



REPUBLIC OF KENYA



KENYA LAW
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**Laly v Magnate Ventures Limited (Environment & Land Case
682 of 2014) [2023] KEELC 20095 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20095 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 682 OF 2014**

**JA MOGENI, J
SEPTEMBER 21, 2023**

BETWEEN

SUKHDEV SINGH LALY PLAINTIFF

AND

MAGNATE VENTURES LIMITED DEFENDANT

RULING

1. Before this court for determination is the defendant's application dated 11/05/2023 brought pursuant to the sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#), order 42 rule 6, order 50 rule 6 & order 51 of the [Civil Procedure Rules](#) and all other enabling provisions of the law. The applicant is seeking for the following orders: -
 1. Spent.
 2. That the defendant's notice of motion applications dated 2/02/2023 and 10/05/2023 be marked as withdrawn with no orders as to costs.
 3. That this honourable court do order a reinstatement of the stay of execution orders granted in this matter on 23/06/2022 by Honourable Judge J. A. Mogeni pending the inter partes hearing of this Application.
 4. That this honourable court do order an enlargement of time to the defendant to file its record of appeal as directed on 23/06/2022 by honourable Judge J. A. Mogeni pending the issuance of the typed proceedings by the Court Registry.
 5. That this Court do order a stay of execution of the Judgment delivered on 23/05/2022 by Honourable Judge J. A. Mogeni in ELC suit No 682 of 2014 - *Sukhdev Singh Laly v Magnate Ventures Limited*, Decree and subsequent



orders pending the hearing and determination of the defendant's intended Appeal.

6. That the honourable court be pleased to issue such further orders as it may deem fit in the interests of justice.
 7. That the costs of this application be provided for.
2. The application is premised on the grounds stated on the face of the application together with the supporting affidavit of Kibaara Murithi, the Defendant herein sworn on 11/05/2023. I do not need to reproduce the same.
 3. The application was opposed through the replying affidavit of Sukhdev Singh Laly, who is the plaintiff/respondent herein, sworn on 05/06/2023.
 4. On 22/05/2023, directions were given on filing of written submissions to the application. The Defendant/Applicant filed its written submissions on 27/06/2023 while the plaintiff/respondent's submissions were filed on 30/06/2023.

Issues for determination

5. I have considered the applicants' application, both affidavits (in support and against) and the written submission and I find the main issue for determination to be whether the grounds and facts presented make the Applicants' motion dated 11/05/2023 merited.
6. The applicant's case is that this Court issued a conditional stay of execution on 23/06/2022. That the Applicant deposited the decretal sum in a joint interest-earning account in the name of the parties' Advocates in part fulfilment of the conditional stay. They aver that they were not able to file a record of appeal within 30 days of the Ruling due to a delay in issuance of the typed proceedings by the Registry. They acknowledge that the conditional stay of execution orders therefore lapsed and the Applicant has now been served with a proclamation dated 10/05/2023 by the plaintiff's auctioneers purporting to have proclaimed 13 vehicles in execution of the Judgment in this matter. They contend that the said vehicles are not located in Nairobi and that substantial loss will result unless the orders sought are issued.
7. The plaintiff/respondent opposed the instant application. According to the plaintiff, the Applicant is not entitled to the orders sought for the following reasons; trial court is functus officio, the instant Application is res judicata, non-compliance with the conditional orders for stay of execution issued by this Court on 23/06/2022 (record of appeal not filed); inordinate, undue and unexplained delay on the part of the Defendant; and no prejudice on the part of the Defendant.
8. The plaintiff asserts that the instant application is defective since the Court lacks jurisdiction and is functus officio to issue the orders being sought considering the fact that the Court heard and finally determined the defendant's application dated 26/05/2022 that sought similar orders for stay of execution; leaving no case upon which the current application can be predicated upon.
9. Furthermore, the plaintiff argues that since the defendant did not apply to vary, review or Appeal the ruling and the resultant conditional orders for stay of execution issued by this Court on 23/06/2022, this Court has now become functus officio and cannot consider the instant Application which ought to be canvassed before the Appellate Court. That the doctrine of functus officio bars and or prevents a Court from revisiting the matter on a merit-based re-engagement once a final Ruling has been entered and orders issued accordingly, as is the case herein.



10. The Plaintiff avers that *vide* the Ruling of the Court delivered on 23/06/2022, the Court directed that the “costs of the Application dated 26/05/ 2022 to abide the Appeal”, this therefore means that the intention of the Court at the time of rendering its Ruling was that it has determined the Application in finality and that explains why it orders that costs to abide the outcome of the Appeal since it had no intent whatsoever of revisiting the said Application once it pronounced itself.
11. Further, it is the Respondent’s contention that that the instant Application is *res judicata* as it offends section 7 of the *Civil Procedure Act* since the Court heard and determined a previous and similar Application by the Defendant dated 26/05/2022 which sought *inter alia* an order for stay of execution (at prayer 3 of the Application) and that a ruling was delivered on 23/06/2022 granting conditional orders for stay. That the instant Application now seeks similar orders for stay of execution (at prayer 5 of the instant Application), and as such any contrary decision in the instant Application may embarrass this Honourable Court.
12. The Respondent contends that the defendant has never appealed against the ruling of this court of 23/06/2022, instead the defendant has now disingenuously brought and or filed a similar Application seeking similar orders before this Court which is ostensibly a deliberate abuse of the Court process.
13. The respondent states that *vide* the ruling of the court delivered on 23/06/2022, the Court gave conditional orders for stay *inter alia*, the Defendant was ordered to file the Record of Appeal within 30 days from the date for the Ruling (23/06/2022) and failure to comply with the same the orders for stay of execution shall automatically lapse. That the defendant was supposed to file the record of appeal on or before 23/07/2022. However, they are yet to comply with the conditional orders for stay of execution issued on 23/06/2022. Consequently, the orders of stay automatically lapsed on 23/07/2022. That the Defendant has not shown any good cause or proffered valid reasons for non-compliance with the conditional orders for stay that were issued by this Court. Further, the defendant has not shown any steps taken in procuring the proceedings and that the only correspondences on record are the notice of appeal dated 24/05/2022 that was filed and served contemporaneously with the undated Letter bespeaking proceedings upon my Advocates; all of which were done before Application dated 26/05/2022 was filed, heard and determined.
14. Whereas the defendant allegedly attributes the failure to file the record of appeal within 30 days of the Ruling to the alleged delay in issuance of the typed proceedings by the registry, the defendant has not demonstrated by way of evidence the follow ups (if at all) they made and steps taken to pursue the typed proceedings. That if at all there were any delays as alleged (which is disputed), the Defendant has not demonstrated what steps it took to mitigate the same, for instance, the Defendant did not timeously apply to Court for extension of time to file the Record of Appeal before the 30 days deadline lapsed. That the Defendant was awakened from its slumber when the respondent commenced execution proceedings on 10/05/2023 while the instant Application was filed a day later on 11/05/2023. That whereas the Defendant states that it has deposited the decretal sum in a joint interest earning account in the name of parties Advocates, it should be noted that the said compliance is partial and that other mandatory conditional orders were not fulfilled within 30 days of the Ruling as directed by the honourable court.
15. It is the respondent’s case that the decretal sum was for security for costs for the due performance of the decree for purposes of the intended appeal, which the defendant is seemingly not keen on pursuing as evidenced above. That it is rather clear that the Defendant has depicted its indolence, disinterest and a lack of willingness to pursue its quest for an appeal. That that the Defendant is guilty of laches, since it took it literary 10 months, & 2 weeks from the time the Ruling was delivered on 23/06/2022 to when



it filed the instant Application (res judicata), on 11/05/2023. No reason whatsoever has been proffered by the Defendant as to why the instant Application has been filed with inordinate delay.

16. Finally, the plaintiff asserts that the unexplained/inordinate delay of more than 10 months & 2 weeks in bringing the instant Application makes it impracticable for the Court to properly and fairly administer justice. Regard to prejudice on the part of the defendant, the respondent avers that whereas the defendant filed the notice of appeal dated 24/05/2022 intending to appeal to the Court of Appeal against the entire judgment and despite filing the instant Application seeking stay of execution, the Defendant has since paid the taxed costs of the suit in the sum of Kshs. 432,871.66. that noting the Defendant has paid the taxed costs of the suit in the sum of Kshs. 432,871.66, it has partly satisfied the very Judgment and resultant Decree which it now purports to appeal against in its entirety while at the same time seeking stay of its execution thereof. As such, there will be no prejudice occasioned on the Defendant if the instant Application is not allowed since the Defendant has already partly satisfied the subject Decree.

Analysis and Determination

17. The Applicant has mainly sought for the reinstatement of the stay of execution orders given on 23/06/2022 pending the hearing of this Application and an order for the enlargement of time for the Applicant to file its Record of Appeal as directed on 23/06/2022.
18. Before I delve into the merit of this instant application, I note that the Applicant also sought for an order of stay of execution of the judgment delivered on 23/05/2022 under prayer 5. Prayer 5 reads as follows:

“That do order a stay of execution of the Judgment delivered on 23/05/2022 by Honourable Judge J. A. Mogeni in ELC Suit No. 682 of 2014 - *Sukhdev Singh Laly v Magnate Ventures Limited*, Decree and subsequent orders pending the hearing and determination of the Defendant’s intended Appeal.”
19. The Plaintiff submitted that the entire Application is res judicata and is a ploy to deny him the fruits of a lawfully obtained judgment against the defendant. The Defendant on the other hand submits that the instant application cannot be said to be res judicata as the matters in issue are not identical. They submit that there is no final determination on the issues being raised in this Application. I do not agree that the entire instant application is res judicata. However, it is my considered view that prayer 5 of the defendant/applicant’s instant application is res judicata. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru v the Attorney General and 8 others Civil Appeal No. 110 of 2011 [2013] eKLR.
20. This Court heard and finally determined on merit, the issue of stay of execution and gave a Ruling on the same on 23/06/2022. It is my humble view that the issue has been definitively settled by a judicial decision. Prayer 5 is directly and substantially the same as in the Defendant’s application dated 26/05/2022 wherein they sought to move the Court for orders of stay of execution of the judgement pending the hearing and determination of the defendant’s intended appeal. Therefore, it is clear that prayer 5 is res judicata and this Court cannot entertain it and the same is struck out.
21. On the issue of this Court being functus officio, the Plaintiff/Respondent contends that this court lacks jurisdiction and is functus officio to issue orders being sought considering the fact that the court heard and finally determined the suit and subsequently heard and determined the Defendant’s similar



application for stay of execution dated 26/05/2022 which sought similar orders for stay and a ruling was delivered on 23/06/2022, leaving no case upon which the current application can be predicated upon. That since the Defendant did not apply to vary, review or appeal the ruling and the resultant conditional orders for stay, this court has now become *functus officio* and cannot consider the instant application which ought to be canvassed before a higher court/appellate court.

22. The Plaintiff further submitted that the doctrine of *functus officio* bars and/or prevents a Court from revisiting the matter on a merit-based re-engagement once a final ruling has been entered and orders issued accordingly. The Plaintiff submitted that vide the Ruling of the court delivered on 23/06/2022, the Court ordered that the “costs of the Application dated 26/05/2022 to abide the Appeal” which meant that the intention of this Court at the time of rendering its ruling was that it has determined the said Application in finality. That the only option available for the Defendant is to move to a higher court/appellate court and not this Court.
23. I do not agree with the Defendant’s submissions that the present application only seeks to reinstate the conditional stay orders issued on 23/06/2022 as prayer 5 actually seeks the Court to issue a stay of execution order. The Court is in agreement with the Plaintiff on this issue only to the extent of prayer 5 which seeks for an order of stay of execution. But that is beside the point. It is my considered view that the Plaintiff/Respondent is misdirected when he avers that the Court is *functus officio* in this matter.
24. It is my humble view that the Court does not become *functus officio* merely because it has delivered a judgment in civil proceedings. The Court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. In [Leisure Lodge Ltd v Japhet Asige and another](#) (2018) eKLR the court said and held:

“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under section 94 of the [Act](#). In [Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others](#) [2018] eKLR, this court said of the doctrine of *functus officio*: -

“I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.”
25. It however does not command that the moment the court delivers its decision in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.
26. As was held by the court of Appeal in [Telkom Kenya Ltd v John Ochanda](#), the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.
27. In the present application, the Defendant seeks to have the orders of stay of execution reinstated and for enlargement of time to file its record of appeal. The Court has already struck out prayer 5 on grounds of res-judicata. Therefore, it is my considered view that the rest of the orders being sought have more to do



with moving the file towards closure and making the decision final rather than re-opening the dispute for determination on merits. I decline to hold that the Court has become *functus officio* to this extent.

28. If one was to accede to the position taken by the plaintiff/respondent that the court is *functus officio* then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed. In any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a final decision. To do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the court is *functus officio* because there is a final decision in a matter.
29. On the issue of whether the grounds and facts presented make the instant application merited, the Court will now examine whether the applicant is entitled to reinstatement of the stay of execution order given on 23/06/2022.
30. Section 3A, 95 of the [Civil Procedure Act](#) and order 50 rule 6 of the [Civil Procedure Rules](#) are the operative parts in answering the question whether the prayer to extend interim orders is merited. The sections grant the courts unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.
31. In [Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR, the court stated thus: -

“..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion: - Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
32. In light of the above reasoning, I find that the application is rightly before the court and having found so, I will now consider the Application on its substance. Our case law has now provided guidelines on what will be considered “just terms” for purposes of permitting a party whose time is limited to extend such orders. The most important consideration is for the Court to advert its mind to the fact that the power to extend time is discretionary and must be granted on a case-by-case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.
33. Some of these factors were suggested by the Supreme Court in [Nicholas Kiptoo Arap Korir Salat](#) (supra). They include the following:



- a. Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court;
- b. Whether there would be any prejudice suffered by the respondent, if extension is granted;
- c. Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

34. The Plaintiff/Respondent contends that vide the Ruling of the Court delivered on 23/06/2022, the Court gave conditional orders for stay and failure to comply with the same, the orders for stay of execution shall automatically lapse. The Respondent points out that the Defendant was supposed to file the Record of Appeal on or before 23/07/2022, however, the Defendant is yet to comply with the conditional orders for stay of execution issued by this Court on 23/06/2022 by failing to file the Record of Appeal within 30 days. The Plaintiff submitted that it should be noted that the Defendant has not shown good cause or proffered valid reasons for non-compliance with the conditional orders for stay. That the Defendant has not shown any steps taken in procuring the proceedings and that the only correspondences on record are the Notice of Appeal dated 24/06/2022 which was filed and served contemporaneously with the undated letter bespeaking proceedings upon the Plaintiff's Advocates, all of which were done before the Defendant's Application dated 26/05/2022 was file, heard and determined.
35. The defendant/applicant on the other hand submitted that it has at all times complied with this Court's orders and they insist that any instances of non-compliance have not been due to any faults of its own. The defendant contended that it was unable to file the record of appeal within 30 days of the ruling due to a delay in issuance of the typed proceedings by the Registry. That they wrote to the Court *vide* letter dated 24/03/2023 requesting typed copies of the proceedings to enable it to file its appeal and its hands became tied with respect to the Appeal until the typed proceedings were availed. They aver that they filed an application dated 2/02/2023 seeking an extension of the stay of execution orders but the same is yet to be heard and determined on its merits. I note that the Applicant is seeking that the Application to be marked as withdrawn.
36. It is the defendant's contention that it stands to suffer substantial loss and damage if the stay of execution orders sought are not granted and no loss or prejudice will be occasioned to the Plaintiff if the orders sought are granted. They contend that the failure to file the record of appeal within the stipulated time is due to no fault of its own. The Applicant also avers that the Application has been made without inordinate delay and it is in the interest of justice and equity that the orders sought be granted as prayed.
37. I do not think there is any principle that says that if you have succeeded in getting a stay order you are precluded from having it extended if it has lapsed as long as you have demonstrated the same to court. However, I have carefully considered the grounds put forward by the defendant/applicant and I am not convinced that they are plausible. I opine that in a case such as this where there was a deadline set for filing of documents, a party would do more to follow up with the court registry and not just write a letter and wait for a response. It is true that the Applicant wrote an undated letter requesting for typed proceedings. The applicant further submitted that their letter was dated 24/05/2023. The court gave its conditional order on 23/06/2022. Too much time had passed and the Applicant only wrote one letter and claims that its hands were tied regarding its Appeal. The Defendant/Applicant would have gone an extra mile to ensure that they have put in effort to meet the deadline as set by the Court.



38. In the end, I find no merit in the Applicant's Application dated 11/05/2023. The same is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21st Day of SEPTEMBER 2023.

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MOGENI J

JUDGE

In the virtual presence of:

Ms. Mburu for the Defendant/ Applicant

Mr Oguye holding brief for Mr. Kimathi for Plaintiff/Respondent

Ms. Caroline: Sagina Court Assistant

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MOGENI J

JUDGE

