



Masibo & another v Were & 5 others (Environment and Land Case 27 of 2021) [2025] KEELC 4376 (KLR) (28 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 27 OF 2021**

A NYUKURI, J

MAY 28, 2025

BETWEEN

**ANTHONY MASIBO DIFFU AKA ANTHONY GABRIEL
MASIBO 1ST PLAINTIFF**

**JOSEPHINE NAOMI DIFFU (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF CHARLES NAULE DIFFU - DECEASED) 2ND PLAINTIFF**

AND

MILDRED AWINO WERE 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR 2ND RESPONDENT

**FELISTER JUMA SIFUMA (SUED AS THE ADMINISTRATOR OF THE ESTATE
OF EDWARD BULUMA SIFUMA - DECEASED) 3RD RESPONDENT**

FRANK M. OKINGO 4TH RESPONDENT

HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

MATHEWS TONADO OKETCH 6TH RESPONDENT

RULING

1. Before court is a Notice of Motion dated 4th July, 2024 filed by the plaintiff seeking the following orders;
 - a. Spent
 - b. That pending the hearing and determination of the intended appeal, this honourable court be pleased to stay execution of the certificate of costs dated 14th December, 2023 and other consequential orders arising from the ruling of the court delivered on 20th June, 2024.
 - c. That costs of this application be borne by the respondent



2. The application is predicated on the grounds on its face as well as the supporting affidavits sworn by Antony Masibo Diffu the 1st applicant on 4th July, 2024 and 21st January, 2025 respectively. The applicants' case is that this court in its ruling of 20th June, 2024, dismissed the applicant's application seeking reinstatement of the main suit and consequently costs were assessed against the plaintiff in the sum of Kshs. 261,555/=. That the applicants have appealed against the decision of 20th June, 2024. Further that it is difficult to convert the estate's assets into cash. That the 1st applicant is unemployed and has no capacity to make payments on behalf of the deceased estate and that the appellants have filed appeal to the Court of Appeal.
3. They maintained that they have an arguable appeal with chances of success. They argued that this court has power under order 42 Rule 6 of the Civil Procedure Rules to grant orders sought and that the intended appeal would be rendered nugatory and academic unless the orders sought are granted as the estate of the deceased is unable to pay the costs. They stated that security is not mandatory. They attached copies of the ruling of 20th June, 2024; certificate of costs; Notice of Appeal; draft memorandum of appeal and notices of execution.
4. The application was opposed. Mildred Awino Were the 1st respondent filed two replying affidavits sworn on 2nd July 2024 and 22nd January 2025 respectively on her own behalf and on behalf of the 3rd and 6th respondents. She stated that the applicants' oral application for stay of execution was allowed in court and that an application for stay of execution and reinstatement of suit were sought in the motion dated 28th November, 2023 when the same was dismissed. Further that the applicants sought for orders of review of the ruling of 2nd October, 2023.
5. She argued that the application herein was res judicata as the court has rendered its ruling on it. She also stated that costs follow the event and that she had incurred costs in this matter and the court allowed reasonable costs. That the applicants who have filed several suits and applications should be aware of consequences thereof, and that costs are not a punishment given to the applicants as it is an expense incurred by the respondents.
6. The respondent also averred that in the unlikely event that the applicants succeed on appeal, they will be refunded the costs as the respondents are able to do so. She stated that execution of costs will not impede the applicant's appeal and that there is no competent appeal filed. Further that the deceased's estate was confirmed and that the suit property is not registered in the deceased's name. She maintained that the suit was filed by the plaintiffs in their personal capacities.
7. The 2nd and 5th respondents filed grounds of opposition dated 15th July, 2024 in response to the application. They stated that the application was misconceived, incompetent, devoid of merit, an abuse of the court process and ought to be dismissed with costs. They further contended that the application had not satisfied conditions for stay of execution pending appeal under order 42 Rule 6, as there was no demonstration of substantial loss and no security was offered. They also argued that there was nothing to be preserved.
8. The application was disposed by way of written submissions. On record are submissions filed by the applicants and those filed by the 1st, 3rd and 6th respondents both dated 22nd January, 2025 and which this court has duly considered.

Analysis and determination.

9. The court has carefully considered the application, the response thereto and parties' rival submissions. The issues that arise for the court's determination are;



- a. whether the instant application is res judicata in view of the ruling dated 20th June 2024; and
 - b. whether the applicants deserve orders of stay of execution of the certificate of costs pending hearing and determination of the appeal against the ruling of 20th June 2024 dismissing their application for reinstatement of suit.
10. Section 7 of the [Civil Procedure Act](#) provides for the doctrine of res judicata as follows;
- Res judicata
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
- Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.
- Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
- Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
- Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
- Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
- Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
11. Therefore, where a court of competent jurisdiction has determined with finality an issue or suit on merit, between the same parties or their privies, the court is barred from again trying the same issue or suit.
 12. In the case of *Abok James Odera v John Patrick Machira Civil Application No. Nai 49 of 2001*, the court held that the doctrine of res judicata applies to both suits and applications and to rely on the defence of res judicate, there must be;
 - a. Previous suit in which the matter was in issue;
 - b. The parties were the same or litigating under the same title;
 - c. A competent court heard the matter in issue;
 - d. The issue had been raised once again in a fresh suit.
 13. In the instant case, the prayers made regarding taxation in respect of the ruling of 20th June 2024 were that the delivery of the ruling on taxation be arrested and that the taxation be stood over. As at the time of filing the application, the respondent’s bill of costs had not been taxed by the Deputy Registrar. The ruling on taxation was delivered the following day, after the instant application had been filed and before delivery of this court’s ruling of 20th June 2024, which is why the court found that the issue



of arresting and or standing over taxation was moot, because the taxation in issue had already been done. In the instant case, the applicants seek for stay of execution of the certificate of taxation. That is completely a different issue and having arisen after change of circumstances and therefore it is the finding of this court that the issues raised in the ruling of 20th June 2024 and in the instant application are different, hence the instant application is not res judicata.

14. On the merits of the application, the application is stated to have been brought under sections 1A and 1B of the [Civil Procedure Act](#) and Order 42 Rule 6 of the Civil Procedure Rules. While the cited provisions of the [Civil procedure Act](#) provide for the overriding objective of the [Civil Procedure Act](#), being to facilitate the just, expeditious, proportionate and affordable resolution of disputes as well as the duty of the court in furthering the overriding objective; the cited provisions of the civil Procedure rules provides for the court's jurisdiction to grant stay of execution pending appeal.
15. Order 42 Rule 6 provides as follows;
Stay in case of appeal [Order 42, rule 6]



(1)	<p>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.</p>		
(2)	<p>No order for stay of execution shall be made under subrule (1) unless—</p> <table border="1" data-bbox="858 1025 1045 1973"> <tr> <td data-bbox="858 1025 922 1973">(a)</td> <td data-bbox="922 1025 1045 1973"> <p>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</p> </td> </tr> </table>	(a)	<p>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</p>
(a)	<p>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</p>		



	(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.
(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.

16. Therefore, to obtain stay of execution pending appeal, an applicant must demonstrate that they have filed an appeal against the decision sought to be stayed; that they stand to suffer substantial loss if stay is not granted; that they have sought for stay without unreasonable delay and show willingness to provide security for the due performance of the decree.
17. In the instant matter, the applicants seek to stay execution of the certificate of costs dated 14th December 2023. There is no appeal against the said taxation and the appeal referred to by the applicants herein is in regard to the ruling dated 20th June 2024. In that ruling, the applicants' quest to reinstate their suit was declined, the court having found that it had no jurisdiction to grant the same and that the question of arresting the taxation was moot. Ultimately, the court struck out the application dated 28th November 2023 with costs. The above being the case, in the circumstances therefore, I find and hold that the application herein dated 4th July 2024 does not fall within the ambit of Order 42 Rule 6 of the civil Procedure Rules since the order sought to be stayed is different from the order appealed against.



18. The above notwithstanding, this court has inherent jurisdiction under section 63 (e) of the *Civil Procedure Act* to grant orders in the interest of justice. Therefore, this court still asks whether the interests of justice would be served by granting stay of execution of the certificate of costs pending hearing and determination of the appeal filed by the applicants. The first applicant stated that he has no capacity to make payments from the deceased's estate, that he is unemployed and unable to pay costs and that the deceased's estate has assets that cannot be easily liquidated. On the other hand, the 1st, 3rd and 6th respondents have maintained that they have incurred costs and that the same should be paid even as the applicants continue filing fresh applications. They stated that in the event the appeal succeeds, they will have no difficulty in refunding the paid costs. This assertion was not rebutted or challenged by the applicants in their affidavit.
19. Having considered the arguments on both sides, it is my view that the applicants' reason that they have no capacity to pay costs when they had capacity to file suit is in bad faith, unjustified, contradictory, and illogical, which I reject. An administrator filing suit is aware and or ought to be aware that the determination of the suit may go either way and since costs follow the event as expressed in section 27 of the *Civil Procedure Act*, the possibility is that such administrator may or be may not pay costs. Therefore, the applicants cannot hide behind the narration that they have no capacity to pay costs. The argument that they are unable to pay costs cannot be a plausible reason to grant them the orders sought. Besides, the decision appealed against is the order striking out their application dated 28th November 2023, which is a negative order and therefore there is essentially nothing to be stayed.
20. In the premises, I find no merit in the application dated 4th July 2024 which I hereby dismiss with costs to the respondents.
21. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/ VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 28TH DAY OF MAY, 2025

**NYUKURI
JUDGE**

In the presence of

Mr. Ondari for the applicants

Mr. Okuta the respondent

Court Assistant: M. Nguyai

