



**M'Aluma v M'Aluma (Environment and Land Appeal E026 of 2023)
[2023] KEELC 22384 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E026 OF 2023**

CK YANO, J

DECEMBER 14, 2023

BETWEEN

STANLEY NTOITHA M'ALUMA APPELLANT

AND

MARGARET MUTHONI M'ALUMA RESPONDENT

RULING

1. The subject of this ruling is a notice of motion application dated 18th September, 2023 stated to be brought under Order 22 Rule 22 (1) & (3) of the [Civil Procedure Rules](#), Sections 1A, 3, 3A, & 63 (e) of the [Civil Procedure Act](#) and all other enabling provisions of the law. The appellant is seeking the following orders-;
 1. Spent
 2. That this Honourable court be pleased to lift the warrant of arrest issued against the applicant/ appellant herein on 6th September, 2023 pending the hearing and determination of this application.
 3. That pending the hearing and determination of this application, this Honourable court be pleased to admit the applicant/appellant to favourable bond/bail terms or as the Honourable court shall deem fit and just.
 4. That pending the hearing and determination of this application, this Honourable court be pleased to stay execution of the orders/ruling delivered on 6th September, 2023.
 5. That pending the hearing and determination of this appeal, this Honourable court be pleased to stay execution of the order/ruling delivered on 6th September, 2023.
 6. That this Honourable court be pleased to issue any other or better orders it deems fit and just in the circumstances to meet the ends of justice.



7. Costs of this application be provided for.
2. The application is premised on the grounds thereon and supported by the affidavit of Stanley Ntoitah M'Aluma, the applicant herein sworn on 18th September, 2023 and a supplementary affidavit dated 12th October, 2023. The applicant states that on 6th September, 2023, the trial court found him in contempt of the interim injunction orders issued on 22nd August 2022 in Maua ELC No. E055 of 2020 and committed him to civil jail for a period of 30 days. That a warrant of arrest has been issued.
3. The applicant states that he is greatly dissatisfied with the ruling/order issued by the trial court and has preferred an appeal. That the said orders are punitive, unlawful and offends not only the tenets and principles of injunction, but also the rule of law and the *Constitution* of Kenya 2010. The applicant states that the impugned ruling/order issued on 6th September, 2023 in its strict wording and purport literally evicts the applicant from his home and bars him from enjoying the fruits of his hard-earned properties thus rendering him homeless and destitute. That the property consists of the matrimonial home and the only place the applicant calls home thus denying him user of his home which he states is unfair, unreasonable and against the rules of natural justice. The applicant states that unless the order sought herein are granted, the applicant will suffer irreparably. In his affidavit, the applicant has faulted the said ruling/order for inter alia, offending the provisions of Order 40 Rule 4 & 5 of the *Civil Procedure Rules*, adding that the respondent sought to execute interim orders more than 12 months after its issuance, and that the orders are ambiguous. The applicant has annexed copies of the said ruling, interim orders, a title deed and certificate of search, an application dated 28th November, 2022 and a replying affidavit. He states that the respondent who is his wife is a teacher earning her own salary and utilizes Miraa proceeds from land parcel No. Igembe/Antubetwe/Kiongo/2117 and therefore does not depend on the applicant's miraa. He has also faulted the trial court for disregarding his evidence.
4. In response to the application, the respondent filed her replying affidavit dated 25th September, 2023 whereby she vehemently opposes the application. She states that the application is meant to rubberstamp an illegality as the applicant is in contempt. That the applicant physically ran away from court during the delivery of the ruling and sentencing and vowed to hide until the lower court ruling is stayed. It is therefore the respondent's contention that the court should not come to the aid of the applicant who has directly disrespected a court order, adding that he should not be given audience. That the applicant ought to have appealed the subject orders instead of breaching the same and blaming other parties for his wrong doing. The respondent states that the orders were extended and reinstated on 18th August 2022 and as at the time of breach they were in force hence Order 40 Rule 4 was not breached.
5. The application was canvassed by way of written submissions. The applicant filed his submissions dated 12th October, 2023 through the firm of M/s Frank Gitonga & Associates Advocates while the respondent filed hers dated 27th October, 2023 through the firm of M/s Mutembei & Kimathi Advocates.

Applicant's Submissions

6. Counsel for the applicant gave brief facts of the case before the lower court and pointed out that the impugned injunction orders issued on 18th August 2022 at prayer 2 thereof which gave rise to



the contempt proceedings before the trial court and subsequently the instant appeal and application stated-;

- “2. That an order is hereby issued restraining the defendant from evicting the plaintiff and interfering with her use of L.R Antubetwe Kiongo 2986 where her matrimonial home is and which property she has been depending on for her livelihood pending the hearing and determination of this application.”
7. Counsel submitted that the literal interpretation of the wording of the said order does not restrain the applicant from utilizing any property in the suit land. That the orders only bars the applicant from evicting the respondent herein from their matrimonial home and interfering with the use of the suit property LR. Antubetwe Kiongo/2986. That from the affidavit of service, the applicant has neither evicted the respondent nor has he interfered with her use of the land subject matter herein. The applicant’s counsel stated that the respondent is still in occupation and using the applicant’s properties and is actually putting up a permanent house therein.
8. Counsel for the applicant cited the provisions of Order 22 Rule 22(1) & (3) of the Civil Procedure Rules and Sections 1A, 3, 3A and 63(e) of the Civil Procedure Act and relied on the case of Turbo Transporters Ltd vs Absalom Dova Limited [2012] eKLR and Nicholas Mutuku Mwasuva vs Patricia Mueni Kilonzo [2022] eKLR and submitted that the applicant stands to suffer irreparably unless the orders sought herein are granted. It was submitted that the trial court in its ruling delivered on 6th September, 2023 confirmed the interim orders without giving the parties a chance to canvass the respondent’s application dated 18th August 2022. That the impact of the said orders against the applicant is that he has been barred from enjoying anything within land parcel No. Antubetwe Kiongo/2986 which is his land and home and therefore means that he has been thrown out of his land and home by his wife and has been rendered homeless, impoverished and destitute.
9. Counsel also submitted that the interim orders of injunction which gave rise to the instant appeal and application were granted pursuant to the application dated 18th August 2022 which was premised on Order 40 Rule (1) & (2) of the Civil Procedure Rules. Counsel submitted that the instant does not qualify for such provisions as the property in dispute has never been in any danger of being wasted, damaged or alienated by the applicant, nor was it being wrongfully sold in execution of any decree because there is none. Counsel further submitted that the respondent was not under any threat and has proved none either by way of affidavit evidence or otherwise as dictated by the provisions of Order 40 Rule 1. That the orders issued by the trial court on 18th August 2022 were not deserving in the first instance.
10. Similarly, counsel for the applicant submitted that the provisions of Order 40 Rule 2 seeks to restrain breach of contract or other related injury and stated that there is no contract between the applicant and the respondent who are husband and wife. That conjecture has not been broken and therefore the suit property herein cannot be deemed as matrimonial property as the respondent’s suit suggests. That the same offends the provisions of Section 6(1) and (7) of the Matrimonial Properties Act 2013. The applicant’s counsel submitted that under this proviso, Order 40 Rule 2, an injunction does not arise. Counsel for the applicant further submitted that the interim orders subject of this appeal are interim orders of injunction under the provisions of Order 40 Rule 4 and explicitly offend the same and are therefore invalid orders hence not available for purposes of execution and implementation. Counsel also submitted that the provisions of order 40 Rule 6 which was also cited kicks the respondent out of the way completely, as she had not yet prosecuted the injunction yet. That even if she had prosecuted the said application, she could not have a chance to file contempt proceedings of any orders she could have. The applicant’s counsel relied on the case of Siade (India) Ltd vs M.A Majid. Learned counsel



for the applicant submitted that the applicant has clearly demonstrated by affidavits that he is not a contemnor and that the orders issued on 18th August 2022 are invalid by virtue of effusion of time and could not have raised a ground of contempt and that consequently, the arrest orders and the contempt of court punishment meted upon the applicant are irregular and unlawful, and urged the court to allow the application herein as prayed.

Respondent's Submissions

11. Counsel for the respondent submitted that the application herein as filed by the applicant is not properly on record as it was filed by the applicant when he did not have the legal capacity to lodge the same due to contempt of court, and that public interest and interest of justice demand that court order must be obeyed and that whomsoever approaches the court must do so with clean hands without contempt. The respondent's counsel pointed out that there was an order of inhibition and injunction restraining the applicant from interfering with the respondent's use of the suit property issued on 16th July, 2020. That the said orders were reinstated on 18th August 2022 which prompted the applicant to file the application dated 28th November, 2022 seeking to vary and set aside the said order which application was never heard. That the applicant herein had been found guilty of contempt of court and he physically ran away from court during the delivery of the ruling and the sentencing thereafter so as to avoid being taken into custody, and as such the applicant should not be granted audience by this court as he had not deemed it appropriate to obey the court order, yet he is seeking an equitable relief from court. The respondent's counsel relied on the case of *Trust Bank Limited vs Shanzu Villas Limited & 3 others* (2004) 2 KLR 299 and submitted that it is plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. Counsel also relied on the case of *Fred Matiangi, The Cabinet Secretary of Interior and Co-ordination of National Government vs Miguna Miguna & 4 others*. That it is clear as per the ruling delivered on 6th September, 2023 that the order was in force as the magistrate clearly stated that "the order he disobeyed shall continue to be in force until the case is heard and determined." Counsel for the respondent submitted that the applicant herein has exhibited total disregard for the rule of law and is making a mockery of the administration of justice, hence allowing the application herein will amount to rubberstamping an illegality as the applicant is in contempt of court orders.
12. Counsel for the respondent also submitted that the applicant's application is marred with lots of falsehood that is meant to mislead the court. That the applicant vacated his matrimonial home on 24th July, 2019 without notifying the respondent and while the respondent was at work and since then has been residing at one of their premises at Antubetwe/Kiongo/4178. It was submitted that the respondent herein depends on the proceeds of LR. Antubetwe/Kiongo/2986 for her livelihood and her children as she is not employed, while the applicant is left with over ten parcels of land full of miraa where he gets hundreds of thousands of shillings. That the applicant has more than enough to cater for his needs as he is retired under public interest and earns some retirement benefits besides enjoying rents in the parties' LR Ithima/Antuambui/6948 that fetches hundreds of thousands of shillings.
13. Counsel for the respondent submitted that the application herein is made out of malice as the applicant even threatened to chase the respondent from her matrimonial home where she resides. That the applicant has not deposited any security in court as is required as a condition to be satisfied for grant of orders of stay. That further, the applicant makes this application while in hiding and wants to be bonded while outside court, and as such the court is not even assured of the applicant's attendance when he is required to do so as he has not assured the court of his presence. It is the respondent's submission that the applicant is seeking equitable remedies but has approached the court with unclean



hands and is not truthful. The respondent submitted that it is only fair that the application is dismissed with costs.

Analysis and Determination

14. I have given due consideration to the application and the submissions made by the parties in support of their respective cases. The applicant's application basically seeks for an order of stay of execution of the warrant of arrest issued by the trial court on 6th September, 2023 pending the determination of this appeal. The same is therefore premised on Order 42 Rule 6 of the Civil Procedure Rules which specifies the circumstances under which this court may order stay of execution of a decree or order pending an appeal.
15. Rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending an appeal. The applicant must satisfy the court that he or she stands to suffer substantial loss if stay is not granted and that the application has been filed without unreasonable delay. The applicant must also show that he/she is willing to offer such security as may be ordered by the court.
16. As regards the time taken by the applicant to lodge the application, I note that the order of warrant of arrest was issued on 6th September, 2023. The applicant filed the present application on 18th September, 2023 simultaneously with the memorandum of appeal. It is clear therefore that the application was filed in about twelve days, hence I find the application was filed without unreasonable delay.
17. The next issue for consideration is whether the applicant stands to suffer substantial loss if stay of execution is not granted. I note that the applicant submits that a warrant of arrest has been issued against him and risks being committed to civil jail for 30 days for contempt of court. The applicant is worried that he may be committed to jail yet as far as he is concerned, the whole process leading to execution was flawed. From the memorandum of appeal, among the grounds raised by the applicant are that the trial court disregarded the principles of injunction, rule of law and the Constitution and confirming interim orders without hearing the application inter-parties. On the other hand, it is the view of the respondent that the court should not come to the aid of the applicant who has disrespected the court. That the applicant has come to court with unclean hands and ought not be granted audience by this court. In my view, if the applicant is arrested and committed to civil jail, the appeal herein may be rendered nugatory and the applicant will suffer substantial loss. Whereas the respondent is entitled to enjoy the fruits of the ruling of the trial court, the applicant must also be allowed to pursue his undoubted statutory and constitutional right of appeal and have his appeal heard and determined. As to whether the appeal has chances of success, it is my view that I need not delve into the same at this juncture but leave it for determination of the appeal. I find that in the event of the appeal succeeding and without an order of stay of execution of warrant of arrest, there is a likelihood that the applicant will suffer irreparable loss as my have served the sentence imposed upon him which is a jail term and which may not be reversed.
18. In Butt vs Rent Restriction Tribunal (1982) KLR 417, the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held in part as follows-;
 - i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



- ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
- iii. A judge should not refuse a stay if there is good grounds of granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
- v. The court in exercising its powers under Order XLI Rule 4 (2) (b) of the CPR can order security upon application by either party or on its own motion. Failure to put in security for costs as ordered will cause the order of stay of execution to lapse."

19. On the issue of security, I note that the applicant is silent on the same both in his application and the affidavits in support of the application. However, I further note that the applicant submits that the court is obliged to impose any conditions it deems fit upon the applicant as a condition for his release and/or liberty. This therefore signifies the applicant's readiness to offer security as may be binding on him for the due performance of the order. Order 22 Rule 3 of the Civil Procedure Rules pursuant to which the application herein is brought provides that

“before making an order to stay execution or for the restitution of property or the discharge of the judgment – debtor, the court may require such security, or impose such conditions upon, the judgment-debtor as it thinks fit”.

This court will therefore grant stay of execution on condition that the applicant deposits in court security of Kshs. 200,000/= within fourteen (14) days from the date of this ruling.

20. In view of the foregoing, I find that the applicant has satisfied the requirements of stay of execution under order 42 Rule 6 of the Civil Procedure Rules. The applicant's application dated 6th July, 2023 is allowed in terms of prayers 3, 4 and 5 thereof in the following terms:-
- a. Stay of execution of the order/ruling delivered on 6th September, 2023 in Maua CMC ELC No. 55 of 2020 is granted pending hearing and determination of the appeal herein.
 - b. The stay granted in (a) above is granted on condition that the applicant deposits in court security in the sum of Kshs. 200,000/= within fourteen (14) days from the date hereof, in default, the order of stay of execution will lapse.
 - c. Costs of the application to the respondent in any event.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF DECEMBER, 2023

C.K YANO

JUDGE

In the presence of;

Gitonga for appellant

M/s Asumba for respondent

