELC Petition No. E003 of 2022 is a delaying tactic to prevent him from enjoying the fruits of his judgment.

Analysis and Determination

14. Having considered the application, the grounds of opposition and the rival submissions, the only issue for determination is whether the Applicant is entitled to the orders sought. The Applicant is seeking to stay the Notice to Show Cause dated 08/07/2022 pending the hearing and determination of Makueni ELC Petition No. E003 of 2022.
15. From the record, it is evident that the parties litigated the dispute before the Adjudication Committee, the Land Adjudication Board and before the Minister. In the three forums, the dispute was resolved in favour of the Interested Party. In the instant Judicial Review proceedings, the Applicant sought the following orders:-
 - i. An order of *Certiorari* directed to the 1st Respondent to bring to the High Court to be quashed the 1st Respondent's decision (through Deputy County Commissioner Mukaa Sub County) by the delegated dated 13/09/2018 dismissing the Applicant's Appeal No. 89 of 2017 and upholding the decision of the Land Adjudication Officer and the Arbitration Board to David Mutoko Musymi as owner which formal notice of finalization of the Minister's decision was communicated to the Applicant on 25/09/2018.
 - ii. Prohibition directed to the 1st Respondent, the Director of Land Adjudication and Chief Land Registrar Nairobi their servants and/or agents or whomsoever from in any way dealing with the plot No. 131 (Plot 1557) Kilome Adjudication Section or from implementing the award of the Minister aforesaid.
16. The parties were directed to canvass the application by way of written submissions. Both parties filed their respective submissions. The application was dismissed *vide* the Judgment delivered on 26th September, 2019.
17. The Applicant did not appeal or challenge the judgment in any forum. The judgment is therefore final and binding on the parties thereto. Subsequently, the Interested Party filed a party and party bill of costs dated 29/01/2020. *Vide* a ruling dated 20/12/2021, the bill of costs was taxed at Kshs.156, 373/-.
18. Paragraph 11 of the [Advocates Remuneration Order](#) provides that any party aggrieved with the decision of the taxing master should file a reference. In the present matter, the Applicant did not file a reference to challenge the ruling delivered on the taxation of the bill of costs.
19. The Applicant averred that Petition No. E003 of 2022 raises critical issues on the disappearance of Plot No. 1557 Kilome Adjudication Section which was illegally merged with Plot No. 131 Kilome Adjudication Section.
20. This court finds and holds that Makueni ELC Petition No. E003 is independent of the present proceedings and will be heard on its own merits. The Applicant is introducing new matters which are not related to the present proceedings. Subsequent to the Judgment delivered by this court, the party and party bill of costs was taxed and no reference was filed against the same. The Applicant should therefore show cause why execution should not issue.
21. In light of the foregoing I find that the application is devoid of merit and the same is dismissed with costs to the Interested party.



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HON. T. MURIGI

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31ST DAY OF
MAY, 2023.**

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi

Mwongela for the Applicant

Kiluva for the Interested Party

