



**Nderu v Ng'ang'a (Environment & Land Case 303 of 2019)
[2023] KEELC 18204 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18204 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 303 OF 2019
MD MWANGI, J
JUNE 15, 2023**

BETWEEN

MARGARET WANGUI NDERU PLAINTIFF

AND

ALICE WACEKE NG'ANG'A DEFENDANT

(In respect to the application dated 8th May 2023 seeking to stay the eviction order issued in this matter on the basis of pending police investigations into the title, the subject matter of this suit)

RULING

Background

1. In this matter, the court rendered a judgment way back on the September 27, 2022 granting the plaintiff an eviction order against the defendant in respect to the suit property herein, LR No Ngong/Ngong/5677 and a sum of Kshs 1,000,000/- as general damages with interest at court rates from the date of the judgment until payment in full. Subsequently the defendant sought for stay of execution pending appeal before this court as well as before the Court of Appeal. She was denied the orders of stay in both courts.
2. The defendant has now once again come before the court seeking to stay execution of the decree of the court this time round on the basis of pending investigations on the title to the subject property on allegations that the plaintiff obtained it fraudulently. As framed in the application, the defendant prays for an order that, "... this honourable court be pleased to stay eviction orders granted to the plaintiff/respondent and await the investigation report from the DCI on the authenticity and illegality of the title."
3. The application is strenuously opposed by the Plaintiff/Decree holder terming it as mischievous and without basis in law.



Court's Directions.

4. The court invited the parties to make oral submissions which they did on the May 31, 2023.

Submissions By The Parties.

5. In his submissions, the advocate for the defendant/applicant, Prof Kiama Wangai reiterated that the title to the suit property was the subject of an investigation by the police specifically the Director of Criminal Investigations (DCI). The complaint was lodged by the defendant on the basis that the suit property was solely owned by her deceased husband, but upon his death, it was mysteriously altered into joint ownership between the deceased and the plaintiff in this case. She alleges fraud on the part of the plaintiff.
6. It was the defendant/applicant's case that the police were in a quagmire since they were required to supervise the execution of the decree of this court on the one hand and at the same time to carry out the investigations on the title on the other hand. He urged the court to exercise its discretion in his client's favour since no prejudice would be suffered by the plaintiff, just the inconvenience of waiting a little longer to enjoy the fruits of her judgment.
7. In response, Mr Mbigi Njuguna, advocate for the plaintiff/respondent reiterated the averments in his client's replying affidavit sworn on May 22, 2023. He termed the application hopeless and an abuse of the process of court.
8. The plaintiff reminded the court that it had already dealt with an application for stay of execution pending appeal, earlier on in this matter. The court was therefore *functus officio*. He further submitted that the issues raised by the defendant in the application were substantively in issue during the hearing of the case and have since been determined with finality. The defendant had the forum and opportunity to bring out the issues during the hearing which she now seeks to reintroduce through the backdoor.
9. The respondent pointed out that the alleged complaint was only expressed through a letter dated April 11, 2023, months after the court had pronounced itself and delivered a judgment in this matter. The respondent asserted that the application has no basis in law. There is no provision for stay of execution pending police investigations in the law.
10. In rejoinder, Prof Kiama Wangai submitted that the discretion of the court cannot be *functus officio*. It is unfettered in the interest of justice. The advocate for the defendant urged the court to exercise the discretion in favour of his client.
11. The applicant further submitted that every application should be considered on its own merits. The grounds in the current application are different from the ones in the earlier application for stay pending appeal. He clarified that the defendant merely needed a stay for 30 days only. He urged the court not to allow its discretion to be inhibited by technicalities.

Issues for Determination.

12. Having considered the application by the defendant/applicant, the replying affidavit of the plaintiff and the oral submissions by the advocates for both parties, I am of the view that the only issue for determination is whether the prayers by the defendant/applicant are merited.



Analysis and Determination.

13. The application before the court is stated to have been brought under the provisions of sections 1A, 1B & 3A of the [Civil Procedure Act](#), order 51 of the [Civil Procedure Rules](#) and all enabling provisions of the law.
14. Sections 1, 1A, 3 and 3A of the [Civil Procedure Act](#) and article 159 of the [Constitution](#) reserves the court's inherent jurisdiction.
15. The Court of Appeal in the case of [Kenya Power & Lighting Company Ltd v Benzene Holdings Ltd t/a Wyco Paints](#) (2016) eKLR, described the inherent jurisdiction of the court as a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. The court further observed that section 3A of the [Civil Procedure Act](#) appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice to be met or to prevent abuse of the process of the court. This power has been broadened by the introduction in the year 2009 of the overriding objective in sections 1A & 1B and in the year 2010 by article 159 of the [Constitution](#).
16. The Court of Appeal in the above cited case and in an attempt to define the scope and extent of the inherent powers of the court made reference to the [Halsbury's Laws of England](#), 4th Edn vol 37 para. 14 where the authors expounded it as follows;

“The jurisdiction of the court which is comprised within the term ‘inherent’ is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

17. As this court observed in [Ayub Njenga Wainaina & another v John Edward Ngure & 2 others](#) – ELCC 727/2017, a judge or a magistrate must always be cautious whenever called upon to exercise his unfettered discretion. He must never lose sight of the fact that the discretion of the court is judicial discretion; and judicial discretion must be exercised judiciously on the basis of sound legal principles. It is not an open cheque at the disposal of the court. It is not open to the court to issue any order anyhowly.



18. The Court of Appeal in the case of *Murtaza Hussein Bandali t/a Shimoni Enterprises v P.A Willis* (1991) KLR, 469, eloquently stated that; -

“This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously.”

19. The application by the defendant herein has no basis in law whatsoever. This court already pronounced itself on an application by the same party for stay of execution pending appeal. I agree with the submission of the plaintiff/respondent that it is an abuse of the process of court. It is hereby dismissed with costs to the plaintiff.

20. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Nyambura holding brief for Mbigi for the Plaintiff/Respondent.

No appearance for Defendant/Applicant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

