



REPUBLIC OF KENYA



Ndung'u v Mwangi & 7 others; Carnelian Enterprises Auctioneers (Interested Party) (Environment & Land Case 1391 of 2014) [2023] KEELC 20694 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20694 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1391 OF 2014
J OMANGE, J
SEPTEMBER 29, 2023**

BETWEEN

FRANCIS MAINA NDUNG'U PLAINTIFF

AND

PETER MWANGI 1ST DEFENDANT

JOSEPH MUGO 2ND DEFENDANT

PETER NJOROGE NDERITU 3RD DEFENDANT

JOHN KAMANDE NJOROGE 4TH DEFENDANT

PETER WANJOHI MWANGI 5TH DEFENDANT

WANJIKU WANJENGA KARANJA 6TH DEFENDANT

FRANCIS NJENGA MUKUA 7TH DEFENDANT

ISIAH PETER KANYI 8TH DEFENDANT

AND

CARNELIAN ENTERPRISES AUCTIONEERS INTERESTED PARTY

RULING

1. The application dated 22nd August, 2023 prays for the following reliefs;
 - a. That application be certified as urgent and be heard ex parte in the first instance and during the current court vacation.



- b. That this Honourable Court be pleased to grant leave to the firm of Prof. Kiama Wangai & Co. Advocates to come on record for the 2nd Defendant/Applicant herein.
 - c. That pending the hearing and determination of this application this honourable court be pleased to stay the execution commenced by proclamation of attachment/repossession/distrain of movable property dated 16/8/2023 issued by the Interested Party herein.
 - d. That pending the hearing and determination of this application interparties this honourable court be pleased to stay execution of this judgment of this honourable court issued herein on 24/10/2021.
 - e. That this honourable court be pleased to set aside the judgment dated 24th January 2021.
 - f. That the costs of this application be provided for.
2. The applicant argues that since he cannot be evicted from Ruiru Kiu Block 2/4546 the Respondent should not execute on damages either. He further avers that the warrants of attachment indicate that the Judgement Debtors are to pay the Defendants and do not indicate that the payment is to the Plaintiff.
 3. The applicant depones that he occupies the property Ruiru Kiu Block 2/4546 and the execution cannot happen as the Judgement is in respect of Ruiru Kiu Block 2/4547. It is the applicant's argument that given that the Judgement was in respect of a different property the Applicant cannot execute on damages and costs as that would be fraudulent.
 4. The applicant further argues that he has commenced ELC E019 of 2023 in respect of the property he actually occupies which is Ruiru Kiu Block 2/4546. In view of this he should not be compelled to pay the damages as ordered by court. He refers the court to various annexures which prove that he resides on Ruiru Kiu Block 2/ 4546.
 5. Counsel for the applicant referred the court to the evidence that was adduced in court and urged the court to find that the Judgement cannot be executed as the suit property the plaintiff/applicant lives in is a different property. Further he said that the claim that the application is res judicata does not lie as the court has inherent jurisdiction to do justice.
 6. I have considered the submissions by both counsels. The following issues emerge for determination by the court;Should the firm of Prof Kiama Wangai be granted leave to come on record for the 2nd Defendant/ Applicant.Should the Judgement dated 25th January, 2021 be set aside?Should the application for Stay of Execution be granted?Is the applicant liable for the entire decretal amount and if yes should the court allow him to pay in instalments?
 7. On the first issue, counsel seeks to represent the 2nd Defendant in this matter in which Judgement had been pronounced. I find that it is in the interest of justice for the 2nd Defendant to be allowed to be represented by an advocate of his choice. As such this prayer is allowed.
 8. On the question of Res Judicata Section 6 of the *Civil Procedure Act* provides "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"



9. As such in determining the issue of *Res Judicata* the court is called upon to determine the following issues;
 - a. Whether the issue was directly and substantially in issue in the former suit.
 - b. Whether suit was between the same parties or parties claiming under them.
 - c. The parties were litigating under the same title.
 - d. The issues were heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.
10. The 2nd Defendants application is based on the fact that the applicant resides on Ruiru Kiu Block 2/4546 and not Ruiru Kiu Block 2/ 4547. It is his contention that the Judgement on damages should not be executed against the 2nd Defendant due to the fact that the 2nd Defendant resides on a different parcel of land which was not subject of the Judgement.
11. This issue has been litigated before this court before. On the 28th July, 2022 Hon Lady Justice Komingoi rejected an application for review that sought to set aside the Judgement on the very same contention of mix up of titles. On the 2nd day of March, 2023 I rejected a similar prayer. In paragraph 9 of my Ruling I noted that the issue of who resides in which parcel was litigated by the parties and the Judge discounted the evidence as being contradictory. This was a finding by a court of concurrent jurisdiction which subsequently rejected an application for review. This finding can only be challenged through an appeal not in an application in this court. On this basis I rejected the application.
12. The 2nd Defendant is before me again still on the basis of the issue of the titles. The issue of the mix up of titles is substantially the same issue as was litigated upon in the earlier applications between the same parties and a final determination made. As such the prayer for setting aside of the Judgement on this ground is *Res Judicata* and fails. However, the applicant had sought other prayers which I will consider.
13. The applicant sought stay of execution on grounds that the warrants are defective. I have looked at the warrants and note that they indicate in the title that the warrants are to be executed against the Judgement Debtors the above Defendants. This is correct. In the citation to the Auctioneers it indicates that Judgement Debtors were ordered to pay to the Defendants. Having considered the Warrants and the Proclamation I find that no prejudice or confusion was caused by this reference that would justify granting stay of execution.
14. The last issue was not pleaded in the prayers in the application but was raised in the affidavit of the 2nd Defendant. The 2nd Defendant argued that decretal amount should be apportioned by all the Defendants and if not he should be allowed to pay in instalments of Kshs 20,000. The Judgement was entered against the Defendants jointly and severally. This means that each of the Defendants was independently liable for the whole decretal amount. The Plaintiffs decision to pursue the 2nd Defendant cannot thus be faulted on this ground.
15. On the question of instalments, the 2nd Defendant did not provide evidence of his means. In absence of this information on his financial position, the court cannot exercise discretion in his favour.
16. In the final result the court makes the following orders;
 - a. The firm of Prof Kiama is allowed to come on record for the 2nd Defendant.



- b. The prayers to set aside the Judgement and for Stay of Execution are dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF SEPTEMBER 2023.

JUDY OMANGE

JUDGE

