



REPUBLIC OF KENYA



KENYA LAW
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**Wahome v Maina (Environment and Land Appeal E015 of 2022)
[2023] KEELC 20130 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E015 OF 2022
JO OLOLA, J
SEPTEMBER 28, 2023**

BETWEEN

JORAM WAMBUGU WAHOME APPELLANT

AND

PAUL MURIUKI MAINA RESPONDENT

RULING

1. By the Notice of Motion dated and filed herein on January 31, 2023, Paul Muriuki Maina (the respondent) prays for an order that this Court be pleased to dismiss the appeal filed herein and thereby set aside the orders issued on November 3, 2022.
2. The application which is supported by an affidavit sworn by the Respondent is premised on the grounds:
 - (i) That a Ruling was delivered on 3rd November, 2022 requiring the Appellant to deposit a sum of Kshs.500,000/- within 30 days from the date of the Ruling;
 - (ii) That the Appellant has failed to deposit the said sum as directed; and
 - (iii) That the Respondent continues to suffer financially while the Appellant continues to receive rent from the suit premises.
3. The Appellant Joram Wambugu Wahome is opposed to the application. In his Replying Affidavit sworn on 28th February 2023, he conceded that an order was made requiring him to deposit the sum of Kshs.500,000/- as security for costs on 3rd November, 2022. It is however his case that having long retired and without any other steady source of income, he was unable to deposit the same within the stated timelines as he was relying on rental income which was not forthcoming.



4. The Appellant asserts that the rental houses on the suit premises have largely remained vacant due to threats to potential tenants by the Respondent and urged the Court to grant him ample time to deposit the sum.
5. I have carefully perused and considered the Respondent's application as well as the Appellant's response thereto. I have similarly perused and considered the submissions placed before me by the Parties herein.
6. By this application, the Respondent has urged the Court to be pleased to dismiss the Appellant's Appeal and to thereby set aside the orders of stay issued herein on 3rd November, 2021 in favour of the Appellant. It is the Respondent's case that the Appellant has failed to abide by the orders issued by the Court and that he should no longer be allowed to benefit from the orders of stay of execution.
7. In his response to the application, the Appellant concedes that he was unable to comply with the orders of the Court within the timelines that were given as he is now a retiree and is not possessed of sufficient income. The Appellant thus urges the Court in his response to grant him more time to comply.
8. The genesis of this matter is a suit filed by the appellant in the Chief Magistrates Court at Nyeri (ELC Case No. 84 of 2019) wherein the Appellant sued his wife Lucy Nduta Kamau and the Respondent herein for a declaratory order that the transfer of L.R No. Nyeri/Municipality Block 1/1577 by his wife to the Respondent was null and void. The Appellant further sought an order that the Land Registrar Nyeri be ordered to cancel the Certificate of Lease issued to the Respondent on 24th October, 2019 in regard to the suit property and that instead the same be registered in the joint names of his wife and himself.
9. In a Judgment delivered on 28th June 2021, the Chief Magistrates Court dismissed the Appellant's suit and proceeded to allow the Respondent's counter-claim which had sought the eviction of the Appellant from the suit premises.
10. Aggrieved by the said determination, the Appellant filed an application dated 3rd September, 2021 before the same Court seeking orders of stay of execution of that Judgment pending an Appeal to this Court. On 9th May 2022, the Lower Court allowed the application for stay but on condition that the Appellant deposits the sum of Kshs.3.5 Million in a joint interest earning account to be opened in the names of the Advocates for the two Parties within 30 days.
11. Dissatisfied yet again with that Ruling, the Appellant lodged the present Appeal. By an application dated 27th May, 2022 he sought a stay of the decision of the Lower Court as delivered on 9th May, 2023. Having heard the said application, and in a decision delivered on 3rd November 2022, this Court granted a stay of execution of the orders on condition that he deposits a reduced sum of Kshs.500,000/- as security for costs within 30 days of the decision.
12. It was apparent from the proceedings herein that to-date the Appellant is yet to comply with the orders to provide security for costs.
13. The law governing the provision of security for costs is set out under Order 26 of the Civil Procedure Rules which provides as follows:
 - “ 1. In any suit the Court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other Party.
 2. ...
 3. ...



4. . . .

5.

- (1) If security for costs is not given within the time ordered and if the Plaintiff is not permitted to withdraw the suit, the Court shall upon application, dismiss the suit.”

14. As was stated in [Patrick Ngeta Kimanzi -vs- Marcus Mutua Muluvi & 2 Others](#) – High Court Election Petition No. 8 of 2013;

“Security of costs ensures that the Respondent is not left without recompense for any costs or charges payable to him. The duty of the Court is therefore to create a level ground for all the Parties involved, in this case the proportionality of the right of the Petitioner to access justice vis-à-vis the respondent’s right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”

15. That was the same position taken by the Supreme Court of [Kenya in Westmont Holdings SDN BHD -vs- Central Bank of Kenya & 2 Others](#) (Petition 16 (E023) of 2021 [2023] KESC 1 (KLR) where the Apex Court held inter alia that:

“The rationale for security for costs was aimed at balancing the overarching objectives in the administration of justice as expressed under articles 48, 50 and 159 of [the Constitution](#), that Courts should aim to dispense justice. The costs protected the defendant or a respondent against the risk that a Court order made in its favour may be rendered ineffective by the Plaintiff’s impecuniosity. An order for security for costs would normally affect the interest of the Plaintiff’s access to the Court system, regardless of their financial status; shield a successful defendant from litigation, costs; and conserve the Court’s processes; costs and security for costs could discourage frivolous claims, and encourage the Parties to conduct litigation in a manner that was proportional to the matters at issue.”

16. In the circumstances and this Court having issued an order of stay of execution on condition that the Appellant deposits the sum of Kshs.500,000/- as security within 30 days of the date of the decision, it was incumbent upon the Appellant to comply and provide the security as required. Where the Appellant was for whatever reason unable to comply with the orders within the timelines stated, it behooved him to come back to Court and apply for a review of the terms. It was certainly not open for him to sit at home and when the Respondent moves the Court to compel compliance of the orders he cites his alleged impecuniosity in response and purports to urge for more imprecise time to comply.

17. As was stated in [Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County \(Ex-parte\) David Mugo Mwangi](#) [2008] eKLR:

“It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party had difficulty in complying therewith, the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a court order is made in a suit, the same is valid unless set aside on review or appeal.”

18. Arising from the above, I was persuaded that the appellant was in breach of the orders of stay of execution issued herein on November 3, 2022 and that he was acting in contempt of the said orders.



19. It follows that I am persuaded that there is merit in the Motion dated and filed herein on January 31, 2023. I allow the same as prayed with costs.

**RuLING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 28TH DAY OF SEPTEMBER, 2023.**

In the presence of:

Mr. S. K. Njuguna for the Respondent/Applicant

Mr. Joram Wambugu – the Appellant in person

Court assistant - Kendi

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J. O. OLOLA

JUDGE

