



**Nthiga (Suing as a Legal Representative and Administrator of the Estate of the Deceased Leonard R. I Nthiga) v Governor, Tharaka Nithi County Government & 5 others (Civil Suit 2 of 2019) [2023] KEELC 18396 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18396 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
CIVIL SUIT 2 OF 2019  
CK YANO, J  
JUNE 26, 2023**

**BETWEEN**

**NJIRU MICHENI NTHIGA (SUING AS A LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE DECEASED LEONARD R. I NTHIGA) ..... PLAINTIFF**

**AND**

**GOVERNOR, THARAKA NITHI COUNTY GOVERNMENT . 1<sup>ST</sup> DEFENDANT  
COUNTY GOVERNMENT OF THARAKA NITHI ..... 2<sup>ND</sup> DEFENDANT  
MEMBER OF COUNTY ASSEMBLY, MAGUMONI WARD ..... 3<sup>RD</sup> DEFENDANT  
CHIEF OFFICER, ROADS AND INFRASTRUCTURE THARAKA NITHI  
COUNTY ..... 4<sup>TH</sup> DEFENDANT  
CHIEF OFFICER, LANDS, PHYSICAL PLANNING AND URBAN  
DEVELOPMENT THARAKA NITHI COUNTY ..... 5<sup>TH</sup> DEFENDANT  
WESTOMAXX INVESTMENT LTD ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the plaintiff's notice of motion application dated November 16, 2022. It is brought pursuant to section 1A,3A and 63 (e) of the *Civil Procedure Act*, 2010 cap 21 Laws of Kenya, order 51 rules 1, 3 and 4 of the *Civil Procedure Rules, 2010* and article 50 and 159 of the Constitution of Kenya 2010 in which the applicant seeks the following orders:

1. That this Application be certified as urgent deserving to be heard on priority basis, and service be dispensed with in the first instance.



2. That the Order issued vide the Ruling delivered on December 14, 2021 be hereby vacated and the Decree issued on July 7, 2021 do proceed for execution.
3. That the costs of this application be provided for.
2. The application is based on the grounds:-
  - a. That judgment in the matter was delivered on June 15, 2021 in favour of the Plaintiff and a decree to that effect on July 7, 2021.
  - b. That the respondents filed an application dated July 2, 2021 seeking stay of execution of the judgment delivered on June 15, 2021 pending lodging, hearing and determination of their intended appeal to the court of appeal.
  - c. That the said application was allowed vide a ruling delivered on December 14, 2021 granting the defendants stay of execution of the judgement pending lodging, hearing and determination of their intended appeal to the court of appeal.
  - d. That the defendants have however not lodged any appeal at the Court of Appeal for a period of almost one year now despite the lapse of the statutory period to do so.
  - e. That the Defendants/Respondents are enjoying the said orders to the detriment of the Applicant herein, who already been issued with a Decree by the honorable Court.
  - f. That it is now clear that the Defendants/Respondents are not interested in further prosecution of the said Appeal at the Court of Appeal.
  - g. That the Defendants/Respondents are also causing inordinate delay denying the Plaintiff/Applicant enjoyment of the fruits of the judgment delivered by this honorable court in his favour.
  - h. That if the orders sought are not granted, the Applicant stands to suffer prejudice, irreparable loss and damages.
  - i. That it is in the interest of justice, fairness and equity that the orders sought herein be granted.
3. The said application is supported by the supporting affidavit by Njiru Micheni Nthiga sworn on November 16, 2022 wherein the above grounds are repeated.
4. The applicant avers that if the orders sought are not granted, he stands to suffer prejudice, irreparable loss and damage and that there is dire need to vacate the orders issued vide the ruling delivered on 14<sup>th</sup> December 2021 for the Applicant to proceed with execution of the Decree issued on July 7, 2021.
5. In opposing the application, the Defendants filed a Replying Affidavit sworn by Lilian Kiruja, the Principal Legal Officer of the 2<sup>nd</sup> defendant on 13<sup>th</sup> January, 2023 in which she deponed inter alia, that on 21<sup>st</sup> June, 2021, the Defendants' Advocates filed a Notice of Appeal and requested for the typed proceedings. Copies of the Judgment, the said Notice of Appeal and letter requesting for proceedings have been annexed. That the Defendants also filed an application dated July 2, 2021 seeking a stay of execution of he said Judgment and upon hearing the parties, this court allowed the said application on December 14, 2021. Copies of the said application, Replying Affidavit, submissions and the said Ruling are annexed.
6. Relying on legal advice, the deponent avers that the Defendants have not been informed by the Registry whether or not the proceedings have been typed and ready for collection to enable them compile and file a Record of Appeal, adding that the delay in typing of proceedings by the Registry should not be



- visited on a litigant. That if the Plaintiff's application is allowed, much prejudice will be occasioned to the Defendants in that the Plaintiff will execute the said judgment during the pendency of the intended appeal to the detriment of the Defendants, thus rendering the said intended appeal nugatory.
7. The Defendants argue that if the Plaintiff was aggrieved by this court's ruling, he ought to have appealed against the same and that the application herein is a thinly veiled attempt to appeal against this court's ruling delivered on 14<sup>th</sup> December, 2021 which is not allowed by law. It is the Defendants' contention that this court is *functus officio* and the issues raised in the application herein are *res judicata* the same having been heard and determined through this court's ruling delivered herein on December 14, 2021, and that this court has no jurisdiction to grant the prayer sought. It is averred that the Defendants are desirous of filing and prosecuting their intended appeal and that the delay in filing the Record of Appeal has been occasioned by the slowness of the Registry in availing typed copies proceedings.
  8. The Defendants cited the Supreme Court decision in [Hassan Nyauje Charo vs Khatib Mwashetani and 3 others](#) [2014] eKLR and order 42 rule 8 of the Civil Procedure Rules.
  9. The court, with the consent of the parties, directed that the application be canvassed by way of written submissions. The Applicant filed his submissions dated February 8, 2023 through the firm of Waklaw Advocates while the Defendants filed theirs dated February 22, 2023 through the firm of Kamau Kuria & Company Advocates.
  10. The applicant submitted inter alia, that although in their response to the application the respondents averred to have filed a notice of appeal on June 21, 2021, no such notice has ever been served upon the Applicant and believes that no such notice was filed as stated. That there is no any evidence of such service from the Respondents, adding that there is also no evidence of any request for proceedings or any effort from the Respondents part seeking to obtain the proceedings. That after obtaining a stay of execution, the respondents got contended and went to slumber leading to an inordinate delay in processing the intended appeal, and have only been awoken by the pursuit of execution by the decree holder who deserves to enjoy the fruits of his successful litigation without further undue hindrance. That the reason given for the delay has not been satisfactorily explained and is therefore inexcusable and cannot be entertained.
  11. The Applicant's counsel cited the provisions of articles 47 and 48 of the [constitution](#) and relied on the case of [Simon Wachira Nyaga vs Patrick Wamwirwa](#) [2018] eKLR which referred to the Court of Appeal decision in [Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another](#) [2014] eKLR.
  12. On the question whether or not this court is now *functus officio*, the Applicant submitted that the instant application seeks to vacate the stay of execution orders that were given to allow the Respondents file their intended appeal. That it was the reasonable expectation that the appeal would have been filed within reasonable time. The Applicant argued that this court can vacate the orders issued on 14<sup>th</sup> December, 2021 and allow execution. The Applicant relied on the case of [Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others](#) [2013] eKLR; [Owners of the motor vessel Lillian S' -v- Caltex \(Kenya Ltd\)](#) (1989) KLR 1, [Leisure Lodge Ltd -vs- Japhet Asige & another](#) [2018] eKLR.
  13. It is the Applicant's submission that in this matter, the issue of *res judicata* is improperly invoked and cannot be sustained, adding that the court has the proper jurisdiction to grant the prayers sought in the application herein.
  14. In their submissions, the Respondents pointed out that they served both the Notice of Appeal and letters requesting for proceedings on the Applicant shown in previous affidavits, adding that



submissions are not evidence, and the Applicant ought to have filed a further Affidavit stating the fact and not through submissions. The Respondents urged the court disregard the Applicant's submission on the issue. The Respondents submitted that the letters requesting for proceedings was filed and served within 30 days of the judgment, that is June 15, 2021, and cited rule 84 of the Court of Appeal Rules. Further, that since a Notice of Appeal was filed and served on 22<sup>nd</sup> June, 2021, the Applicant ought to have proceeded under the Court of Appeal Rules for any relief and had 30 days to do so. That this court downed its tools once it delivered a judgment and a ruling staying execution of the said judgment, and cannot be asked to re-hear the very facts which it heard and determined culminating in the said ruling delivered on 14<sup>th</sup> December, 2021. The Respondents also cited rule 86 of the Court of Appeal Rules and relied on the case of the speaker of the National Assembly vs James Njenga Karume Civil Application No. Nairobi 92 of 1992. It is submitted that the attempt by the Plaintiff herein to try and have this matter heard and determined in an unprocedural manner is unacceptable, unlawful and should be frowned upon by this court.

15. The Respondents submit that if the Plaintiff was aggrieved by this court's delivered herein on 14<sup>th</sup> December, 2021, he ought to have appealed against their decision. It is further submitted that the application herein is a thinly veiled attempt to appeal against this court's ruling delivered on 14<sup>th</sup> December, 2021, which is not allowed by law. It is the Respondents submissions that this court is *functus officio* and the issues raised in the application are res-judicata the same having been heard and determined through the court's ruling delivered on 14<sup>th</sup> December, 2021. The Respondents cited section 7 of the Civil Procedure Act and relied on the case of Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR, Telkom Kenya Limited vs John Ochanda (suing on His own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR and Hassan Nyanje Charo –vs- Khatib Mwashetani and 3 others (*supra*). The Defendants urged the court to dismiss the application herein with costs.
16. I have carefully considered the application herein the affidavit in support, replying affidavit and the submissions filed as well as the authorities relied on. The sole issue for determination before this court is whether the court should vacate the orders of stay of execution granted on 14<sup>th</sup> December, 2021 and the Applicant to be allowed to proceed with execution of the decree herein.
17. It is not in dispute that by the ruling delivered on 14<sup>th</sup> December, 2021, this court granted the Respondents orders of stay of execution of the decree herein pending the hearing and determination of the intended appeal. The Applicant in this application contends that the Respondents have since securing the orders of stay have never filed and served a notice of Appeal and that their inaction or delay has caused the Applicant to suffer prejudice, irreparable loss and damage as he is being denied the enjoyment of the fruits of the judgment delivered by this court in his favour.
18. I have perused the court record. In their affidavit in support of their application dated 2<sup>nd</sup> July, 2021, the Respondents annexed a Notice of Appeal dated 21<sup>st</sup> June, 2021 and a letter of even date requesting for a certified copy of judgment delivered on 15<sup>th</sup> June, 2021. It is clear therefore that the Applicant's argument that the Respondents have never filed a Notice of Appeal is unfounded and not factual.
19. The Respondents argue that the application herein is res-judicata and that the court is *functus officio*. It is the Respondents submission that if the Applicant was aggrieved by the Ruling of this court delivered on 14<sup>th</sup> December, 2021, he ought to have appealed against the same. The Respondents contend that the application herein is a thinly veiled attempt to appeal against the said ruling.
20. My understanding of the application herein is that the Applicant seeks review of the orders of stay granted on 14<sup>th</sup> December, 2021, although the application is brought under order 51 of the Civil Procedure Rules and Sections 1A, 3A and 63(e) of the Civil Procedure Act as well as Articles 50 and 159



of the constitution which are sections of general application. That notwithstanding, this court is duty bound under the spirit of article 159(2)(d) to determine disputes without due regard to technicalities.

21. The Respondents submitted that the application is res judicata and that the court is functus officio. However, as already noted the spirit of the application is review of the orders made on 14th December, 2021 granting stay. Therefore, I am not persuaded that the application is res judicata or that the court is functus officio. This is so because the court has powers to review its own orders where sufficient cause is shown. The question is whether under the circumstances of this case, the Applicant has met the threshold for review orders.
22. The law governing review orders is order 45 rule 1 of the Civil Procedure Rules. For such orders to issue, the Applicant must prove that there is discovery of new or important matter or evidence, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reasons. It is incumbent upon the Applicant to prove the above ingredients before this court can exercise its unfettered discretion to grant the orders in his favour.
23. In the case of Asset Recovery Agency vs Charity Wangui Gethi & 3 Others [2020] eKLR, the Court of Appeal had this to say:

“In an application for review, as envisaged under order 45 of the Civil Procedure Rules, the grounds which ought to be established are conclusive. An Applicant must establish that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made; that there has been a mistake or error apparent on the face of the record; or any “other sufficient reason.” The ground “other sufficient reason” has been held to be consonant with the first two grounds: see Kuria vs Shah 1990 KLR 316. Additionally, the Applicant must exhibit that he acted expeditiously.”
24. In this case, the Applicant inter alia, accuse the Respondents for not lodging any appeal at the Court of Appeal for a period of almost one year despite enjoying the said orders of stay to the detriment of the Applicant. In response, the Respondents contend that they filed a notice of Appeal and requested for the typed proceedings and have not been informed by the Registry whether or not the proceedings have been typed and ready for collection to enable them compile and file a Record of Appeal. That the delay in typing of proceedings by the Registry should not be visited on a litigant.
25. On the face of the application, the Applicant has shown that there is “other sufficient reason” which is the delay in filing of the Record of Appeal by the Respondents upon securing the orders of stay. Having perused the court record, I note that the proceedings are already in the file. It is however, not clear when the same were ready. It is also not clear why the Respondents have not made any efforts to collect the same for purposes of preparing their Record of Appeal.
26. In the case of Absalom Dora vs Turbo Transporters [2013] eKLR, it was stated that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree-holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”



27. I am inclined to take judicial notice that the typed proceedings are ready and the Respondents have no reason in expediting their appeal. Therefore, in balancing the rights of both the Applicant and the Respondents, and in the interest of justice, the court will allow the notice of motion dated November 16, 2022 in the following terms:

- a. The orders of stay granted on December 14, 2021 are reviewed and are to remain in force for a period of ninety (90) days from the date of this ruling to enable the respondents lodge their intended appeal.
- b. In the event of failure to comply with the above condition, the orders of stay granted on December 14, 2021 will stand vacated.
- c. Costs of the application are awarded to the Applicant.

28. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 26<sup>TH</sup> DAY OF JUNE, 2023 IN THE PRESENCE OF:**

C/A: Martha

Kirimi for Plaintiff/Applicant

Mwenda holding brief for Kamau Kuria for Respondents

**C. K. YANO,**

**JUDGE.**

