



REPUBLIC OF KENYA



**Magany & another v Ouma & 5 others (Environment and Land Appeal
22 of 2021) [2023] KEELC 19220 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19220 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 22 OF 2021
GMA ONGONDO, J
JULY 25, 2023**

BETWEEN

SERFINA OKUTA MAGANY 1ST APPELLANT

ANDREW ONYANGO MAGANY 2ND APPELLANT

AND

MICHAEL ABONGO OUMA 1ST RESPONDENT

ISAYA JUMA MWARE 2ND RESPONDENT

MARTIN JOHN OKECH 3RD RESPONDENT

LAND ADJUDICATION OFFICER - SUBA/MBITA 4TH RESPONDENT

LAND REGISTRAR-HOMABAY 5TH RESPONDENT

HON ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. The appellant/applicant through the firm of Ayoo-See and Associates Advocates mounted an application by way of a notice of motion dated February 23, 2023 under sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* chapter 21 Laws of Kenya seeking the orders infra;
 - a. Moot.
 - b. That this Honourable Court be pleased to enforce its Judgment dated January 25, 2022 and decree dated August 19, 2022.
 - c. That this Honourable Court be pleased to enforce its Judgement and decree, specifically the prayers seeking for eviction, demolition of structures constructed on part of LR. No. Kaksingri/k.waregi/43 and permanent injunction restraining the 1st, 2nd and 3rd respondents



either by themselves or through their agents from trespassing or in any way interfering with LR. No. Kaksingri/k. Waregi/43.

- d. That this Honourable Court be pleased to order the Officer commanding Nyatoto Police Station to ensure compliance with judgement and decree of this Honourable Court and that the said order be served upon the officer commanding Nyatoto Police Station.
 - e. That the costs of this application be born by the 1st, 2nd and 3rd respondents.
2. The anchorage of the application is a supporting affidavit sworn on even date by the 2nd applicant with the authority of the 1st applicant alongside the annexed documents marked as “AOM-1 to AOM-4” which include; judgment and decree of the trial court. Further, the application is anchored on grounds (a) to (e) stated on it’s face.
 3. Briefly, the applicants lament that the judgment and decree of this court were issued on January 25, 2022 and August 19, 2022 respectively against the respondents who have since forcefully entered the land in dispute herein namely land parcel number Kaksingri/K.Waregi/43 and started to plough the same. That the respondents are aware of the said judgment and decree but have blatantly ignored to comply thereof. That the respondents’ actions are likely to cause irreparable harm to the applicants.
 4. The 1st, 2nd and 3rd respondents through Mbugua Muriithi and Company Advocates objected to the application by grounds of opposition dated March 10, 2023 on the basis that;
 - a. The application is being brought in bad faith as there exist a valid order of stay issued by this Honourable Court on the 10th of May 2022.
 - b. The existence of a stay order implies that the parties are governed by the judgment in the Environment and Land Case Number 19 of 2018, Mbita Court.
 - c. The applicants have come to court with unclean hands as they are the ones who have violated the stay order by trespassing on the 3rd respondent’s parcel of land.
 - d. The application is frivolous vexatious and an abuse of the court process.
 5. By a supporting affidavit sworn on March 10, 2023 by the 3rd respondent in support of the said grounds, the 1st, 2nd and 3rd respondents stated in part that they filed a notice of appeal and Civil Application No. E092 of 2022 at the Court of Appeal. That the said court allowed the respondents to file appeal out of time and proceeded to serve the Record of Appeal accordingly.
 6. In a further affidavit sworn on March 31, 2023 by 2nd appellant, it was the applicants’ contention that whereas the respondents obtained extension of time through the ruling delivered by the Court of Appeal, they have not filed and served any record of appeal as ordered. That the stay order issued by this court granted automatically lapsed and that the application is merited.
 7. The 4th, 5th and 6th respondents failed to participate in this application.
 8. By the submissions dated April 5, 2023, the applicants relied on the case of *Sifuna and Sifuna Advocates-vs-Patrick Simiyu Khaemba* (2021) KLR on proof of service. That the respondents have never served them with any record of appeal as ordered by the Court of Appeal’s ruling thus, the application be allowed accordingly.
 9. In the submissions dated 21st April 2023, the respondents stated that they filed appeal number COACA No. E 280 OF 2022 at the Court of Appeal, Kisumu. That therefore, the applicants have come to court with unclean hands, among other things.



10. Further to order 50 rule 16 of the *Civil Procedure Rules*, 2010, on April 27, 2023, this court received oral submissions from counsel for the respective parties as regards the existence of an appeal at the Court of Appeal and service of the record of appeal thereof. The submissions reinforced their respective written submissions.
11. I have anxiously considered the application, the grounds of opposition, the further affidavit and both written and oral rival submissions. So, is the application merited?
12. It is crystal clear that the applicants seek to enforce this court’s judgment rendered on January 25, 2022 and decree thereof.
13. It is pretty clear that the respondents filed a notice of appeal dated February 3, 2022. So, an appeal from the said judgment was deemed to have been duly lodged as provided for under order 42 rule 6 (4) of the *Civil Procedure Rules*, 2010.
14. By this court’s ruling delivered on May 10, 2022, the respondents were given sixty days to file and serve an appeal to the Court of Appeal. Therefore, did they comply with the orders?
15. It is a common baseline herein that is that there is in existence, Court of Appeal Civil Number E092 of 2022 where ruling was delivered on December 2, 2022 and paragraph 9 thereof reads;

“The applicants shall within 14 days hereof institute and serve the appeal upon the respondents.....”
16. Equally, there exists an appeal as disclosed in paragraphs 9 and 13 hereinabove.
17. Furthermore, this court is conscious of the import of lack of jurisdiction on a court’s decision; see *Republic-vs-Karisa Chengo and 2 others* (2017) eKLR.
18. To that end, it is quite clear that this matter has been escalated to the Court of Appeal which is seized of jurisdiction over the same. Therefore, this court has ceased to have jurisdiction over this matter.
19. In the circumstances, it would not be right for the matter to run at Court of Appeal and this court simultaneously; see *Judicial Commission of Inquiry into Goldenberg Affair and 3 others-vs-Kilach* (2003) eKLR 249 at 265/266.
20. Wherefore, the instant application is incompetent. The same is hereby struck out.
21. Costs of the application to abide the outcome of the appeal at the Court of Appeal.
22. It is important to note that this ruling is rendered as scheduled in the absence of the parties who had been notified accordingly.
23. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 25TH JULY 2023.

G.M.A ONG’ONDO

JUDGE

PRESENT.

1. Court Assistant, Okello.

