



Abdullahi v County Government of Nairobi & another; Chebor & another (Interested Parties) (Civil Suit 516 of 2015) [2023] KEELC 22276 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 516 OF 2015
J OMANGE, J
DECEMBER 7, 2023**

BETWEEN

FOZIAH MULKI AHMED ABDULLAHI PLAINTIFF

AND

THE COUNTY GOVERNMENT OF NAIROBI 1ST DEFENDANT

FATUMA IBRAHIM LIMO 2ND DEFENDANT

AND

NAIMA CHEBOR INTERESTED PARTY

MOHAMMED OMAR ABDULAHI INTERESTED PARTY

(Being an application for stay of execution pending the lodgment, hearing and determination of an intended appeal from the ruling of the honourable Justice Judy Omange delivered on 20th April 2023)

RULING

1. In the Notice of Motion application dated the 20th June 2023 the Applicant sought the following orders:
 - a. That the honourable court be pleased to order stay of execution of ruling of Hon Justice Judy Omange delivered on the 20th April 2023 in Milimani ELC suit no 516 of 2015 and judgment and eviction order delivered on 14th October 2021 and 14th January 2022 respectively and all the consequential orders pending lodgment, hearing and determination of the intended Appeal.
 - b. Costs of the application.



2. The Application is brought by the Applicant who depones that she was the estate administrator of the suit property that was the subject of ELC 516 of 2015. That her application to be enjoined in the suit as an interested party after delivery of the Judgement was dismissed *vide* the Ruling delivered on 20th April, 2023. That being an administrator in the estate of the late Fatuma Chebii Limo the owner of the suit property she is aggrieved by the Judgement delivered on 14th October 2021 and the consequential orders of eviction. She therefore seeks to have the ruling, judgement and eviction orders stayed so as to not render her appeal nugatory. She deponed that unless the orders sought are granted, she is bound to suffer irreparable harm as she is in the danger of being evicted from the suit property, a place she has known as home since the passing of her late mother.
3. The 1st Respondent opposed the application by filing a notice of preliminary objection dated 3rd July 2023 on grounds that the application was *res judicata* and further that the appeal had been filed out of time offending the provisions of section 77 of *court of appeal rules*.
4. the application is *res judicata* since the Applicant had approached the court with a similar application dated 28th September 2022, seeking similar orders to be enjoined as an interested party and have the Judgement and eviction orders reviewed which application was dismissed *vide* ruling dated 20th April 2023. Further he highlighted that there was no appeal as the Notice of appeal had been filed out of time and hence a violation of the *Court of Appeal rules*.
5. I will address the Preliminary Objection first. The preliminary objection is brought on the grounds that the application is *res judicata*. Section 7 of the *Civil Procedure Act* Cap 21 provides that:

“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”.
6. *Black’s law Dictionary* 10th Edition defines *res judicata* as follows;

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
7. In respect of the current application in considering whether the matter is *res judicata* the court is called upon to consider;
 - i. The issues in the previous Application;
 - ii. whether the issues are the same as in the current application and if so whether the decision addressed all the issues.
 - iii. whether the parties are the same or are litigating under the same title and if the court that rendered the decision was of competent jurisdiction.
8. In *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court ruled that the application before it was *res judicata* as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined “thrice by the High Court and twice by the Court of Appeal”, it could not be resuscitated by another Application.



9. The Court of Appeal further stated:

“That is to say, there must be an end to applications of similar nature, that is to further, under principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for.

10. The Applicant had filed an application to be enjoined as an interested party and also sought a review and setting aside of the Judgement. There was also a prayer for stay of execution. This court held that Applicant could not be enjoined to a matter which had no pending action as eviction had already taken place.
11. On the prayer for review and setting aside the court found... Apart from the claim that the Applicants were not heard, there is no attempt by the Applicants to prove their application to the standards set out in order 45 rule 1. They have not brought tangible evidence that was not brought before the court by the defendant who the plaintiff admits to be her sister in law. The Applicants have not attempted to demonstrate any new matter or mistake or error. I am therefore unable to find any new or material mistake, error or sufficient course to warrant exercising discretion to set aside the court’s judgment”.
12. For the above reasons, the Applicants application which included a prayer for injunction or stay of execution was dismissed. The present application seeks stay of execution pending an appeal. The issues raised are the same issues which the court had made its findings on.
13. Regarding the application for stay of execution, the Applicant has deponed that she filed a Notice of Appeal on 14th June, 2023 hence seeks for stay of execution. This application has been overtaken by events as averred by the Respondent in paragraph 18 of the Replying Affidavit. The Applicant has already been evicted hence the court order would serve no purpose. Furthermore, it is the uncontroverted contention of the 1st Respondent that the Notice of Appeal was filed out of time hence not valid.
14. As posited in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the notice of appeal is therefore incompetent and cannot be relied upon by the Applicant as basis for seeking stay orders for an intended appeal. Being that there is no notice of appeal then the court deems that there is no appeal filed and stay orders cannot be issued on an appeal that does not exist.
15. Having considered the foregoing I find that the application has no merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF DECEMBER 2023.

Judy Omenge

JUDGE

In the presence of: -

Mr. Omondi for Plaintiff/Respondent

No appearance for the Defendant

Steve - Court Assistant

