



REPUBLIC OF KENYA



**Mabwa v Angelei & 3 others (Environment & Land Case 118 & 87 of 2015  
(Consolidated)) [2023] KEELC 18228 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18228 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 118 & 87 OF 2015 (CONSOLIDATED)  
FO NYAGAKA, J  
JUNE 21, 2023**

**BETWEEN**

**SHEILA KABOLE MABWA ..... JUDGMENT DEBTOR**

**AND**

**JOSHUA ANGELEI ..... 1<sup>ST</sup> DECREE HOLDER**

**ROBERT LOBUR ANGELEI ..... 2<sup>ND</sup> DECREE HOLDER**

**GEDION LOITALIM ANGELEI ..... 3<sup>RD</sup> DECREE HOLDER**

**ALLAN ENGILAE ANGELEI ..... 4<sup>TH</sup> DECREE HOLDER**

**RULING**

**Introduction**

1. The Applicant herein, who now is the Plaintiff and Judgment Debtor, is not only innovative and daring but as extremely subtle. After losing her claim which, through the evidence tendered, led to counterclaim against her succeeding she has made a number of desperate applications to go around it but in vain. This is her fourth application, when counted with the one the Applicant admits to as having been filed in the Court of Appeal, aimed at stopping execution of the decree but she has clad it as a prayer for injunction. She hardly seems to appreciate that whatever cloth she adorns the application, the nature thereof will remain: if it is a wolf it is a wolf. She also fails to appreciate that there is a time for everything under the sun: a time to sue and a time to be sued, a time to prosecute a matter before a trial court and a time to prosecute it on appeal, a time for hostilities and a time for peace, a time to litigate and a time to stop. There cannot be justifiable endless knocks at the same door. I now consider the application.
2. Before me is an Application dated February 10, 2023 and filed on February 13, 2023. The Applicant brought it on the strength of Sections 1A, 1B, 3, 3A of the [Civil Procedure Act](#) and Section 152E of the [Lands Act](#). It sought the following reliefs:



1. ... spent
  2. ... spent
  3. That the Respondents be restrained from evicting, demolishing house (sic), cultivating, cutting or harvesting trees, entering into and or doing anything to occupy or occupying the land in dispute till the hearing and determination of the Civil Appeal No 35 of 2019.
  4. That the order be directed to the local administration, the area Chief and Office Commander Maili Police Station to ensure peace and compliance with order.
  5. That costs of this Application be provided by the Respondents.
3. In brief, in her Application the Judgment-Debtor accused the Decree-Holders of forcefully entering into the suit land, felling trees, threatening to evict and demolish all houses and/or structures and other plants and cultivating without either a court order or her consent.
  4. She lamented that since there was a pending Application dated September 26, 2022 (which the Court has now determined in a separate ruling) and an active appeal, being Civil Appeal No 35 of 2019, she stood to suffer substantial loss if the Respondents were allowed to cultivate, evict her and occupy the suit land. But she acknowledged that her Application dated June 3, 2019 purportedly filed in the Court of Appeal which she referred to as SKM1 (but not annexed to the Affidavit) in which she sought a stay of execution of the decree herein had, in her own words, been overtaken by events.
  5. The Applicant accused the Decree-Holders of taking advantage of the COVID-19 pandemic outbreak since they had the suit land registered in their names during that period. She observed that the Decree-Holders, while registered proprietors, were not in occupation and had interrupted her cultivating and farming activities on the suit land. That they proceeded to ingress the suit land and cultivate on it to her disadvantage. She annexed to her Affidavit and was marked SKM2 photographs of the suit land under cultivation.
  6. She continued that the Application was improper since it had failed to follow the legal procedure as set out in the Land Act insofar as eviction was concerned.
  7. For the above reasons, the Appellant urged this court to grant her Application since it occasioned no prejudice upon the Decree-Holders.

### **The Response**

8. The 1<sup>st</sup> Decree-Holder responded to the Application. He deposed an Affidavit dated February 24, 2023 and filed on March 1, 2023 to vehemently oppose the Judgment-Debtor's Application.
9. The deponent attached the decree espousing the judgment of the court dated December 3, 2018 and marked it as JA1. He deposed that the Judgment-Debtor's Application dated February 8, 2019 in which she sought stay of execution was dismissed by this Court on March 11, 2019 and that failure of the Applicant to seek stay or injunction in the Court of Appeal and her action to argue the present Application was misconceived and bad in law.
10. For the reason that judgment was entered on December 3, 2018, the 1<sup>st</sup> Decree-Holder deposed that this court was *functus officio* towards granting injunctive reliefs adding that those prayers were only at the preserve of the Court of Appeal.
11. The Respondent informed the court that following judgment, he had since ploughed on the suit land in readiness for planting while noting that his Application dated September 26, 2022 sought eviction



orders. Finally, it was deposed that the Application amounted to an abuse of the process of the court and was thus one for dismissing.

### **Submissions**

12. The court directed parties to file and exchange written submissions addressing the issues in the Application but the parties left it to the court to decide it based on the grounds in support and facts as deposed in the Affidavits thereto.

### **Analysis and Disposition**

13. I have considered the Application, the law, the obtaining circumstances and the rival parties' Affidavits. The only two issues for determination arising from the application are whether the Application is merited and who to bear the costs thereof.
14. It is indeed beyond doubt that this Court delivered its judgment on December 3, 2018. In it the court granted the following reliefs:
  1. A declaration that the subdivision of parcel number 201 into parcel numbers 247, 248, 249 and 250 is illegal, null and void;
  2. An order be and is hereby issued cancelling all the titles to plot numbers 247, 248, 249 and 250 and reinstating plot number 201 as one undivided whole as was the case before subdivision;
  3. An order that the Plaintiff's title to all that parcel known as 201 has been extinguished and that the Defendants are the rightful owners of plot No 201;
  4. The Defendants should be registered as the owners of plot No 201;
  5. An order that the Plaintiff shall bear the costs of this suit and the Counterclaim.
15. It is admitted that following the delivery of the judgment, the Applicant filed a Notice of Appeal against it, and ultimately filed an appeal No Civil Appeal No 35 of 2019. Following the institution of an appeal through Notice of Appeal against the judgment herein the Applicant moved the Court of Appeal through an application dated June 3, 2019 for stay of execution of the judgment. She only deposed about the filing of the Application and purported to annex a copy of it as SKM1 but did not. Nevertheless, she deposed that the application was not prosecuted but instead overtaken by events because, according to her, Covid-19 Pandemic paralyzed operations of the Court. She deposed further that the Respondents took advantage of the Pandemic and got registered as proprietors of the land and had now moved the Court vide the Application dated September 26, 2022 (this Court has delivered a separate Ruling on the said application) to evict her from the land.
16. The law and practice in the civil process is that once the trial Court has refused an application for stay of execution of an order or judgment pursuant to an appeal preferred from its decision the aggrieved party is at liberty to move the appellate Court for a similar order. As for stay of execution pending an appeal from this Court to the Court of Appeal, it is clear that when this Court does not grant it, Rule 5(2)(b) of the [Court of Appeal Rules](#), 2010. It provides that:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may- in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”



17. In the instant application, the Applicant moved this Court for the substantive order of restraining the Defendants/deed holders from evicting, demolishing house, cultivating, cutting or harvesting trees, entering into and or doing anything to occupy or occupying the land in dispute till the hearing and determination of Civil Appeal No 35 of 2019. These, in my view, were the same orders she sought when she filed the application for stay of execution of the decree. Thus, rather than moving the Court of Appeal over the relevant issue the Applicant has come back to this court subtly like the serpent of the Biblical times to clothe stay of execution with an injunction.
18. First, it is trite law that an injunction can only be granted where an Applicant shows that they have a prima facie case against the Respondent. That then has to be in situations where there is a suit pending trial and the applicant is apprehensive of loss and damage beyond recovery by way of damages is likely to result. It cannot be granted pending the success or otherwise of a matter pending before different forum: it has to be pending in the same matter.
19. In the instant case, when this Court delivered its judgment, it became *functus officio* in the suit. There is nothing else pending before it except for post-judgment procedures. In any event, the Applicant sought a stay of execution of the decree and it was refused. Instead of him seeking stay of execution in the Court of Appeal as the law stipulates under Rule 5(2)(b) of the Rules (supra), she resorted to unorthodox means of obtaining the same orders she had sought earlier.
20. This is an abuse of the process of this Court. The Court cannot countenance situations where its process is open to abuse. I must chastise the conduct of the Judgment-Debtor who by trickery, hook or crook has tried to interfere with the execution of the decree herein by what I would term as antics, but in vain. To demonstrate it, and the record bears it, following judgment the Applicant firstly filed an Application for stay of execution pending Appeal on February 11, 2019. It was dismissed on March 11, 2019. Upon that unsuccessful step, someone by name Richard Simwa to who the Applicant herein allegedly sold the 5 acres to filed a similar application dated August 25, 2021, albeit in the façade nature of a review and set aside. That bid similarly was dismissed on November 19, 2021. It is admitted by the Applicant that besides the failed two efforts herein to stop the execution she moved the Court of Appeal on June 3, 2019 for stay of execution orders. That did not bear fruit to date. She then filed the present Application albeit the three former unsuccessful bids for stoppage of the execution process. From the deposition in her Affidavit the instant Application was only galvanized by the Decree-Holders' Application dated September 26, 2022 for her eviction.
21. It is observed that the Applicant dared apportion blame on the unfortunate consequential turn of events arising from the Covid-19 Pandemic to justify the inordinate delay in bringing the present Application. It is common and in the public knowledge that the Covid-19 Pandemic struck the globe from early 2020 but in Kenya, the first case was reported on March 13, 2020. Following the onset of the Pandemic, court operations were scaled down from March 16, 2020. But it is also in the public knowledge that during the period, court matters proceeded virtually and with speed with a view to avoiding an impediment to justice. There is no explanation why the Applicant never moved the Court from June 3, 2019 to March 16, 2020 when the operations of the Court slowed down. I do not understand why the Judgment-Debtor would dare cast aspersions on the very same platform it seeks reliefs.
22. It appears to me that the Judgment-Debtor wants to stretch the Court's patience to the uttermost limit by her conduct. This court must caution against such conduct. The Court will not hesitate to declare such a litigant vexatious, scandalous and or frivolous and make the necessary orders to defeat such tactics.



23. In the end, I find that the Application dated February 10, 2023 is an open abuse of the process of this Court. It is hereby dismissed with costs to the Decree-Holders.

24. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 21<sup>ST</sup> DAY OF JUNE, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

