



**Kisyula & 2 others (Suing as legal representatives of Katani
Community SHG) v Nyakundi & 11 others (Environment & Land Case
462 of 2017) [2023] KEELC 19240 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19240 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 462 OF 2017**

A NYUKURI, J

JULY 24, 2023

BETWEEN

**JONES MAVUTI KISYULA 1ST PLAINTIFF
FATUMA IBRAHIM GOLICHA 2ND PLAINTIFF
EVELYN WANZA MUSAU 3RD PLAINTIFF
SUING AS LEGAL REPRESENTATIVES OF KATANI COMMUNITY SHG**

AND

**HARON GEKONGE NYAKUNDI 1ST DEFENDANT
JOYCE N GIKUNDA 2ND DEFENDANT
LA-NYAVU GARDENS 3RD DEFENDANT
TITUS NGUTI MUSYOKI 4TH DEFENDANT
DAVID WAMBUA MASIKA 5TH DEFENDANT
TOM MBALUTO 6TH DEFENDANT
WILSON MWONGA NGOKA 7TH DEFENDANT
DANIEL MUSYOKA NDONYE 8TH DEFENDANT
SAMUEL KIOKO MUUMBI 9TH DEFENDANT
MWITO INVESTMENT CO LTD 10TH DEFENDANT
ATHI GREENS LIMITED 11TH DEFENDANT
NEW KIVAE NGWATANIO WELFARE SOCIETY 12TH DEFENDANT**



RULING

1. Before court is a Notice of Motion dated June 23, 2023 filed by the Plaintiffs seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to set aside the proclamation and eventual sale herein unconditionally or as the court may direct.
2. The application is supported by the grounds on its face and supporting affidavit sworn by Jones Matuvi Kisyula the 1st Plaintiff. He deposed that the Plaintiffs were unaware of the ruling delivered on February 23, 2022 and were shocked to be served with a proclamation from Moran Auctioneers. He averred that the Applicant was never updated of the matter by their advocate and were not aware that their advocates then on record never attended court. According to him, the mistake of an advocate should not be visited on an innocent client; the mistake having been done by their previous advocates being the firm of Andrew Makundi & Company Advocates. That if execution proceeds, they will have been condemned unheard.
3. In response, the 4th and 6th Defendants filed replying affidavit sworn on July 5, 2023 by Tom Mbaluto the 6th Defendant, opposing the motion. He deposed that the Plaintiffs filed this suit in 2017 and that on October 7, 2020, when the matter came up for hearing, the Plaintiffs were absent and therefore the suit was dismissed for want of prosecution with costs to the Defendants; that the 4th and 6th Defendants filed a bill of costs dated April 15, 2021 which was taxed vide a ruling delivered on February 24, 2023 at Kshs 617,110/-; that he instructed Moran Auctioneers to execute against the Plaintiffs and that the proclamation notice was lawfully issued.
4. The 4th Defendant stated that the allegation that the Plaintiffs were unaware of the ruling was not true as they were all along represented by their counsel who was on record and who was duly served with all the court process in regard to the Respondents bill of costs. He stated that the Plaintiffs had become frivolous and perennial litigants abusing the court process to ward off their obligation to settle costs. He maintained that stay of execution cannot be granted in regard to taxed costs and that therefore, the application offends the basic tenets of law.
5. In a rejoinder, Jones Matuvi Kisyula swore a supplementary affidavit dated July 10, 2023 wherein he stated that he had been informed that the suit was still ongoing and he denied being a frivolous and perennial litigant.
6. The application was canvassed by way of written submissions; on record are the Applicant's submissions filed on July 10, 2022.

Submissions

7. Counsel for the Applicants submitted that the Applicant had satisfied the principles for grant of stay of execution. Counsel argued that as the suit was dismissed without the Plaintiffs being heard, they intended to appeal against the said judgment. Counsel argued that the Plaintiffs were unaware of the dismissal of the suit and the ruling on taxation of the 4th and 6th Defendants' costs, due to failure by their



- advocate to inform them, and that mistakes of counsel should not be visited on an innocent litigant. Reliance was placed on the case of *Board of Governors, Moi High School Kabarak & Another v Malcom Bell* [2012] eKLR, for the proposition that the Appellant intended appeal has high chances of success.
8. Counsel also argued that the Plaintiffs had demonstrated sufficient cause to entitle them to the orders sought since execution means that the Applicants may never recover their money, if they are successful and that their application will be rendered nugatory and a mere academic exercise.
 9. It was also submitted for the Applicants that the Applicants had satisfied the test of granting interim injunction. Counsel referred to the case of *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358 and argued that the Applicants had established a prima facie case by showing that they were not granted a right to be heard contrary to Article 50 of the *Constitution*.
 10. On whether the Applicants stood to suffer irreparable injury if temporary injunction is not granted, counsel argued that if execution proceeds, the Applicants may never get their money back. Counsel submitted that this is a dispute touching on ownership of land which is an emotive matter and that the Plaintiffs should be accorded a fair hearing. Counsel further argued that the balance of convenience tilted in favour of the Applicants as the Respondents have never been in actual possession of the suit property. On the question of costs, counsel submitted that costs follow events and argued that they be awarded to the Plaintiffs/Applicants.

Analysis and Determination

11. I have considered the application, the response and submissions. I note that as prayers 1, 2 and 3 of the application were prayers made pending hearing and determination of the application dated June 23, 2023, those prayers are now spent and the only prayer that needs determination is prayer number 4, seeking the setting aside of the proclamation and eventual sale herein unconditionally. The issue that arise therefore is whether or not there is sufficient cause to unconditionally set aside the proclamation and sale of the Applicants' property.
12. It is not disputed that this suit was dismissed with costs on October 7, 2020. The record shows that the dismissal was done in the presence of Mr Muli counsel for the Plaintiffs, Mr Matemo counsel for the 5th, 7th and 8th Defendants, Mr Muindi counsel for the 1st, 2nd and 3rd Defendants and Mr Mbaluto counsel for the 4th and 6th Defendants. The dismissal was done after the Plaintiffs application for adjournment was declined by the court. Subsequently, on July 2, 2021, the 4th and 6th Defendants filed their party and party bill of costs dated April 15, 2021 which was determined by a ruling of the Deputy Registrar of this court delivered on February 24, 2023 and the bill taxed at Kshs 617,110/-.
13. Thereafter warrants of attachment of movable property in execution of a decree for money were issued to Moran Auctioneers. Having considered the record, I note that the order dismissing this suit with costs for want of prosecution made on October 7, 2020 has not been appealed against, reviewed or set aside and therefore the same is still in force. That being the case, the Plaintiffs are lawfully bound to settle the 4th and 6th Defendants costs as the order awarding the latter costs of the suit is valid, in force, and has not been challenged either before this court or in the Court of Appeal.
14. In addition, the order of February 24, 2022, taxing the 4th and 6th Defendants costs has not been challenged before this court nor is there an application to set aside the said ruling. Although the Applicants allege that they were not aware of the ruling of February 24, 2020 and the order of dismissal no application to set aside the two decisions has been filed before this court or any other court.
15. In the premises, as no challenge has been filed against the order of this court of October 7, 2020 and the taxation of April 24, 2023, the warrants of attachment issued herein have been lawfully issued pursuant



to a lawful process and no material has been placed before this court to warrant the setting aside of the execution process commenced in this matter.

16. The upshot is that the Notice of Motion dated June 23, 2023 has no merit whatsoever and the same is hereby dismissed with costs to the 4th and 6th Defendants.

17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr Oloo for Applicants

Mr Ajack Respondents

Abdisalam – Court Assistant

