



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC APPEAL NO. 4 OF 2021**

**FRED WASWALA.....APPLICANT**

**VERSUS**

**EVERLYNE NASIMIYU EJILO.....1<sup>ST</sup> RESPONDENT**

**FRED WANYONYI MUCHANGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

*(Being an application for stay of execution of the Judgment of HON S. MOGUTE (PRINCIPAL MAGISTRATE)*

*delivered on 11<sup>th</sup> August 2021 in BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 200 of 2015)*

1. The parties herein i.e. **FRED WASWA** (the Applicant) and **EVERLYNE NASIMIYU EJILO** (the Respondent) litigated over the land parcel **NO EAST BUKUSU/SOUTH KANDUYI 5849** (the suit land), in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 200 of 2015** in which the Applicant was the plaintiff and the Respondent was the defendant.

2. Having heard the parties, the trial Magistrate **HON S. MOGUTE (PRINCIPAL MAGISTRATE)** delivered his Judgment on 11<sup>th</sup> August 2021 in which he found in favour of the Respondents and made the main order that the Applicant vacates the suit land forthwith failure to which he would be evicted.

3. The Applicant is aggrieved by that Judgment and filed his appeal promptly on 19<sup>th</sup> August 2021.

4. By a Notice of Motion dated 9<sup>th</sup> November 2021, the Applicant seeks the following remedies: -

**1. Spent**

**2. Spent**

**3. Stay of further proceedings and execution of the decree in BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 200 of 2015 pending the hearing and determination of the BUNGOMA HIGH COURT APPEAL No 2 of 2021.**

**4. Costs of the application be provided for.**

The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit.

5. The gravamen of the application is that the suit land is where the Applicant and his family derive their livelihood and that he will suffer substantial loss if the decree in the Subordinate Court is executed. That he has moved to the Court expeditiously and is ready and willing to abide by any conditions which this Court may impose.

6. Annexed to the application are the decree issued in the Subordinate Court and the Memorandum of Appeal filed in **CIVIL APPEAL No 49 of 2021** (it is not clear whether the appeal is **No 2 of 2021** or **No E049 of 2021** or **No 4 of 2021**. The Deputy Registrar will hopefully have that sorted out).

7. When the application was placed before **OMBWAYO J**, the Judge directed that it be served upon the Respondents within three (3) days

after which they would have 10 days to respond. The Judge further ordered that the application be canvassed by way of written submissions. It is not clear why there are now two (2) Respondents in this application and in the Memorandum of Appeal yet the decree from the Subordinate Court shows only the Applicant and **EVERLYN NASIMIYU EJILO** as the parties who litigated in that Court.

8. **EVERLYN NASIMIYU EJILO** (the 1<sup>st</sup> Respondent) has filed a replying affidavit dated 22<sup>nd</sup> November 2021 in response to the application. She has averred that the application is frivolous, vexatious and an abuse of the process of this Court and should therefore be dismissed with costs. That the Applicant had filed a similar application before the trial Magistrate on 10<sup>th</sup> November 2021 but which is still pending in that Court and therefore, there can be no two applications pending seeking similar remedies.

9. That the Applicant has failed to meet the threshold set out in **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** and has also filed it late without explaining the delay which is inordinate. That having failed to disclose that he has filed a similar application in the trial Court, the Applicant has approached this Court with un – clean hands and is not deserving the exercise of this Court’s discretionary power in his favour.

10. Annexed to the replying affidavit is an application filed in **BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE No 200 of 2015** seeking similar orders as those in this application, a Certificate of Search in respect of this suit land and an application filed in the Subordinate Court seeking Police assistance to evict the Applicant from the suit land.

11. Submissions have been filed both by **MR SIMIYU** instructed by the firm of **WAMALWA SIMIYU & COMPANY ADVOCATES** for the Applicant and by **MR BW’ONCHIRI** instructed by the firm of **OMUNDI BW’ONCHIRI ADVOCATES** for the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent one **FRED WANYONYI MUCHANGA** (if indeed he was a party in the trial in the Subordinate Court) did not file any response to the application.

12. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel.

13. In paragraph 4 of her replying affidavit, the 1<sup>st</sup> Respondent has averred as follows: -

*“That further, my advocate informs me which information I verily belief (sic) to be true that the application is filed in total violation of Order 42 Rule 6 of the Civil Procedure Rules 2010 due to the fact that on the 10.11.2021 the Appellant herein filed a similar application under Certificate of Urgency dated 9.11.2021 before the Hon Magistrate and which application is still pending for hearing and determination. My advocate informs me which information I verily belief (sic) to be true that there cannot be two applications seeking similar orders at the same time hence this application is for dismissal with costs (hereto annexed and marked EN 1 is a copy of the application.”* Emphasis mine.

And although the Appellant was granted leave to file any supplementary affidavit within seven (7) days of service upon him of the replying affidavit, none has been filed. The result is that the averment in paragraph 4 of the replying affidavit has not been rebutted.

14. What the 1<sup>st</sup> Respondent is therefore alleging in paragraph 4 of her replying affidavit is that this application is infact sub – judice which is provided for under **Section 6** of the **Civil Procedure Act** as follows: -

*“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”*

It is clear from the above that under **Section 6** of the **Civil Procedure Act**, Courts are forbidden from adjudicating on issues which are pending determination in other competent Courts. The term sub – judice is defined in **BLACK’S LAW DICTIONARY 9<sup>TH</sup> EDITION** as:

*“Before the Court or Judge for determination.”*

The Rationale of that rule was captured by the Supreme Court in the case of **KENYA NATIONAL COMMISSION on HUMAN RIGHTS .VS. A – G, IEBC & OTHERS 2020 eKLR** as follows: -

*“The purpose of the sub – judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Court, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before Courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub – judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before Courts of competent jurisdiction and lastly, that the suits are between the same parties or their representatives.”*

It is not disputed that prior to filing this application, the Applicant had moved to the Subordinate Court seeking similar orders. That application is still pending. It is not clear why the Applicant did not wait for the Subordinate Court to deliver it’s ruling before moving to this Court.

15. Secondly, this application is an abuse of the process of the Court. Abuse of the process of the Court arises where, for example, a party

files a multiplicity of applications or suits involving the same subject matter and parties simultaneously in different Courts of competent jurisdiction. There is no doubt that under the provisions of **Order 42 Rule 6**, the Subordinate Court has the requisite jurisdiction to consider the application now before this Court. By filing this application in this Court while a similar one is still pending in the trial Court, the Applicant is basically engaging in forum shopping. That is not permissible.

**16.** The Court enjoys inherent jurisdiction to prevent an abuse of its processes. There can be no exhaustive list of what amounts to abuse of the process of the Court. But where, as in this case, the Applicant is forum shopping, the Court must stop him in order to preserve the dignity and integrity of the judicial process. He should have withdrawn the application in the Subordinate Court before filing this application.

**17.** The up – shot of all the above is that the Notice of Motion dated 9<sup>th</sup> November 2021 is both sub – judice and an abuse of the process of this Court. It is accordingly struck out with costs to the 1<sup>st</sup> Respondent.

**Boaz N. Olao.**

**J U D G E**

**23<sup>rd</sup> March 2022.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 23<sup>RD</sup> DAY OF MARCH 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.**

**Boaz N. Olao.**

**J U D G E**

**23<sup>rd</sup> March 2022.**