



REPUBLIC OF KENYA



Ngathiko & 6 others v Mwarire & 2 others (Environment & Land Case 34 of 2016) [2022] KEELC 15023 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 34 OF 2016
A KANIARU, J
NOVEMBER 15, 2022**

BETWEEN

**PETER MBOGO NGATHIKO 1ST PLAINTIFF
SAMUEL MURIITHI 2ND PLAINTIFF
MICHAEL KARIUKI MUGO 3RD PLAINTIFF
JACOB NJERU MUGO 4TH PLAINTIFF
MARINGA NGATHIKO 5TH PLAINTIFF
NGARI NGUNGURU 6TH PLAINTIFF
CHRISPINE NDARU KARIUKI 7TH PLAINTIFF**

AND

**MBARA MWARIRE 1ST DEFENDANT
ITA MWARIRE 2ND DEFENDANT
REGISTRAR OF LANDS MBEERE 3RD DEFENDANT**

RULING

1. The application before me for determination is a notice of motion dated May 6, 2021 filed in court on even date. It is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya & Order 51, and order 22 rule 22 of the *Civil Procedure Rules, 2010*, and any other enabling provisions of the Law.

Application

2. The application came with five (5) prayers but prayer one, two, and three (1, 2 and 3) are now moot. The prayers for consideration are therefore two (2) and they are as follows:



Prayer 4: The Honourable court be pleased to issue a stay of execution of certificate of costs issued and dated September 2, 2020 for the sum of Kes 93,911 against the plaintiffs/applicants pending the hearing and determination of ELC No E010 of 2021 (Peter Mbogo Ngathiko & 5 Others v Mbara Mwarire & 3 Others) by the plaintiffs /applicants on Block No 22 Gichiche Adjudication Section.

Prayer 5: Costs of the application be provided for.

3. The application is anchored on the grounds set out on the face of it and amplified by the supporting affidavit sworn on even date by Peter Mbogo Ngathiko. The applicants contend that the respondents, vide a ruling delivered on July 23, 2020, extracted a certificate of cost dated February 2, 2020 for the sum of Kes 93,911.00. The respondents were said to be desirous of executing the said certificate of cost against the applicants. Further, it was deposed that the 1st and 2nd respondents have already engaged the services of Ms Giant Auctioneers to proclaim and sell the property of the applicants. It was stated that the applicants still have a pending suit against the decree holders, which is yet to be determined and which also has a chance of success. It was said that if the same is determined, the respondents and/or decree holders are likely to be condemned to pay higher costs of the suit.
4. It was further stated that the applicants are currently under serious economic constraints due to the Covid 19 and that under such circumstances, it would be fair and just to stay the execution of the certificate of costs pending the hearing and determination of the case against the respondents. The case is on the same subject matter. Infact it appears that it is the same case re-filed. It was alleged that unless the orders sought herein are granted, the plaintiffs/ applicants' lives will be greatly affected.
5. The 1st respondent opposed the application by way of a replying affidavit sworn on June 9, 2021. He claimed that the application is an afterthought, misconceived, bad in law, and an abuse of the court process. It was his position that there has been unreasonable and inordinate delay in filing the application and further that the application aims at denying the respondents their fruits of the ruling delivered on March 28, 2019. Further also, it was deposed that the respondents having been awarded costs by this court, the same has never been appealed against and therefore the respondent should not be stopped from enjoying his fruits of victory. In the same vein, it was his case that the respondents are strangers to the ELC No E010 of 2021 and that they came to learn of the same via this application and that in any case, the same is a distinct and/or separate suit from the one currently before the court.
6. The court gave directions that the application be canvassed by way of written submissions, an order that only the applicants complied with. The applicants made their submissions as regards whether the applicants have a prima facie case. It was submitted that they have already proved that they have filed ELC Case No E010 of 2016 after the adjudication register was finalized in line with section 29(3) of the [Land Adjudication Act](#). That is the reason this court had used to strike out the suit as the Adjudication had not been finalized. The other case was said to have a high chances of success as it is the same parties and the same suit properties which are in both suits.
7. In reference to whether the applicants would suffer irreparable loss which cannot be compensated by an award of damages, it was their case that Giant Auctioneers have already proclaimed household goods belonging to the applicants and if the same were to be sold, it would occasion upon the applicants irreparable loss. It would also amount to incapacitating their livelihoods and further dehumanizing them. In regard to whether the application should be determined on a balance of convenience, it was submitted that even on a balance of probabilities, were the costs of this suit to be transferred to the cause of ELC Case No E010 of 2016, which is equally before this court, the respondents would still realize the said costs.



8. Further that the suit, having been struck out due to lack of jurisdiction, was by no fault of the applicants but rather due to the reason that the Land Adjudication Office had not finalized its Adjudication Register. That the applicants could not just sit and watch their rights being infringed upon. The applicants placed reliance on the case of *Butt v Rent Restriction Tribunal (1982) KLR 417* and further Order 22 Rule 25 of the Civil Procedure Rules which stipulates that the court has power to stay execution of a decree in a suit if the decree holder is a defendant in another pending suit in which the judgment debtor is the plaintiff. In the end, the applicants/plaintiffs urged this court to allow the application herein.
9. The court has considered the application, the court record, and the written submissions. The main issue for determination is whether the orders sought herein should issue. The legal provision on the discretion to consider stay of execution is Order 22, Rule 25 of the Civil Procedure Rules which stipulates when court may stay execution in circumstances such as obtain in this case.

Order 22 rule 25 reads as follows:

' Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.'

10. It is clear from the above provision that the court has a discretion to put on hold execution in a concluded matter if the judgement/debtor has sued the judgement/creditor in another but related matter. There is a dearth of local judicial pronouncements on the issue of stay of execution under order 22 rule 25 of Civil Procedure Rules, 2010. This impels this court to look elsewhere for guidance.
11. In Mulla: *The code of Civil Procedure Code, 18th Edition, volume 2*, P 2463, at 2464, the following observation appears in reference to order 22 rule 29 of India's Civil Procedure Code, which is in general similar to order 22 rule 25 of our Civil Procedure Rules, 2010.

' The jurisdiction to stay execution of the decree under O 21, r 29, has to be exercised with great care and only in special cases.' It is clear from Mulla (supra) that the above observation was derived from the case of [*Sbri Krishna Sing vs Mathora Abir, Air 1982 SC 686: \(1981\) 4 SCC 421.*](#)

12. It appears clear to me that it is not in every case that a judgement/debtor will succeed in putting on hold execution in a concluded matter even where a judgement/debtor and judgement/creditor have another pending matter in court. The court is called upon to exercise care in the exercise of its discretion. The matter before me now is one where the judgement/debtors instituted their case before time. The case was struck out but at the right time, they filed another case which is substantially similar to the one struck out. The case filed later – ELC No E010 of 2021 – is still pending in this court.
13. As I pointed out earlier, the applicable law calls for exercise of discretion. [*Blacks Law Dictionary \(Tenth Edition\)*](#) defines discretion as:

' The exercise of judgement by a judge or court based on what is fair under the circumstances and guided by the rules and principles of Law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.'

14. The exercise of discretion requires that the court acts reasonably and impartially. The judgement/creditors are eager to execute for costs even when the case that gave rise to the costs has been re-started



and is pending before this court. In their eagerness to execute, they are said to have even proclaimed for attachment household goods belonging to the judgement/debtor. It is clear to me that household goods are usually not part of the items allowed to be attached in execution of decrees. It seems clear to me that the judgement/creditor is acting in possible violation of law. This makes it easier for me to decide how to exercise my discretion.

15. I bear in mind that the case now pending in court is broadly similar to the one in which this application was made. The case does not appear to me hopeless. It is a triable one. The judgement/debtors, who are respondents in the application, are not losing their costs. They are only being told to wait until the pending case is concluded. When this is considered alongside the fact that they seem interested in attaching the judgement/debtors household goods, the exercise of discretion would require that they be stopped in their mission until the entire justice of the dispute between them and the judgement/debtors is established.
16. But I think it is also necessary to order the judgement debtors to deposit some amount of money as security for costs. It is not very clear to me why they were prematurely rushing to court to file a case that was ultimately bound to be struck out as it was.
17. In this regard, I hold that the application before me is merited and I hereby make the following orders.
 - I. Prayer 4 in the application is granted.
 - II. That the judgement/debtors/Applicant do deposit an amount of Kshs 50,000/- as security within the next 45 days failing which prayer 4 shall lapse.
 - III. The costs of this application to abide the outcome of the pending suit between the parties – ELC No E010 of 2016.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15TH DAY OF NOVEMBER, 2022.

In the presence of Njiru Mbogo for Kathungu Joe for 1st & 2nd defendants/respondents; Njiru Mbogo also for Kiongo for 3rd & 4th defendants/respondent; Kamunda (absent) for plaintiffs/applicant

Court Assistant: Leadys

A.K. KANIARU

JUDGE

15. 11.2022

