



Chege (Defending and suing in his own behalf and on behalf of the Estate of Njeri Chege) v Kagoni & 2 others (Environment and Land Appeal E076 of 2022) [2023] KEELC 20898 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20898 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E076 OF 2022
JG KEMEL, J
OCTOBER 18, 2023**

BETWEEN

GABRIEL MUTHUA CHEGE (DEFENDING AND SUING IN HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF NJERI CHEGE) . APPELLANT

AND

**JANE WAIRIMU KAGONI 1ST RESPONDENT
JULIAH WARUGURU MWANIG 2ND RESPONDENT
MAGDALINE MUGOIRI CHEGE 3RD RESPONDENT**

(Being an appeal from the Judgement in Gatundu MCELC No. E040 of 2021 delivered by Hon H. M. Ng'ang'a, Principal Magistrate delivered on the 31/8/2022)

RULING

1. On 4/5/2023 the Applicant filed a Notice of Motion under Article 159 of the [Constitution](#) of Kenya, 2010, Sections 1A and 3A of the [Civil Procedure Rules](#), 2010 and all enabling rules, regulations and provisions of the law seeking the following orders:-
 - a. Spent.
 - b. That the Court be pleased to stay orders of dismissal of the Appeal issued on the 4th day of May 2023.
 - c. That by virtue of the stay of the orders of dismissal: that this Court re-instate the earlier orders of stay of execution issued on the 14th day of March 2022 when our application dated the 29th day of September 2022 was allowed pending hearing and determination of this application.



- d. That this Honourable Court be pleased to enlarge the timelines for filing submission issued on the 14th March 2023: to enable the Applicant file and serve its submissions before close of business upon our prayer being allowed; and to afford the Respondents; 14 days corresponding leave.
 - e. That by virtue of the stay of the orders of dismissal; that this Court re-instate the earlier order of stay of execution issued on the 14th day of March 2022 when our application dated the 29th day of September 2022 was allowed pending hearing and determination of this Appeal.
 - f. That cost be provided for.
2. The application is premised on the following grounds:-
- a. That the Judgment of this Honourable was delivered on the 4th day of May 2023, where orders were issued dismissing the Appeal.
 - b. That we had before delivery of the Judgment tried to file our application dated 3rd day of May 2023 with our written submissions attached seeking arrest of the Judgment and enlarge the timelines of filing submissions but we were informed that we were already locked out; the file was already in chambers.
 - c. That one of our staff, Advocate Erick Munene, who engages and assists in the drafting of pleadings, has been out of office sick for a period of one and half months preceding the Court's Judgment.
 - d. That as a result, and admittedly, we have from human weakness fallen behind in some of our deadlines and timelines, this one included, but have not neglected our fiduciary duty to our clients.
 - e. That to avert possible execution of the lower Court Decree in absence of the Appeal having been heard on merit: we apologize to the Court for having failed to adhere to its directions: and seek at the behest of our innocent clients that our mistake not be visited upon them.
 - f. That our submissions are now ready and annexed to our application which we seek be allowed as prayed.
 - g. That we have made effort to mitigate our error through filing the earlier application seeking to arrest the Judgment; and have now timeously filed this application before Court.
 - h. That it is just, fair and in the interest of justice that this application be allowed.
3. Vide a Replying Affidavit sworn on 12/7/2023 the Respondents stated that the application is an abuse of the process of Court. That the delay in filing the written submissions was inordinate. That the Court delivered its Ruling on 24/5/2023 the Court became functus officio and the only avenue available to the Applicant is to move the Appellate Court.
4. That the Respondents shall stand to be prejudiced as they cannot be able to utilize the land the way they deem fit.



Written submissions

5. The Applicant relied on the decision of the case in *Nicholas Kiptoo Arap Salat Vs. Independent Electoral and Boundaries Commission & 7 Others* [2014]eKLR to persuade the Court to grant the application. The Court held:-

“.... It is incumbent upon the Applicant for an extension of time to provide the Court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in its favour as a defaulter, unless he provides an explanation for the default.”

6. Further the Applicant relied on the case of *Edith Gichungu Koine Vs. Stephen Njagi Thoiti* [2014]eKLR where the Court stated:-

“I have anxiously considered the application, the affidavits on record and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others ...”

7. The Court was urged to invoke Article 159(a) and (d) of the *Constitution* of Kenya and reinstate the Appeal as well as the orders of stay of execution to pave way to the hearing of the Appeal on merit.

8. On the issue of prejudice, the Applicant relied on the case of *Christopher Kioi & Anor. Vs. Winnie Mukolwe & 3 Others* (2013)eKLR where the Court held:-

“ Article 159 (2) of the *Constitution* also enjoins the court to administer justice without due regard to technicalities. Having considered all the circumstances herein, I find that granting leave to the plaintiff to bring a fourth witness will not be prejudicial to the defendant and interested party herein. They will have an opportunity to respond to the said statement ...”

9. It was submitted that the Respondent stands to suffer no prejudice if the application is allowed.

10. The Respondent stated that litigation must come to an end and in this case it did when the Court dismissed the Appeal. Interalia, that the application is an afterthought and contains falsehoods and ought to be dismissed. That the Appeal was dismissed and the Court is functus officio.

11. The Respondent relied on the Supreme Court decision of *Raila Odinga & 2 Others Vs. IEBC & 3 Others* (2013)eKLR where the Court cited with approval;

“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.”



12. It was further submitted by the Respondents that Section 99 of the Civil Procedure Act provides exceptions to the rule of functus officio in the following terms:-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

Analysis and determination

13. The key issue is whether the application is merited.
14. The current appeal was dismissed on 4/5/2023 on grounds that the parties failed to comply with the directions of the Court issued on 14/3/2023 with respect to filing of written submissions, the mode of hearing the appeal elected by the parties.
15. On the same date the Appellant / Applicant filed the current Motion seeking orders to stay the said dismissal orders.
16. The Respondents have urged the Court to find that following its decision to dismiss the appeal the Court is functus officio. Inter alia that the application of the Applicant is inordinate and suffers from laches and ought to be dismissed.
17. The Court finds that the orders of 4/5/2023 having been dismissal, the said orders are negative in nature for which stay orders cannot be issued. There will be nothing that the Court will be staying.
18. That said the Court finds that the application of the Applicant was filed timeously and the reason for failing to file written submissions was stated to be the absence of Counsel handling the matter on account of illness. The Court has not been given any evidence to the contrary.
19. It is to be noted that the Respondents did not comply with the directions of the Court and therefore I find no prejudice if the application is allowed so that the Appeal is heard on merit.
20. In the interest of justice I make the following orders:-
 - a. The Orders dismissing the Appeal be and are hereby set aside.
 - b. The appeal be and is hereby reinstated for determination.
 - c. The parties shall file their written submissions within thirty (30) days.
 - d. The orders of stay of execution issued on 14/11/2022 be and are hereby reinstated
 - e. Costs of the application shall be in favour of the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18TH DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muiruri for Appellant/Applicant

1st, 2nd and 3rd Respondents - Absent

Court Assistants – Phyllis/Lilian

