



REPUBLIC OF KENYA



KENYA LAW
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**Makanda v Omusolo (Environment & Land Case 165 of 2006)
[2022] KEELC 2383 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 165 OF 2006**

FO NYAGAKA, J

JUNE 27, 2022

BETWEEN

ALFRED JUMA MAKANDA PLAINTIFF

AND

ALFRED OCHOKOROD OMUSOLO DEFENDANT

RULING

1. This is a Ruling on an Application dated 09/03/2022. The Application is simple and straight forward. It is about the tale of two Alfreds one of whom holds a decree in respect of a claim he made, and the other who does not wish the decree to be executed against him. The Application was bought under Order 22 Rules 80, 82 and 83(7) of the *Civil Procedure Rules* and “all other enabling provisions of law.” The Court does not know which the other enabling provisions of law are and the reason why they would not be particularized herein if they existed and were of meaning, if at all. Be that as it may, the Applicant sought the following Orders:
 1. ...spent
 2. That the OCS Kitale Police Station be ordered to provide security to enforce the Court decree dated 21st May, 2020 and to proceed to evict the Defendant, his relatives, agents and or whoever found in the subject parcel of land and remove all illegal structures erected in the suit property, being LR. Number Trans-Nzoia/ Botwo/384.
 3. The Defendant to pay the costs of this Application and eviction.
 4. Any other order that may deem fit to grant.
2. The Application was based on six (6) grounds which were basically transcribed into an Affidavit sworn by one Alfred Juma Makanda on 9/03/2022. In brief the Applicant reiterated the fact that judgment herein was delivered on 21/05/2020 in respect of the parcel of land in question; that by it



the Defendant was required to remove himself from the suit land within ninety (90) days failure of which he would be evicted; the Respondent preferred an appeal from the judgment but the same has never been prosecuted for over two (2) years and there are no order of stay of execution pending the hearing of the appeal; the execution in the matter could not be executed because the Respondent still occupied the suit land hence the instant Application and the application was not made on good faith (sic). He annexed to the application a copy of the judgment and Notice of Appeal.

3. The Application was opposed through the Replying Affidavit by one Alfred O. Omusolo. He stated that the decree herein is yet to be drawn hence incapable of execution; that it was admitted that the Application was not made in good faith hence should not be allowed; judgment was delivered on 21/05/2020 yet the notice thereof was received on 22/06/2022; a Notice of Appeal was lodged on 3/06/2020 and paid for on 05/06/2020 and certified copies of proceedings, judgment and decree applied for in writing on 5/06/2020, within thirty (30) days of the judgment appealed from; the Notice was erroneously endorsed as filed on 18/06/2020 but the error was corrected vide letters annexed as AOO-1A and AOO-1B; paragraphs 4 and 5 of the Supporting Affidavit were misleading; that it was the Respondent's constitutional right to be allowed to appeal against the judgment and the status quo be maintained and he prayed that the instant Application be dismissed with costs.
4. The parties did not submit on the Application. That notwithstanding, the Court shall proceed to pronounce itself based on analysis of the pleadings and the law.

Issues, Analysis and Determination

5. I have considered the Application, the law and the circumstances thereof, I find two (2) issues for determination:
 - a. Whether the Application is merited:
 - b. Who to bear the costs of the instant Application.
6. I begin with discussing the merits or otherwise of the Application. The starting point for this is making the record straight as I understand it. First, the Respondent deponed that judgment was delivered on 21/05/2020. It appears that notice thereof was received by the Defendant on 22/05/2020 and NOT 22/06/2022 since the letter dated 24/06/2020 requesting for rectification of the date of signing of the Notice of Appeal indicated the former date as the one of receipt of the notice of delivery. In any event, it would be practically impossible for one to file a Notice of Appeal (on 5/06/2020) if he had no knowledge of it.
7. The record further shows that when the Notice of Appeal dated 02/06/2020 was lodged on 05/06/2020, it was paid for at 5.32 pm, way after the official working hours of the day, which was a Friday, hence as by the Rules, it ought to have been indicated as received and paid for the next working day, which was the 8/06/2020. I state so because from the face of the email print-out that the Respondent attached to the letter by Ms. Katama Ngeywa & Co. Advocates, dated 24/06/2020 and gave to the Court to evidence payment for the Notice of Appeal and request for correction of the date of signing, it shows that it was printed the following day, the Saturday of the 06/06/2020 at 2.37 pm. It shows when the payment by way of M-pesa was made, being 05/06/2020, at 5.32pm.
8. In relation to the deposition that paragraphs 4 and 5 of the Supporting Affidavit are false, this Court finds that as to the legality or competence of the Notice of Appeal, that is not a matter within the jurisdiction of this Court to determine. It is a matter for the Court of Appeal to consider. Again, the Respondent's contention that the Applicant had admitted that the Application was not made in good faith it plausible. However, a reading of the context and content of the entire application shows that



the word “not” in the impugned paragraph was included by error. The paragraph should not be read in isolation. Be that as it may, since a party is bound by its pleadings, the court will take it that the point as contended it what the Applicant intended to put across. The question that remains then is whether the Application is made in bad faith. From the application before me, the Applicant wants the OCS Kitale to provide security when the eviction of the judgment debtor is to take place. Where is bad faith in such an application? Provision of security for safety during execution of the Court’s decree is for both the Applicant and Respondent and all those who may be involved in the exercise. I am prepared to find that in the circumstances the Application is made in good faith.

9. The issue this Court is to consider, at this stage, is whether or not there is just cause to stay execution of the decree herein. In order to do so, this Court considers the fact that, as things stand, an appeal was preferred against the judgment of this Court by the Respondent. This is evidenced by the fact that a Notice of Appeal was lodged against him, and this suffices to show that an Appeal has been filed. This Court takes that view because in terms of Order 6 Rule 4 of the Civil Procedure Rules, once a Notice of Appeal has been lodged in respect of an order or judgment of the Court, it is deemed that an Appeal has been filed.
10. Once an appeal has been filed, the law is clear on what the Appellant should do in regard to the decree or order if it is one which is capable of execution. I state so because there are judgments and rulings or orders which are incapable of execution hence the explanation I give hereafter will not apply thereto. In such other cases, the Appellant only needs to process the preparation towards the prosecution of the Appeal in terms of the law. But, in case, the judgment or decree or ruling or order is one capable of execution, then the fact that an appeal has been made does not lead to an automatic stay of execution or proceedings in the matter. This is because, Order 42 Rule 6(1) and (2) of the Rules provide that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless-

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

11. It therefore follows that if the Applicant in the instant Application sought to have the status quo maintained or stay of execution granted, he should have moved the Court appropriately. That would have given the Court opportunity to consider the reasons advanced by him to stay the decree herein. He has not done so to date. And opposition to an Application for execution of the decree does not amount to an application on his part to stay the execution of the decree. The procedure on stay of execution is clear.
12. The Applicant moved this Court for the execution of the decree and the provision of security by the OCS (I take it that the acronym OCS here means Officer Commanding Station) Kitale Police Station.



It would have been prudent for the Applicant to give the full meaning of the letters “OCS” because this is not a matter of notoriety that the Court can take judicial notice of in terms of Sections 59 and 60 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. But the Court has taken it to mean as stated because the Applicant attached the letters contextually to a Police Station. It can only mean the officer in charge of that station is the one being referred to against whom the request is made to provide security.

13. The Application was made under Order 22 Rules 80, 82 and 83(7) of the Civil Procedure Rules. Order 22 Rule 80 provides for a situation where property which is under the occupancy of a judgment debtor or persons claiming under him is sold pursuant to a decree of a Court in the matter. The Rule provides for how the delivery of the possession thereof should be. Thus, the Rule is irrelevant in the instant Application. The Applicant did not move the Court for delivery of vacant possession due to a sale in realization of the decree but eviction pursuant to the judgment of the Court. These are diverse processes.
14. Order 22 Rule 82 of the Rules provides for cases where the decree holder or the purchaser of immovable property sold in realization of the decree of a Court moves to obtain possession thereof and a person (other than the judgment-debtor) resists the action or obstruct the process. In such a case, the Court shall be moved according for it to investigate the case. The facts herein do not disclose such. The execution has not been made or attempted and resistance or obstruction experienced.
15. Order 22 Rule 83(7) does not exist in the Civil Procedure Rules. Thus, I will not comment on a non-existent law. However, in relation to the process of execution as contemplated in the previous paragraph (above), Order 22 Rule 83 of the Rules provides for cases where the decree holder or the purchaser of immovable property sold in realization of the decree of a Court moves to obtain possession thereof and the judgment debtor or his agent or representative acting under his instigation resists the action or obstruct the process. In such a case, the Court shall be moved according for the judgment debtor or that other person to be put in prison for a period not exceeding thirty (30) days. The facts herein do not disclose such. The execution has not been made or attempted and resistance or obstruction experienced.
16. With this Court finding the irrelevance of all the provisions cited in making the Application, the Notice of Motion is left bare. But that does not render the same incurably defective since Article 159(2)(d) of the 2010 *Constitution* takes care of technicalities such as unintentional failure to observe or follow the Rules. Such a case is the instant one where the Applicant believed to have cited the correct provisions only for his knowledge and intellect to fail him. This mistake or error should not be visited on him. In any event, Section 3 of the *Civil Procedure Act* gives this Court inherent powers to make such orders as it may deem just and fit to grant in order for the ends of justice to be met.
17. The outstanding issue before me in regard to the merits of the Application is the objection raised by the Respondent that the application should not be granted since as at the time the Application was made the decree had not been drawn. I agree with the Respondent that to the extent that a decree had not been drawn in this matter, execution cannot take place. Execution is in respect of a decree of a Court. However, that finding should be in juxtaposition with the substantive prayer sought in the instant Application. The Applicant seeks provision of security when the execution of the decree is to be made. Before me is not an application for execution but one which contemplates effecting the execution smoothly at the point at which that shall take place. As to how and when the Applicant shall move the Court for execution is a matter to be left to him for compliance with the law given that, in any event, the decree is over a year old.
18. The upshot is that the Application dated 9/02/2022 is merited and is hereby granted. Under Section 3A of the *Civil Procedure Act*, in the interest of justice and to avoid the ends thereof being defeated,



since the substantive prayer was crafted in a manner that may bring confusion if granted as it is, this Court varies it. Consequently, I make the following orders:

- (a) The Officer Commanding Station (OCS), Kitale Police Station is ordered to provide security to enforce the Court decree dated 21/05/2020, as and when it shall be executed, and the officers to assist to evict the Defendant, his relatives, agents and or whoever claiming through him found in the subject parcel of land at the time of eviction, and remove all illegal structures erected in the suit property, being LR. Number Trans-Nzoia/ Botwo/384.
- (b) The Defendant to pay the costs of this Application and of eviction, to be loaded onto the total to be paid upon execution.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 27TH DAY OF JUNE, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

