



**Said v Abdulshiek & 2 others (Environment & Land Case
347 of 2017) [2023] KEELC 18874 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 347 OF 2017
SM KIBUNJA, J
JULY 19, 2023**

BETWEEN

SWALEH OMAR SAID PLAINTIFF

AND

KHALID SALIM ABDULSHIEK 1ST DEFENDANT

FIRST COMMUNITY BANK LIMITED 2ND DEFENDANT

LAND REGISTRAR MOMBASA 3RD DEFENDANT

RULING

1. The Plaintiff's notice of motion dated November 10, 2022, is brought under order 45 rule 1 and 2 and order 22 rule 22 of the Civil Procedure Rules and sections 1A, 2A and 3A of the [Civil Procedure Act](#), and seeks for the following orders;
 - a. That this matter be certified as urgent and be heard in the first instant.
 - b. That this Honorable Court be pleased to issue interim order of stay of execution pending interparties hearing of this application.
 - c. That in the alternative the status quo be maintained pending hearing of this application.
 - d. That the Honorable Court be pleased to review the ruling delivered on 3rd November 2022 and the same be set aside.
 - e. That the Honorable Court be pleased to review the judgement delivered on 7th June 2022 be reviewed and the same be set aside.
 - f. That costs of the application be provided for.



The application is premised on the four (4) grounds marked (a) to (d) respectively and supported by the affidavit of Swaleh Omar Said, the plaintiff, sworn on the 10th November 2022. It is the plaintiff's case that the court issued a ruling on the 3rd November 2022 requiring him to deposit Kshs.3,780,000. That no such amount was in his possession. That there is new evidence that the judgement delivered on the 7th June 2022, to which the stay of execution is being sort, was a default judgement entered after close of defence hearing. That the said judgement allowed the counterclaim without it being prosecuted, and it should therefore be set aside. That after the tenants were ordered to pay rent to him, they vacated and he was unable to collect the alleged sum of Kshs.3,780,000. That the suit premises are still empty except the space occupied by his son and one tenant, and that the rent from the two is used to cover water and outstanding electricity bills left by former tenants who had vacated.

2. The application is opposed by the 1st defendant through his replying affidavit sworn on the 18th November 2022, in which he inter alia deposes that it was an abuse of the court process, as the plaintiff had already filed for a stay of execution and the Court had rendered its ruling on 3rd November 2022. That the plaintiff was given 14 days to deposit the sum of Kshs.3,780,000 in the joint names of the Plaintiff's Advocates and the 1st Defendant's Advocates, in an interest-earning account for a stay of execution pending the determination of the Applicant's appeal to issue, and in default the stay order to stand dismissed. The plaintiff had already lodged a Notice of Appeal against the judgment of the Court on 7th June 2022, and an application for a stay of execution had also been filed, with the ruling scheduled for December 16, 2022. Furthermore, the plaintiff has failed to provide any new evidence that could have been presented before the court. That the plaintiff had been collecting rent from the suit properties since September 2017 to the present, and despite giving an undertaking to refund the rent if the case went against him, he has failed to do so. That in blatant disregard of court orders, the plaintiff placed his son to occupy the property, preventing the 1st Defendant from collecting rent or using the premises. The plaintiff's application is misconceived and misplaced as it seeks for this Court to act as an appellate Court regarding the judgment and ruling of Munyao J. that the application is an attempt to frustrate the 1st Defendant and hinder him from enjoying the fruits of his labor, and should be dismissed with costs.
3. The application is also opposed by the 2nd defendant vide the replying affidavit of Claris Ogombo, the manager legal services, sworn on the 18th November 2022. It is their case that the application was an abuse of the court process, with the sole intention of preventing the 1st and 2nd defendants from enjoying the fruits of their judgment. That the copy of the ruling delivered on the 3rd November 2022 has not been attached to the application. That the plaintiff had already lodged two applications for a stay of execution at the Court of Appeal in CACA No. E053 and E042 Of 2022 - Swaleh Omar VS Khalid Salim Abdulsheikh First Community Bank Limited & Land Registrar, that were coming for hearing on November 22, 2022. That the plaintiff's application was incompetent as it blatantly violated the clear provisions of section 83 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure*, that provides that an application for review of a decree or order can only be filed in two situations: that is where an appeal against a decree or order is allowed but no appeal has been preferred, or where an appeal against a decree or order is not allowed. That the supporting affidavit of the Applicant did not include any supplementary affidavit or evidence contradicting the affidavit evidence of the 1st defendant, to the effect that the plaintiff had collected rent amounting to Kshs. 3,780,000 during the pendency of the suit. That if the plaintiff's assertions were true, they should have pleaded that in their application dated 15th June 2022, whose ruling is the subject of the present application. That contrary to the plaintiff's assertions, the counterclaim had been prosecuted and the court had made a determination, and no new evidence has been produced by the plaintiff. The application for review had been filed with an



inordinate delay, six months after the judgment was delivered, and ought not to be allowed. That the application should be dismissed.

4. The 3rd defendant opposed the application through the five (5) grounds of opposition dated the November 24, 2022, inter alia that the plaintiff was abusing the court process by simultaneously pursuing an appeal at the Court of Appeal and filing for review of the same orders before this Court. That the plaintiff has failed to disclose to the Court that he had filed an application dated the 30th June 2022 in CACA No. E042 of 2022, that is scheduled for ruling on the 17th February 2023. That the application should be dismissed with costs.
5. That following directions issued on the November 24, 2022 and February 20, 2023 the learned counsel for the plaintiff and 3rd defendant filed their submissions dated December 5, 2022 and November 24, 2022 respectively, which the court has considered.
6. The following are the issues for the determinations by the court;
 - a. Whether the plaintiff has met the threshold for review and setting aside of the ruling and judgement in question.
 - b. Who bears costs of the application.
7. Top of Form
8. Bottom of Form
9. The court has carefully considered the grounds on the application and opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, the record and come to the following findings;
 - a. The Plaintiff's application has been opposed by the defendants on the grounds inter alia that he had previously sought stay of execution and setting aside of the judgement orders vide the application dated the June 15, 2022 that was determined through the ruling was delivered by Justice Munyao on November 3, 2022. The court has perused the annexures provided by the 1st and 2nd defendants and confirmed from the record that the Plaintiff indeed made an application for the said orders dated the 15th June 2022. That the application was heard on merit and dismissed through the ruling delivered on the 3rd November 2022. That apart from the element of review and setting aside, what the plaintiff is seeking through prayers 4 and 5 of the notice of motion dated the 10th November 2022 is essentially the same with prayers 3 and 4 of the notice of motion dated the 15th June 2022 that has already been decided. That unless the plaintiff succeeds in establishing the threshold for reviewing and setting aside the said orders, this Court would be functus officio on the issue of granting a stay of execution and setting aside the judgement.
 - b. The Plaintiff seeks for a review of the ruling delivered on 3rd November 2022 and the judgment delivered on 7th June 2022. The power to review orders and decrees is provided under Order 45, Rule 1 of the Civil Procedure Rules. According to this rule, a person who considers themselves aggrieved by a decree or order, from which an appeal is allowed but not preferred, or from which no appeal is allowed, may apply for a review of the decree or order on various grounds, including the discovery of new and important matter or evidence, mistake or error apparent on the face of the record, or any other sufficient reason. The application for review should be made without unreasonable delay. The Defendants have opposed the prayers for review and setting aside arguing that the Plaintiff is guilty of material non-disclosure. They claim that the



Plaintiff had previously filed a similar application that has already been decided by this court and has an appeal of the matter in the Court of Appeal. The Plaintiff contends that the review of the judgment is necessary due to apparent errors in the record and the failure to prosecute the counterclaim. The Plaintiff asserts that the Court proceeded to deliver a judgment on 7th June 2022, despite these concerns. The court has perused the annexures filed by the 1st and 2nd defendants and the record, and observed that contrary to the plaintiff's contention that the counterclaim was not prosecuted, the record confirms that the suit was heard on merit before the judgement was rendered. Further, paragraphs (2), (36) to (57) of the judgement leaves no doubt that the court considered the evidence presented by the parties in determining the 1st defendant's counterclaim in his favour. The plaintiff's claim that the counterclaim was not prosecuted and that the judgement of 7th June 2022 granting it should be reviewed and set aside therefore fails.

- c. That it is a fact that the Plaintiff indeed did file a Notice of Appeal dated 8th June 2022, and applications before the Court of Appeal to file the Record of Appeal out of time and stay of execution dated 19th August 2022 and dated 30th June 2022 in Mombasa Caca No. E053 and E042 of 2022 respectively. It is therefore not in doubt that the plaintiff has a pending appeal over the same orders that he seeks to be reviewed and set aside through the instant application. It is a well-established principle that a court cannot review a decree or order if an appeal has already been preferred. Section 80 of the *Civil Procedure Act* provides for this, stating that any person who considers themselves aggrieved by a decree or order from which an appeal is allowed but not preferred, or from which no appeal is allowed, may apply for a review of judgment to the court that passed the decree or made the order. However, if an appeal has already been lodged, no review can be considered, as to do so would result in conflicting decisions on the same matter from the two levels of the judicial system. It is not permissible to pursue an appeal and an application for review over the same decree or order concurrently. If a party chooses to proceed with an appeal, they automatically forfeit the right to request for a review of the decision in question. This was affirmed in the case of *Karani & 47 Others v Kijana & 2 Others* [1987] KLR 557, where the court held that "once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal." Similar principles were recognized in the case of *African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited* [2003] 1 EA 1 (CAK).
- d. The option to either go for appeal or review was put in place to precisely avoid situations like the one the plaintiff herein is pursuing before this court and the appellate court concurrently. Once an intention to appeal has been expressed by filing a notice of appeal, there is no room for a review. (See: *Kamalakshi Amma v A. Karthayani* [2001] AIHC 2264). Consequently, the Plaintiff's application for review and setting aside is incompetent, and this court is without jurisdiction to grant the orders sought in view of the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. In light of the above findings, the Court concludes that the application for the review and setting aside of both the ruling dated 3rd November 2022 and the judgment dated 7th June 2022 is without basis, unmeritorious and cannot be granted as the court is *functus officio*.
- e. The concept of *functus officio* is well established in legal precedents. In the case of *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR, the Supreme Court of Kenya cited an article by Daniel Malan Pretorius, which explains the *functus officio* doctrine as follows:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who



is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

The Court also relied on the case of Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550, where it was stated that;

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

The above position cements the court's finding that the plaintiff's recourse if any should be before the appellate court.

- f. It is a well-established principle in law that costs typically follow the event. In this particular case, the Court's finding is that the prayers sought by the Plaintiff are unwarranted, baseless and an abuse of the court process. This principle of costs following the event has been affirmed in various case laws. For example, in the case of Republic v Owiti & Another [2006] eKLR, the court held that costs ordinarily follow the event and that the unsuccessful party should bear the costs of the successful party. Similarly, in the case of Muteti & Another v Mbithi & Others [2010] eKLR, the court emphasized that the general rule is that costs should be awarded to the successful party unless where there are exceptional circumstances to warrant a different order. In light of the circumstances in this proceedings, it is only fair and just that the Plaintiff bears the costs of the application for unnecessarily bringing the defendants back to the court, especially when the Plaintiff was well aware that an appeal had already been filed.
 1. The upshot of the foregoing is that the Plaintiff's application dated November 10, 2022 is unmerited and it is hereby dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 19th DAY OF JULY 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PLAINTIFF : Mr Kahindi Advocate.

DEFENDANTS : Mr Wafula for 2nd Defendant.

WILSON – COURT ASSISTANT.

S. M. KIBUNJA, J.

ELC MOMBASA.

