



**Mecha v Mangera & 3 others (Environment & Land Case
17B of 2008) [2022] KEELC 3534 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 17B OF 2008**

JM ONYANGO, J

JULY 27, 2022

BETWEEN

HUDSON ONGECHI MECHA PLAINTIFF

AND

NELSON NYABUTO MANGERA 1ST DEFENDANT

JOESPH OBADIA 2ND DEFENDANT

VITALIS MOCHAMA 3RD DEFENDANT

PETER NYANGARESI 4TH DEFENDANT

RULING

Introduction

1. This ruling herein is in respect of the Notice of Motion dated 4th April, 2022 filed by Defendants/Applicants seeking the following orders:
 - a. That there be stay of execution of the judgment of this court delivered on February 22, 2022.
 - b. That the Applicants who were arrested pursuant to warrants of arrest issued by the court be released.
2. The application is supported by the grounds set out on the face of it and the Supporting Affidavit sworn by Nelson Nyabuto Mangera on 20th May, 2022.
3. The application is opposed by the Plaintiff/Respondent vide his grounds of opposition dated 22nd April, 2022 in which he raised the following reasons:
 - a. The application as filed and presented before the court is frivolous, vexatious and lacks merit.



- b. The Deputy Registrar is devoid of jurisdiction to grant the orders sought in the instant application pursuant the mandatory provisions under order 49 rule 7 of the [Civil Procedure Rules](#).
- c. The application is untenable having been mounted by Applicants who are devoid of audience in so far as the same are in contempt of the court orders to pay costs.
- d. The application is *res judicata* since the orders sought therein had already been determined on merit and a ruling issued on 22nd February, 2022.

Brief Background

4. Before delving into the merits of the application, it is necessary to give a background of this suit. The Plaintiff/Respondent filed the suit herein way back in the year 2003. The Applicants failed to enter appearance despite being duly served with pleadings and as a consequence the matter proceeded *ex-parte* and judgment was entered in favor of the Plaintiff/Respondent by Hon. Justice Asike Makhandia in favor of the Plaintiff/Respondent on 12th May, 2012.
5. Thereafter, the Plaintiff filed a Bill of Costs which was taxed at Kshs. 105,550/= by the Deputy Registrar on the 24th February, 2014.
6. On the 8th day of August 2021, the Plaintiff herein took out a Notice to show cause against the Defendants in order to recover his costs. The Defendants who were all served failed to show up in court and a warrant of arrest was issued on the 20th day of September, 2021 for them to appear in court and show cause why they should not be sent to civil jail for failure to pay the decretal sum. They subsequently appeared before the Deputy Registrar on the 18th October, 2021 in response to the warrants of arrest issued against them. They asked for more time and they were ordered to pay the sum of Kshs. 38, 850 by 31st December, 2021. The matter was fixed for mention on 25th January, 2022 when the Applicants failed to attend court and warrants of arrest were issued against them.
7. On 2nd November 2021, the Defendants filed an application in which they sought the following prayers;
 - a. That the court be pleased to grant leave to the Applicants to file notice of appeal and appeal against the *ex-parte* judgment out of time;
 - b. The Court be pleased to order stay of execution of the decree and warrant of arrest against the Applicants issued by this court pending hearing and determination of the intended appeal.
 - c. Costs of the application be in the cause.
8. The said application was heard and dismissed *vide* a ruling dated 22nd February, 2022.
9. The instant application was thereafter filed on 4th April, 2022 by the Applicants seeking an order of stay of execution of the “judgment” of this court dated 22nd February, 2022 and an order releasing the Applicants who had been arrested as a result of a warrants issued by the court. The application is opposed by the Respondent in the manner highlighted herein above.

Issues for Determination

10. The main issues for determination are:-
 - a. Whether the suit the application is *res judicata*



- b. Whether the Applicants should be granted the orders sought.

Analysis and Determination

11. It is not in dispute that the Applicants filed an application dated 29th October, 2021 seeking a stay of execution and leave to appeal against the judgment delivered on 12th October, 2012 out of time. The said application was dismissed vide a ruling delivered on 22nd February, 2022. It is against the said ruling that the Applicants filed a Notice of Appeal. In so far as the intended appeal is against the ruling dated 22.2.2022 and not the judgment dated May 30, 2012, the matter is not *res judicata*.
12. I will now move on to consider whether the Applicants are entitled to the orders of stay pending appeal.
13. As correctly submitted by learned counsel for the Respondent, the orders dismissing the application dated 29.10 2021 are not appealable as of right.
14. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal lies as of right and those against which an appeal lies only with leave of the court.
15. Order 43 Rule (2) of the *Civil Procedure Rules* provides that an appeal shall lie with leave of the court from any other orders apart from the ones listed in Order 43 Rule (1). An appeal against an order dismissing an application for stay and seeking leave to appeal out of time is not appealable as of right. The Applicants were therefore required to seek leave to appeal against the court's ruling of 2nd February 2022. The Notice of Appeal filed by the Applicants is thus incompetent and cannot form the basis for an application for stay of execution.
16. In arriving at this decisions, I am guided by the case of *National Bank of Kenya Ltd v Maurice Onyango Okongo* (2018) eKLR where the Court held as follows:
- “While it must be appreciated that this court has the jurisdiction to hear and determine appeals from tribunals, subordinate courts and bodies as prescribed by article 165 of the *Constitution* and other Acts of Parliament, a party who desires to file an appeal to this court has to demonstrate under what law that right to be heard on appeal is conferred or if not, show that leave has been granted to lodge the appeal before the court”.
17. The above position was espoused by the Court of Appeal in *Nyutu Agrovat Ltd v Airtel Networks Limited* (2015) eKLR where the court cited with approval the decision by Ringera J in *Nova Chemicals Ltd v Alcon International Ltd* HC Misc Appl No. 1124 of 2002, where the learned judge held as follows:
- “The point of departure must be the recognition that the right of appeal with or without leave must be conferred by statute and the same is never to be implied”
18. In view of the foregoing, the application lacks merit and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF JULY, 2022.

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J.M ONYANGO

JUDGE

