



**Lois Holdings Limited v others (Environment & Land Case
77 of 2004) [2022] KEELC 2287 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 77 OF 2004**

FO NYAGAKA, J

MAY 24, 2022

BETWEEN

LOIS HOLDINGS LIMITED DECREE HOLDER

AND

NDIWA TAMBOI & 184 OTHERS JUDGMENT DEBTOR

RULING

1. This suit has had a long and checkered history characterized by a multiplicity of Applications. In the instant one, the Judgement-Debtors moved this court by Notice of Motion Application dated 26/02/2021 and filed on 04/03/2021 under a certificate of urgency of the same date. It was once again supported by a Certificate of Urgency dated 28/02/2022. It sought the following reliefs:
 - (a) ...spent
 - (b) ...spent
 - (c) ...spent
 - (d) There be a stay of execution herein and of the eviction of the Judgement-Debtors pending the hearing and final determination of Kitale ELC No. 14 of 2021 filed by their Co-operative Society Nabakhwana Farmers Co-operative Society Limited against the Decree-Holders seeking to enforce the sale agreement entered into on 04/11/2015 between the Decree-Holder and the Judgement-Debtors' said Co-operative Society for 531 acres of the suit land and which was entered into after the judgment;
 - (e) The sale agreement of 04/11/2015 between the parties herein be adopted in this suit as a consent of the parties;
 - (f) Costs of this Application be provided for.



2. Why an Application dated 26/02/2021 would lie unprosecuted for a year and some days and then, from nowhere, it suddenly becomes urgent as the Applicants wanted this Court to believe is mystery. However, the Application was supported by the grounds on the face of it and by Affidavit of one, Robert Nyongesa Makhanu, one of the Judgement-Debtors. He deponed that the on 10/02/2021, the Judgment Debtor's Cooperative Society, namely, Nabakhwana Cooperative Society Limited, were served with an eviction order dated 02/06/2015 and an eviction notice dated 09/02/2021. These gave them a twenty-one (21) day notice to vacate land parcels numbers L.R. No. 6416/6 and L.R. No. 6485.
3. The said eviction notice and order had been served upon the area Chief and Police Officers at Endebess Sub-County who had since visited the parcels and asked the Judgement-Debtors to vacate. He recalled that of the two parcels of land contained in the Eviction Order, the land parcel number L.R. No. 6485 was the subject of a sale agreement dated 04/11/2015, entered into between the Decree-Holder and the Judgement-Debtors' Cooperative Society. In furtherance of this agreement a suit namely, Kitale ELC No. 14 of 2021 had been instituted seeking the enforcement of the said agreement which, according to them, was yet to be heard and determined. They alleged that the said agreement was binding on the parties to the transaction. They lamented that they would be rendered homeless and suffer irreparable harm if the stay orders are not granted. They deposed further that they had (by then) planted or prepared for planting on the parcels of land the subject of eviction.
4. It was further deposed that the Eviction Order was pursuant to the Court's judgement (delivered on 29/09/2014), through which, although it found that the suit parcels of land belonged to the Decree-Holder herein, the parties were at liberty to enter into a mutual agreement for the sale or otherwise of parcel L.R. No. 5335/2. In the intervening period, the Judgement-Debtors were allowed to remain on that parcel of land. According to the Applicants, this mutual agreement was arrived at and put into writing vide the sale agreement dated 04/11/2015. It was deposed that following the demise of Jason Kiamba Kimbui, the proprietor and shareholder of the Decree-Holder, Lois Holdings Limited, the progression of the terms captured in the sale agreement went into abeyance. According to the said agreement, the Decree-Holder had agreed to sell a total of 531 acres comprised of parcel numbers LR. No. 6485 and LR. No. 5535/2 at a price to be determined by a valuer.
5. It was further stated on oath that the Judgement-Debtors traced Jason Kiamba Kimbui's family members and wanted to know its administrators but the family, who were still mourning, promised to proceed with the transaction accordingly. In a letter dated 30/01/2019, the Judgement-Debtors were informed that the management of the Decree-Holder's properties would be under the control of one, Douglas Kimbui. The Applicants alleged that the Decree-Holders had since reneged on their promise to proceed with the sale of the parcels of land to their favor per the agreement, and that the Decree-Holder had instead commenced eviction proceedings. They further accused the Decree-Holder of clandestinely obtaining eviction orders hence irregular.
6. Finally, the judgment debtors challenged the enforceability of the eviction order for being defective on account of being five (5) years old and for the following other reasons:
 - (i) It does not give names of evictees with specificity;
 - (ii) It was inchoate as it was processed on 02/10/2015 before the sale agreement dated 04/11/2015;
 - (iii) The sale agreement dated 04/11/2015 superseded the decree as it was mutually entered into;
 - (iv) The eviction order is 'archaic' as it was taken out in October 2015;
 - (v) The order was extracted before the 2016 legal regime on evictions.



7. The Application was opposed. In its Replying Affidavit sworn and filed on 20/04/2021 by one, Lois Nyegera Kimbui, a director of the Decree-Holder, it reproduced the final orders enunciated in the court's judgment of 29/09/2014. The deponent conceded that the Decree-Holder and the Judgement-Debtors' representatives, Nabakhwana Farmers Co-Operative Society Limited, entered into a sale agreement for the sale of two parcels of land namely L.R. No. 6485 and L.R. No. 5335/2. Under the terms of engagement, the land was to be valued as to ascertain its consideration. On 23/02/2016, the properties were valued at Kshs. Ninety-nine (99) million. This was captured in the valuation report dated 11/02/2016.
8. In terms of the Agreement, the 1st installment was to be paid on 30/01/2016 which remains due and unpaid to date. Since the Judgement-Debtors were allowed by the Court to remain on the parcel of land namely L.R. No. 5335/2 during the interval, they cultivated the land and have never paid for anything for those seven (7) years that they have lived on the land. This had caused the Decree-Holder huge loss of user. In its letter dated 04/10/2016, the Decree-Holder addressed the District Commissioner of Endebess and maintained that the sale agreement of 04/11/2015 had been revoked as the Judgement-Debtors had failed to make good their obligations.
9. Additionally, since the parcel of land was governed by the provisions of the *Land Control Act*, and in particular Section 22, the said agreement of 04/11/2015 was null and void for lack of the consent of the Land Control Board. Resultantly, specific performance could not be issued over a void contract. It was further deposed that the deaths of Jason Kiamba Kimbui and Douglas Kiamba Kimbui did not affect any transactions as they were not parties to the agreement. It urged this Court to dismiss the Application.
10. On 10/03/2022, the Applicants filed a Supplementary Affidavit sworn on 10/03/2022, although it stamped by the Registry as having been filed on 10/03/2021. They deposed that while the instant Application stated on the face of it that the Supporting Affidavit was filed by Robert Nyongesa Nakhanu, it was actually sworn by Dominic Gitau Mwangi on 26/02/2021. They rued the error. While conceding that Kitale ELC No. 14 of 2021 had been determined, they added that they had since filed a Notice of Appeal against the decision to dismiss the suit. They annexed a copy of the Notice dated 21/02/2022 and marked it as DGM 1. Consequently, they pleaded that it was in the interest of justice that the eviction orders be lifted and set aside and the illegal eviction be stayed.

Submissions

11. The Application was canvassed by way of written submissions. The Judgement-Debtors' submissions dated 09/03/2022 were filed on 11/03/2021 (sic). They are a mirror reflection of both the grounds and Affidavits in support of the Application. They asked this court to allow the Application in the interest of justice.
12. The Decree-Holder's submissions dated 08/04/2022 were filed on 11/04/2022. It was submitted that the judgement delivered on 29/09/2014 remains irrefutable. That prayer (d) of the Application is moot as Kitale ELC No. 14 of 2021 was heard and finally determined on 14/02/2022. It was also posited that in the suit referred to in prayer (d) of the instant Application, the Judgement-Debtors' representative sought specific performance of the agreement of 04/11/2015 to wit would vary the judgement. That since there was no order to set aside the eviction order, those submissions remained an academic exercise. That the filing of a notice of appeal in ELC No. 14 of 2021 was not a contemporaneous stay of execution herein. They submitted that the Application was inconceivable and made mala fides. They urged this court to dismiss the Application with costs.



Analysis And Disposition

13. The Application seeks to stay an eviction following the decree of this Court, pending the hearing and determination of Kitale ELC No. 14 of 2021. One thing that is clear is that the instant Application was filed a year ago, way before Kitale ELC No. 14 of 2021 was determined. Actually, the suit under reference was determined on 14/02/2022. On this ground, the Judgment-Debtors initially connote a red herring; that the suit was pending determination. When the Decree-Holder pointed out that the suit was heard and determined, the Judgment-Debtors furthered that it was in the interest of justice that the orders be granted as prayed since they had filed a Notice of Appeal in the suit, against the Ruling.
14. Respectfully, I disagree with the submissions of the Judgment-Debtors. Firstly, as rightly put by the Decree-Holder, Kitale ELC No. 14 of 2021 was heard and determined as noted above. The effect of the ruling on that date in that matter in the suit was that the Court determined the suit as being res judicata. Thus, the suit was dismissed. Secondly, the fact that a Notice of Appeal was filed against the Ruling does not necessarily mean that the Appeal has been set in motion. However, by the filing of the Notice of Appeal, the law deems the filing of such a document as the Appeal itself having been filed. This is because, under Order 42 Rule 6(4) of the *Civil Procedure Rules*, it is provided that “For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.” It means that the issue being litigated in this Application is also being subjected to consideration before the Court of Appeal. The law does not countenance such a process of multiplicity of issues in Courts.
15. Furthermore, by virtue of Order 42 Rule 1 of the Civil Procedure Rules, an appeal does not of itself entitle a litigant an automatic stay of execution to a decree. The Applicants needed to do more than to state that they had preferred an appeal by way of filing a Notice of Appeal. In any event, this Court is not apprised of the status of the intended appeal, if any. Thirdly, the Appeal systematically morphs into a new matter separate and distinct from Kitale ELC No. 14 of 2021 in which the Applicants could pursue the orders herein sought. Since Kitale ELC No. 14 of 2021 has been fully determined by this Court and this Court is functus officio in it, the same cannot be said to be pending. For that reason, its life having ended, it cannot form the basis for seeking a stay of execution in this matter on the ground that the issue of the agreement is yet to be determined in the suit. That argument is overtaken by events. Consequently, there is no nexus that has been shown between the intended Appeal and the present Application.
16. In any event, this Court is of the view that the Applicants have devised a scheme of how to defeat the decree of this Court by a series of applications to Court in a multiplicity of suits. In essence, what the Applicants are doing is nothing but casting their (fishing) net as wide as possible and doing the best they can to ensure that the decree of this Court is not executed. Simply put, they are intent on challenging the decree of this Court by hook or crook. Here is how they are doing it: one, they file the instant Application and when they realize that it would not go far, they leave it lying in limbo and move the Court, seeking similar orders in Kitale ELC No. 14 of 2021. They urged the Application therein to the end. When they lose the Application, they recall that the instant one was left lying in limbo. They, mischievously, revive the instant Application by way of a certificate of urgency and prosecute it. Meanwhile, they are not done with their quest over the same matter in the other file - Kitale ELC No. 14 of 2021 hence they prefer an appeal therefrom.
17. Fourthly, suit number Kitale ELC No. 14 of 2021 is a separate and distinctive suit from the present suit. If indeed the Judgment-Debtors have lodged an appeal against the decision in that matter, wouldn't it be pragmatic and proper in law to file an Application for stay of execution in that suit and in those



proceedings? The answer is without a doubt in the affirmative. It is for those reasons that I find that prayer for stay of execution pending the determination of Kitale ELC No. 14 of 2021 has not only been overtaken by events but is also moot. The prayer is, at best, frivolous and vexatious.

18. In their other substantive prayer, the Judgement-Debtors seek to enforce the sale agreement dated 04/11/2015 in that the same be adopted as a consent as between the parties. It's quite deplorable to say the least that the Judgment-Debtors have dared to seek this prayer, more so in the instant suit. Why do I say so? A cursory perusal of the pleadings in Kitale ELC No. 14 of 2021 and in particular the prayers sought moved the court to order specific performance on the agreement dated 04/11/2015. In fact, the Judgement-Debtors did admit to that in the instant Application. In my view, the Judgement-Debtors want to re-litigate the issue that was the subject of proceedings in Kitale ELC No. 14 of 2021 yet they have since lodged an Appeal against the decision in its entirety. I think that since that issue has already been determined and an appeal preferred, then the Judgement-Debtors have no business, reason or basis of bringing the said issue in the present Application before me.
19. In the *Black's Law Dictionary*, by Brain Garner, 11th Edition, Thompson Reuters, St. Paul MN, 2019 the learned authors define a fitting practice - abuse of process. They state that abuse of process means "the improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."
20. The Court of Appeal in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002 [2009] KLR 229 held thus:

"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

 - (i) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
 - (ii) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
 - (iii) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
 - (iv) Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.
21. The Judgment-Debtors herein simply tried to go through the back door and were by the instant Application using any means necessary to achieve their hidden and subtle objectives. I find that the present Application falls within the parameters of an abuse of the process of the Court. Any legal system that follows and esteems the rule of law, abhors any slightest attempt to litigate on an issue through a multiplicity of suits or applications. The applicants should have been well aware of the fact that it would not have been a good 'feeling' if they too were on the receiving end of a process of a



barrage of suits and applications against them on the same issue were they to be in the shoes of the Respondents. One ought to do to others what he/she would like to be done unto him/her.

22. The Applicants cannot be litigating on two fronts and it be left so: they cannot be urging an appeal over the same agreement in Kitale ELC No. 14 of 2021 and praying also in this suit that the same “sale agreement of 04/11/2015 between the parties herein be adopted in this suit as a consent of the parties.” Should this Court adopt the agreement and the Court of Appeal rejects it, what absurdity would that create? There was good reason why the law always provides that an issue be litigated in one forum at a time and the hierarchy of Courts be respected. Consequently, that prayer must also suffer the fate of rejection.
23. Be that as it may, this, and indeed any other Court, would still frown at the conduct of the Applicants in this matter in relation to that said agreement (of 4/11/2015) and deny the prayer (d) as sought. This is because, equity, law and conscionability cannot fathom a situation where, assuming that the agreement was rightly executed (and I do not make a finding on that at this point), that parties can enter into an agreement seven years ago, one of the parties does not perform its obligations therein and still move the Court to enforce the agreement as a consent of the parties. Where are clean hands in such conduct? Can the Court act as a mere rubber stamp of parties’ ‘intentions’? Where is good faith in such conduct? Anyway, those are questions that this Court would have posed were the prayer on the adoption of the agreement dated 04/11/2015 to be found worth of deeper analysis on merits. In any event, Section 6 and 22 of the [Land Control Act](#) would also have stood on the way of the requested adoption, unless satisfactorily explained by the parties as to why it was not complied with. A void contract is inoperative before a court of law.
24. In the premises, I find that the instant Application lacks merit. It is therefore dismissed with costs to the Respondents.

Orders accordingly.

**RULING, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
24TH DAY OF MAY, 2022.**

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

