



Mohamed v Muhiddin & another (Environment and Land Case 470 of 2011) [2025] KEELC 5092 (KLR) (9 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5092 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 470 OF 2011**

**SM KIBUNJA, J
JULY 9, 2025**

BETWEEN

AHMED MOHAMED PLAINTIFF

AND

AHMED MUHIDDIN 1ST DEFENDANT

KUSCO (2006) LIMITED 2ND DEFENDANT

RULING

(Notice of Motion Dated 29th January 2025)

1. The plaintiff filed the application dated 29th January 2025, seeking for inter alia setting aside of the order of stay of execution issued on 20th July 2018, and costs. The application is based on the ten (10) grounds on its face marked (1) to (10) respectively and supported by the affidavit of Ahmed Mohamed, the plaintiff, sworn on the 29th January 2025. It is the plaintiff's case that after the court entered judgement in his favour on 31st October 2017, the 2nd defendant applied and obtained stay of execution order pending determination of the intended appeal on 20th July 2018. That by that date the decree had been registered against the title. That the 2nd defendant left the property in a poor state when he ceased operations in 2018. That recently, the property's boundary wall collapsed killing four people and injuring many others, and there is a likelihood of illegal occupation. That though the appeal is still pending, the stay order is no longer tenable.
2. The application is opposed by the 2nd defendant through the nine (9) grounds of opposition dated the 15th April 2025, inter alia that the application is fatally defective, incompetent and bad in law; that the application is res judicata the Court of Appeal ruling dated 7th March 2025 in Civil Appeal No. E141 of 2022, and this court's ruling of 19th February 2025; that this court is functus officio and the stay of execution order can only be reviewed by the Court of Appeal; that while well aware of this suit and the appeal pending before the Court of Appeal, the plaintiff and 1st defendant instituted a probate and



administration cause before the Kadhi's Court in Misc. Succession No. E011 of 2024 with ulterior motives; that vacating the stay orders would render the appeal nugatory and the application should be dismissed with costs.

3. The court issued directions on the 6th March 2025 for service, filing and exchange of replies and submissions within the timelines given. The learned counsel for the plaintiff and 2nd defendant filed their submissions dated the 7th April 2025 and 10th June 2025 respectively, which the court has considered. During the subsequent mention of 11th June 2025, the 1st defendant who had not filed any reply, was given seven (7) days to file and serve submissions, but at the time of preparing this ruling, today the 27th June 2025, none was seen on the record, including the CTS.
4. The issues for the determinations by the court are as follows:
 - a. Whether the court is functus officio.
 - b. Whether the application is res judicata.
 - c. Whether the plaintiff has merit the threshold for the stay of execution order to be vacated/set aside.
 - d. Who pays the costs of the application?
5. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by the learned counsel, the record and come to the following conclusions:
 - a. The learned counsel for plaintiff referred to the case of RWW versus EKW [2019] eKLR, where it was held that:

“...stay of execution order pending appeal is meant to preserve the subject matter so that the appellant, who is exercising his undoubted right of appeal, if successful is not rendered nugatory”

And submitted that the stay order issued herein is no longer serving the lawful purpose. He further submitted that the 2nd defendant has not taken any other step to prosecute his appeal apart from filing the notice of appeal, and the application should therefore be allowed.
 - b. The learned counsel for the 2nd defendant submitted that after filing Civil Appeal No. E141 of 2022, Kenya United Steel Company (2006) Limited versus Ahmed Mohammed Ahmed & Ahmed Mohiddin, the 1st defendant sought to have it struck out but his application was dismissed through the ruling of 7th March 2025. The 1st defendant had also filed an injunctive application dated 22nd November 2024 in this matter, to which the 2nd defendant filed a preliminary objection dated the 19th December 2024, that was upheld vide the ruling of 19th February 2025. That the stay of execution order were lawfully and properly granted to preserve the subject matter pending appeal, and as Civil Appeal No. E141 of 2022 is still pending, it should continue remaining in force, to ensure the appellate process remains meaningful and not academic. The learned counsel cited the cases of Muchai & Another versus Mungania [2023] KEELC 715 (KLR), in which the court cited with approval the rationale in RWW versus EKW (2019) eKLR, [that is set out in (a) above], and Daniel Kaminja & 3 Others (Suing



as Westland Environmental Caretaker Group) versus County Government of Nairobi [2019] eKLR, where it was held that:

“..... No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose....”

The counsel also referred to the cases of Independent Electoral & Boundaries Commission versus Maina Kiai & 5 Others [2017] KECA 477 (KLR), on res judicata. The counsel submitted that the reasons for not prosecuting the appeal were dealt with, and settled by the Court of Appeal in Civil Appeal E141 of 2022 through the ruling of 7th March 2025, and this court’s ruling of 19th February 2025, and asked the court to find the application is res judicata. I have perused the court record and have not seen any other application seeking for similar orders to the current one that has been heard and determined on merit by this court or the appellate court. I therefore find the application is not res judicata.

- c. I have also perused the court record and confirmed that this court presided over by Omollo J, delivered a merit judgement on the 31st October 2017 in favour of the plaintiff in terms of prayers (a) to (d) of the plaint. It is indeed not disputed that the 2nd defendant then filed an appeal, whose reference has been given as Civil Appeal No. E141 of 2022, Kenya United Steel Company (2006) Limited versus Ahmed Mohammed Ahmed & Ahmed Mohiddin, and the application dated 29th November 2017 for stay of execution pending appeal. The application was heard and granted vide the ruling of 20th July 2018, in terms of prayer (3) that had sought for;

“ Pending the hearing and determination of the defendant’s intended appeal against the judgement delivered herein on 31st of October 2017, there be a stay of further proceedings and or execution of the decree resultant from the said judgement.”

That as admittedly the appeal is still pending before the Court of Appeal, then the court finds the plaintiff has failed to establish reasonable basis of vacating or setting aside the stay order.

- d. This court dealt with a preliminary objection on grounds of inter alia functus officio raised by the 2nd defendant dated 19th December 2024 to the 1st defendant’s application dated 22nd November 2024 seeking for injunctive orders, and in its ruling delivered on the 19th February 2025, among others held that:

“(d)the doctrine of functus officio comes into effect as the court has already pronounced itself on the matter before it with finality.....”

(e) but having made a finding that the court is functus officio, then the forum where the parties may seek intervention remains the appellate court.”

The current application was initially filed before the Mombasa High Court on the 19th February 2025, and the record shows it was presented before a judge of that court, Lady Justice Macharia Florence Wangari on the same date, and the following order made on the CTS;

“ Matter filed in the wrong court.”



Though there is no order transferring the application to this court, the record confirms it was placed before me on the 25th February 2025, and fixed for mention on 6th March 2025, when further directions were issued in the presence of counsel for all parties.

- e. On functus officio, the counsel for the 2nd defendant referred to the Supreme of Court of Kenya case of Raila Odinga & 2 Others versus Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, where the court discussed functus officio and cited with approval an excerpt from an article by Daniel Malan Pretorius entitled , “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 as follows:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.” According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.....”

And, submitted that as this court has already delivered its judgement, and granted the stay of execution order pending the appeal, it is therefore functus officio. In view of my findings through the ruling of 19th February 2025, that I referred to earlier, I am in agreement with the 2nd defendant’s submissions that this court is indeed functus officio in this suit.

- f. The learned counsel for the 2nd defendant further submitted that the prayer sought by the plaintiff is not made in good faith, as if granted, the plaintiff and 1st defendant would openly engage in actions aimed at disposing the suit property thereby rendering the appeal nugatory. The counsel relied on the case of Thomas Kimaru Muge versus Kapsabet Division Land Disputes Tribunal & Interested Party, Mathew Kipkemboi Chirchir {2012} eKLR, where the court dismissed the application to vacate stay orders stating that doing so would render the pending appeal nugatory. The counsel submitted that the application should therefore be dismissed with costs. The court having clearly held through its ruling of 19th February 2025, that has not been successfully reviewed or appealed against, that it was functus officio, I have no difficulty in agreeing with the 2nd defendant that this application was not made in good faith and is an abuse of the court process, as that finding has not changed.
- g. That as the plaintiff has failed in its application, then in terms of section 27 of Civil Procedure Act chapter 21 of Laws of Kenya, that provides that costs follow the event unless where ordered otherwise for good reasons, the costs are awarded to the 2nd defendant as the successful party in defending the notice of motion.

6. In view of the foregoing conclusions, the court finds and orders as follows on the notice of motion dated 29th January 2025:

- a. That the said application is without merit.
- b. The application is dismissed.
- c. Costs awarded to the 2nd defendant.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 9TH DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.



In the Presence of:

Plaintiff : M/s Mohamed for Khatib

Defendants : Mr Tindi for 1st Defendant

Mr. Simiyu for 2nd Defendant

Shitemi-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

