



**Too v Lagat (Environment & Land Case 706 of 2012)
[2023] KEELC 17594 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 706 OF 2012**

JM ONYANGO, J

MAY 31, 2023

BETWEEN

DAVID KIMAIYO TOO PLAINTIFF

AND

JOSHUA KIPKEMBOI LAGAT DEFENDANT

RULING

1. What is before me is the Plaintiff/Applicant's Notice of Motion dated February 15, 2023 brought under Order 22 rule 22 of the *Civil Procedure Rules*, sections 1, 1A, 3, 3A, 63(e) and 79 (g) of the *Civil Procedure Act* seeking a stay of execution of the Notice to show cause issued against the Plaintiff. d this
2. The main ground upon which the application is based is that the Defendants taxed their Bill of Costs through the firm of Miyienda & Co Advocates way back in 2017 and they were subsequently paid their costs in full.
3. Upon being served with the application, the Defendant/Respondent filed a Replying affidavit in which he avers that the Applicant has not furnished any evidence of payment of the costs and that the application is merely intended to buy time.
4. The application was disposed of by way of written submissions although only the Applicant filed his submissions. The Respondents opted not to file any submissions and sought to rely on the Replying Affidavit.
5. The only issue for determination is whether execution ought to be stayed.
6. Before delving into the merits of the application, it is necessary to give a background of this case. On the April 7, 2011 the plaintiff filed suit against the defendant claiming that the defendant had fraudulently caused a portion of the plaintiff's land known as plot No 32 to be registered in his name. He therefore prayed for a declaration that the defendant has no legal interest in the suit property and an order of



- permanent injunction restraining the defendant from inter alia alienating or wasting the plaintiff's plot No 32.
7. By an application dated April 21, 2011 the plaintiff sought an order of temporary injunction against the defendant pending the hearing and determination of the suit.
 8. In response to the application, the defendant filed a Notice of Preliminary objection dated July 1, 2011 raising the ground that there existed an earlier suit filed by the plaintiff over the same parcel of land seeking the same orders between the same parties being HCCC No 176 of 2010 which he had not prosecuted. He also stated that he was the first registered owner of land parcel number Pioneer/Ngeria Block 1 (EATEC) 10793 and his interest therein was indefeasible. The Defendant also filed a Defence in which he stated that the plaintiff bought 3.0 acres out of land parcel he Maurice Kibiwott who in turn sold it to the Defendant. After sub-division the plaintiff's title was registered as land parcel No Pioneer/Ngeria Block 1(EATEC) 10792 while the defendant's parcel was registered as No Pioneer/Ngeria Block 1(EATEC) 10793. The defendant therefore denied that he had fraudulently taken the plaintiff's land as the two parcels of land were separate and distinct.
 9. When the matter came up for hearing of the application on May 15, 2013, the court directed that the Preliminary objection be subsumed in the application dated April 21, 2014 and that the same be heard on July 3, 2014. When the application came up for hearing on July 3, 2014, counsel for the plaintiff confirmed to court that he wished to withdraw the suit as there was a previous suit HCCC No 176 of 2010 which had been filed by the Plaintiff. The court then marked this suit as withdrawn with costs to the defendant.
 10. After the withdrawal of the suit, the defendant prepared a Bill of costs dated October 16, 2014 in the sum of Kshs 293.750 through the firm of Ngala & Co Advocates. The same was filed in court on the same date and served upon the plaintiff's advocates M/s Kiplagat Misoi & Co Advocates.
 11. On April 7, 2015, the firm of Lilan Koech & Co Advocates came on record for the plaintiff and filed a Notice of Change of Advocates. The Defendant also changed his advocates from the firm of Ngala & Co Advocates to the firm of Miyienda & Co Advocates through the Notice of Change of Advocates dated September 18, 2017.
 12. When the matter came up for taxation of the Defendant's Bill of Costs on January 31, 2018, the same could not be taxed as the firm of Kiplagat Misoi who had been served with the Notice of taxation indicated that they were not on record for the Plaintiff. The court then directed that the plaintiff be served in person. The matter was adjourned several times and on May 21, 2019 Mr Miyienda informed the court that the parties were negotiating and that the defendant had received part payment. The matter was then fixed for mention on May 29, 2019 to record a settlement. On May 29, 2019 no settlement was recorded as Mr Miyienda was not available.
 13. In the meantime, the firm of Rioba Omboto came on record for the Plaintiff through their Notice of Change of Advocates filed on December 14, 2018. The plaintiff also changed their advocates once again and the firm of Isiaho Sawe & Co Advocates filed their Notice of Change of Advocates dated February 23, 2022.
 14. The matter was finally fixed for taxation on 19.10.22 but counsel for the plaintiff did not attend court even though the date had been taken by consent. The Taxing master proceeded to tax the Bill and delivered a ruling on December 16, 2022. The Plaintiff's costs were assessed at Kshs 160,150/= and a Certificate of costs was issued on January 27, 2023.



15. Pursuant to the issuance of the Certificate of costs, the defendant took out a Notice to Show Cause why execution should not issue against the Plaintiff. That is what triggered the application for stay of execution which is the subject of this ruling.
16. The singular issue for determination is whether execution ought to be stayed.
17. The application was specifically brought Pursuant to Order 22 Rule 22 of the [Civil Procedure Rules](#) which provides as follows:
 - “ 22(1), The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an Order to stay the execution, or for any other order relating to the decree or execution which might have been made by the Court of first instance, or Appellate Court if execution has been issued thereby, or if application for execution has been made thereto.
 - (2) Where the property or person of the judgment debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.
 - (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may request such security from, or impose such conditions upon the judgment-debtor as it thinks fit.”
18. From the above provisions, it is clear that a court issuing decree may in its discretion stay execution of a decree for a reasonable time and upon sufficient cause being shown, to allow the judgment-debtor apply for stay or to apply to the appellate court for stay, and the Court may impose conditions or order for security to be furnished by the judgment-debtor.
19. In the instant case, the Plaintiff has applied for stay of execution on the grounds that the decretal sum has been paid either partly or in full. However, no evidence has been furnished by the Plaintiff to show how much he has paid, if at all. A mere mention by Mr Miyienda, learned counsel for the defendant on May 21, 2019 that the parties were negotiating and that the defendant had received part payment without disclosing the amount is not very helpful. The parties were granted ample time to agree on costs but it is clear that by 31.8.22 when both parties fixed the matter for taxation of the Bill of Costs on 19.10.22, the costs had neither been assessed nor agreed. There is also no evidence that the costs have been paid in full. If indeed the matter had been settled as submitted by learned counsel for the Plaintiff, nothing would have been easier than to furnish evidence of payment.
20. Having opted to withdraw the suit with costs to the Defendant, the plaintiff must pay the defendant’s costs as taxed. In the absence of proof that the costs have been paid, I am unable to exercise my discretion in favour of the Plaintiff as I am not persuaded that the plaintiff has demonstrated sufficient cause why execution should be stayed.
21. The upshot is to that the application lacks merit and it is hereby dismissed with costs Defendant/ Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF MAY 2023.

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J.M ONYANGO

JUDGE

In the Presence of;

Miss Kosgey for Mr. Omboto for the Applicant

No appearance for the Respondent

Court Assistant: A.Oniala

