



**Sare Developers Ltd v Airo & another (Environment and Land Appeal
13 of 2022) [2022] KEELC 15420 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 13 OF 2022
MN KULLOW, J
NOVEMBER 22, 2022**

BETWEEN

SARE DEVELOPERS LTD APPELLANT

AND

CHARLES AIRO 1ST RESPONDENT

BARRACK OTIENO DACHE 2ND RESPONDENT

RULING

1. By notice of motion dated June 17, 2022, the applicant sought for the following orders: -
 - a. Spent.
 - b. That this honourable court be pleased to set aside the orders striking out of Migori ELC No 96 of 2021 and reinstate the said suit for purposes of transferring it to this honourable court for determination on merit.
 - c. That this honourable court be pleased to stay the assessment of the bill of costs dated June 15, 2022 filed in the said lower case until the determination of the appeal.
 - d. That this honourable court be pleased to stay of execution of the said orders and any consequential orders that might be arising therefrom.
 - e. That the respondent herein be enjoined from entering into the subject suit land being South Sakwa/ Waware/426.
2. The application is based on 6 grounds thereof and the supporting affidavit sworn by Esther Aoko Odede on June 17, 2022. The applicant avers that on the May 10, 2022 the trial magistrate struck out his case Migori ELC Case No 96/2021 for want of jurisdiction with costs to the respondents.



3. Further, that pursuant to the said striking out of the suit; the respondents filed a bill of costs dated May 12, 2022 which is due for assessment. That the said bill of costs is based on the valuation of the whole suit property. It is her claim that the valuation report was requested by the trial magistrate for purposes of determining the jurisdiction of the court and should therefore not be used in assessing the said bill of costs. she maintained that the cause of action was only on trespass and injunction.
4. She also averred that no prejudice would be occasioned upon the respondents and urged the court to allow the application in order to preserve the subject matter of the appeal.
5. The application was opposed. The respondents filed a replying affidavit sworn by the 1st respondent on October 30, 2020, on his own behalf and on behalf of the 2nd respondent. It is his assertion that this court neither has the jurisdiction to review orders of another court except through an appeal nor can it confer jurisdiction upon a court that lacks jurisdiction by reinstating the suit.
6. He further contends that there is nothing to be stayed as the decree is merely for striking out a suit and further that there can never be stay of execution on the costs of a suit. He maintained that they incurred costs through advocate's fees and other incidentals which ought to be reimbursed by law.
7. He also averred that the application as framed seeks to have the court act ultra vires and abuse the powers bestowed upon it and thus urged the court to dismiss the same with costs.
8. The application was canvassed by way of written submissions. Both parties filed their rival submissions together with authorities which I have read and considered in arriving at my decision.

Analysis And Determination

9. The issues for determination which arise therefrom are as follows: -
 - a. Whether this court can set aside the lower court orders of striking out Migori ELC Case No 96 of 2021 and reinstate the same for purposes of transferring the same.
 - b. Whether an order for stay of execution can issue against the order and decree issued on May 10, 2022.

I. Whether This Court Can Set Aside The Lower Court Orders Of Striking Out Migori Elc Case No 96 Of 2021 And Reinstate The Same For Purposes Of Transferring The Same

10. The applicant herein has asked the court to set aside the order of the trial magistrate of striking out his suit Migori ELC Case No 96 of 2021 and to reinstate the said suit in the trial court for purposes of transferring it to the present court for determination on merit.
11. The respondents on the other hand contends that this court has no jurisdiction to review the orders of another court unless through an appeal and further asserts that the application seeks to have the court act ultra vires.
12. The trial court struck out the suit for want of jurisdiction, having established that the value of the suit property was beyond its pecuniary jurisdiction. From the valuation report filed, the property was valued at Kshs 90,000,000/= which is beyond the pecuniary limit and/or jurisdiction of the Magistrates' Court which is capped at Kshs 20,000,000/=
13. Section 9 (a) of the *Magistrate's Court Act*, 2015 confers magistrate court with the jurisdiction to deal with environment and land matters subject to their pecuniary jurisdiction and/or limit as outlined under section 7 (1) of the Act. In light of the same, I find that the trial court acted within the law in striking out the suit for want of jurisdiction.



14. The Supreme Court while addressing the issue of jurisdiction *In the Matter of Interim Independent Electoral Commission* [2011] eKLR stated as follows: -

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.

15. Guided by the decision above, it is clear that this court cannot grant jurisdiction where a court has none as sought in prayer no. (b). Once it has been established that a court has no jurisdiction, it must down its tools.
16. Consequently, I find that the orders sought by the applicant for setting aside the orders of the trial court and reinstating the suit are untenable and consequently prayer (b) and (c) of the application fails.

II. Whether An Order For Stay Of Execution Can Issue Against The Order And Decree Issued On 10/05/2022

17. Order 42 rule 6 (2) sets out the grounds of issuing an order for stay of execution as follows: -
- (2) No order for stay of execution shall be made under sub- rule (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.
18. I wish to adopt the Court of Appeal decision in *Ndungu Kinyanjui vs Kibicho Kugeria Services & Another* [2007] eKLR relied on its earlier decision in David Thiong’o T/A Welcome General Stores vs Market Fancy Emporium [2007] eKLR and held as follows: -

“This court has repeatedly stated in previous decisions, among them, David Thiong’o T/A Welcome General Stores vs Market Fancy Emporium, Civil Application No NAI 47 OF 2007.... that in an application under rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to restrain by injunction... the decision of February 9, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything



or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it.”

19. The judgment and decree which the applicant seeks to appeal is for the striking out of the suit for want of jurisdiction. The trial court held that it was not vested with the requisite pecuniary jurisdiction to entertain the suit as filed given the value of the suit property. In my view, the striking and subsequent orders as made by the trial court, are negative orders; neither the applicant nor the respondent was required to do or to refrain from doing anything.
20. In view of the foregoing, I therefore find and hold that what the applicant is seeking is stay of striking out of a suit in the trial court which was a negative order; which, guided by long line of decisions of the court of appeal on the subject, I find that the same is incapable of being stayed. I therefore find that an order for stay of execution sought cannot issue and thus prayer number (c) and (d) of the application are not merited.

Conclusion

21. In the upshot, I accordingly find that the application dated June 17, 2022 is not merited and is hereby dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUALLY AT MIGORI ON 22ND DAY OF NOVEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered virtually in the presence of: -

Non-Appearance for the applicant

Ms. Okota for the respondent

Court Assistant- Tom Maurice

