



Muthoki Brothers Company Limited v Wasanga (Environment and Land Appeal E108 of 2022) [2024] KEELC 6578 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6578 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E108 OF 2022
OA ANGOTE, J
OCTOBER 3, 2024**

BETWEEN
MUTHOKI BROTHERS COMPANY LIMITED APPELLANT
AND
PAUL MASIUKI WASANGA RESPONDENT

RULING

1. The Appellant has filed a Notice of Motion application dated 27th December 2023 under Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules 2010, and Sections 79G and 95 of the [Civil Procedure Act](#). The Appellant has sought for the following orders:
 - a. That this Honourable Court be pleased to grant a stay of execution of the judgment entered and delivered herein against the appellant on 11th October 2022 in ELC Case No. 993 of 2020 and any subsequent decrees and orders emanating therefrom pending the hearing and determination of this appeal.
 - b. That this Honourable Court be pleased to set aside the order dated 7th November 2023 issued by the Hon. Principal Magistrate in ELC Case No. 993 of 2020 pending the hearing and determination of this appeal.
 - c. That the Respondent by himself or acting through his servants and/or agents be restrained from occupying, selling, offering for sale, farming, constructing or in any way dealing with the suit property being LR No. 7583/193 (Nairobi/Block 47/1127) pending the hearing and determination of this appeal.
2. The application is supported by the affidavit sworn by Fidel Jimi Mumina, a Director at Muthoki Brothers Company Limited. Mr. Mumina deponed that Judgment in Chief Magistrates' suit ELC case No. 993 of 2020 was delivered on 11th October 2022 in favour of the Respondents herein and that the



Appellant filed a Notice of Appeal against the entire judgement together with an application for stay of execution of the judgement pending hearing and determination of this appeal.

3. It was deposed by the Appellant's Director that on 7th November 2022, the lower court declined to issue the orders of stay of execution as prayed by the Appellant and that on 19th December 2023, the Respondent, in the company of Messrs Trophy Auctioneers and the OCS Karen Police Station showed up at the suit premises to effect a purported court order from the Chief Magistrates Court for purposes of evicting the Appellant from the suit property and putting the Respondent into possession of the suit premises.
4. According to the Appellant's Director, the Respondent broke the main gate to the property and trespassed into the adjoining property destroying crops and trees planted therein and that the Appellant subsequently managed to fence off and install a gate on the suit property.
5. Mr. Fidel Mumina deponed that neither the Appellant nor its advocates on record have been served with any application at the Magistrates Court that gave rise to the purported court order, nor have they been served with a copy of the purported court order.
6. He averred that this appeal raises valid triable issues with a high chance of success. Further, that the Applicant stands to suffer irreparable damage should the Respondent continue to deal with the suit property and damages would not be a sufficient remedy should the Appellant succeed.
7. The Respondent, through a Replying Affidavit dated 30th January 2024, opposed the application and termed it fallacious and misguided. He deponed that he filed ELC Case No. 993 of 2020 against the Appellant, through a Plaint dated 18th February 2020, seeking orders to compel the Appellant to act in accordance with the sale agreement dated 10th November 2009.
8. He averred that on 5th May 2020, the Appellant's advocates issued his advocates an offer letter with terms that the Appellant would reimburse him KShs. 9,750,000; that on 16th July 2020, a consent was recorded before Hon. Kivuti which required the Appellant to subdivide the suit property within 60 days of signing the consent and that consequently, the Appellant's advocate issued a professional undertaking dated 7th December 2020 to his then advocates, Messr Kamau, Lando & Associated Advocates LLP.
9. It is the Respondent's case that the Appellant undertook to process the said subdivision of land and return the resultant title to him through his advocates; that Judgment was entered on 11th October 2022 in his favor in ELC 993 of 2020 and a decree was issued on 23rd May 2023 and that he has been unable to enjoy the fruits of the judgement given.
10. He noted that the Appellant had filed an application dated 4th November 2022 before this court similarly seeking orders that this court be pleased to stay execution of the Judgment in ELC Case No. 993 of 2020 pending hearing and determination of this appeal and that in its ruling dated 11th May 2023, this court declined to grant the orders of stay.
11. He deponed that as there were no orders staying, varying or setting aside the Judgment from the trial court, Hon. S.A. Opande issued orders dated 23rd November 2023 directing the Officer Commanding Station Karen Police Station to assist and maintain law and order as Trophy Auctioneers put him in possession of the suit property in enforcement of the decree.
12. It was deposed that the Appellant thereafter proceeded to break the barbed wire fence and illegally accessed the suit premises; that he reported the incident to Karen Police Station where he was given



Occurrence Book No. 17 of 18/01/2024 and that the application is a scheme to waste this court's time and to delay the execution of the decree issued on 23rd May 2023.

13. The parties' counsel filed submissions and authorities which I have considered.

Analysis and Determination

14. This court has considered the pleadings and submissions by the parties. The following issues arise for the determination by this court:

- a. Whether this application is res judicata.
- b. Whether this court should grant stay of execution of the judgement and,
- c. Whether this court should set aside the order dated 7th November 2023 pending determination of the appeal.

15. This is an appeal from the determination of Hon. G.M. Gitonga Principal Magistrate in Milimani Commercial ELC No. 993 of 2020, delivered on 11th October 2022. In the judgment, the trial court issued the following orders against the Appellant herein:

- a. That an order of specific performance be and is hereby issued compelling the Defendant to act in accordance with the Sale Agreement dated 10th March 2009 and Amended Sale Agreement dated 2009 as follows:
 - i. That the Defendant do subdivide the parcel of land known as LR No. 7593/66 Karen and acquire a title for a portion measuring one acre known as LR No. 7583/193.
 - ii. That the Defendant do deliver the completion documents to the Plaintiff.
 - iii. That the Defendant do execute all the relevant forms and instruments as well as provide information and documents and/or undertake all tasks necessary to effect registration of the transfer in favour of the Plaintiff.
 - iv. That the Defendant do give up vacant possession of LR No. 7583/193 Karen to the Plaintiff.
- b. That costs of this suit are awarded to the Plaintiff.

16. The Appellant has through this application sought to stay the execution of the judgement of the lower court and any resultant orders. He has further sought that this court set aside the orders dated 7th November 2023, which orders were issued pursuant to an application by Gladys Mutisya T/A Trophy Auctioneers dated 21st August 2023, seeking to put the Respondent/ Decree-holder herein in possession of the suit property.

17. Through the orders dated 21st August 2023, Hon. S.A. Opande issued orders to Officer Commanding Station Karen Police Station to assist, supervise and maintain law and order as the auctioneers put the decree holder in possession in enforcement of the decree dated 11th October 2022. While the Appellant had previously sought to stay execution of judgement in an application before this court, through a ruling dated 11th May 2023, this court declined to issue the said orders.

18. It is not disputed that on 19th December 2023, the Respondent accompanied by Trophy Auctioneers and the police, sought to effect the Judgment and decree of the trial court by evicting the Appellant from the suit property and putting the Respondent into possession of the suit property. The Appellant admits that it resisted the eviction by breaking the main gate to the suit property and trespassing



into the adjoining property destroying crops and trees planted therein. It asserts that it subsequently managed to fence off and install a gate on the suit property.

19. The Respondent has opposed this application and has asserted that the prayer to stay the Judgment of the trial court is res judicata as the Appellant had filed an application dated 4th November 2022 before this court similarly seeking orders that this court be pleased to stay execution of the Judgment and that this court declined to grant the orders of stay, through its ruling dated 11th May 2023.
20. The Appellant, on its part, has asserted that the circumstances at the time when the court dismissed the application to stay execution were substantially and fundamentally different from the current application, where a substantive appeal is on record, with a reasonable likelihood of success.
21. As jurisdiction goes to the root of a matter, this court shall first consider whether the prayer for stay of execution is res judicata, and therefore whether this court has jurisdiction to consider the application.
22. The legal framework of res judicata is set out in Section 7 of the [Civil Procedure Act](#) as follows:

“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.”

23. The Supreme Court case of John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR delimited the operation of the doctrine of res judicata as follows:

“We reaffirm our position as in the Muiiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

24. The Supreme court further laid out the elements that have to be established to invoke res judicata in a civil suit as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former Judgment or order which was final;
- b. The Judgment or order was on merit;
- c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and the second action identical parties, subject matter and cause of action. (See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR).”



25. The doctrine of res judicata, which is predicated on the principle of finality of a court’s decision, is also applicable to applications filed before a court. The court in *Kennedy Mokuwa Ongiri vs John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, rightly opined that a court should consider the decision of the court in contention, in determining whether the issue raised in the subsequent application was settled:

“In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- i. what issues were really determined in the previous Application;
- ii. whether they are the same in the subsequent Application and were covered by the Decision.
- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.”

26. In this case, in the ruling dated 11th May 2023, this court considered an application by the Appellant in which it sought for a stay of the trial court’s Judgment and leave to file an appeal out of time. This court found that at the time, there was no appeal that had been filed before the court. There was therefore no basis for the court to exercise its appellate jurisdiction.

27. This court therefore found that it lacked jurisdiction at the time to consider the prayer for stay of execution. To that extent, the issue of stay of execution was not determined on its merits. The application herein is consequently not res judicata. This court therefore has jurisdiction to consider the application.

28. The principles guiding the court in the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“No order for stay of execution shall be made under subrule (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.”

29. The power to grant or refuse an application for a stay of execution is a discretionary power. As was held in the case of *Butt vs Rent Restriction Tribunal* (1979) eKLR, the court, as a general rule, ought to exercise its discretion in a way so as not to prevent the Appeal, if successful from being rendered nugatory.

30. The court, in *RWW vs EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.



However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

31. As to what substantial loss is, it was observed in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

32. Similarly, in *Antoine Ndiaye vs African Virtue University* [2015] eKLR, the Court held that:-

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserved. This is in recognition that both parties have rights. The Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

33. It is therefore upon the Appellant to establish that this application was made without unreasonable delay and that it stands to suffer substantial loss should the court not stay the Judgment of the trial court.

34. The Judgment of the trial court was entered on 11th October 2022 while the Memorandum of Appeal, which was filed following leave of this court granted on 11th May 2023, was filed on 9th June 2023. This application was filed on 27th December 2023. The computation of delay from the date when Judgment was entered to the filing of this application amounts to one year and two months.

35. The Appellant has not offered any explanation or reason for this delay. Should this court compute the delay from when the substantive appeal was filed, there is a delay of six months between 9th June 2023 and 27th December 2023. This delay is unexplained, inordinate and unreasonable

36. As to substantial loss, the Appellant depones that it stands to suffer irreparable damage should the Respondent continue to deal with the suit property and damages would not be a sufficient remedy should the Appellant succeed.

37. As posited by the court in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, the fact that the process of execution is impending does not constitute irreparable damage. It is also trite that substantial loss must be specifically proven to the court. In *Antoine Ndiaye vs African Virtual*



University [2015] eKLR, the court cited the holding in the case of *Sewankambo Dickson vs. Ziwa Abby* HCT-00-CC MA 0178 of 2005 where it was held that;

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts.”

38. Similarly, in *Machira t/a Machira & Co. Advocates vs East African Standard (No 2)* (2002) KLR 63, the court held as follows;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

39. Further, in *Kenya Shell Limited vs Kibiru* [1986] KLR 410, as quoted in *Kiplagat Kotut v Rose Jebor Kipngok* [2015] eKLR, the court held that if there is no evidence of substantial loss, it would then be a rare case that the appeal would be rendered nugatory:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

40. In this case, the Appellant has not ventured beyond asserting that it will suffer substantial loss. It has failed and neglected to particularize in monetary terms the loss it stands to suffer. It has not claimed to have invested any sums into the suit property, nor has it particularized the nature of loss that it stands to suffer should the order of stay sought be declined.

41. This inference is buttressed by the annexed photographs of the suit property, which show the same to be undeveloped land with no permanent structures or productive activity being undertaken upon it.

42. It is trite law that a litigant must enjoy the fruits of his/her judgment. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“...to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”



43. This court has found that there was inordinate and unreasonable delay in filing this application for stay of execution of the Judgment entered on 11th October 2022. It has also found that the Appellant has failed to show that it stands to suffer substantial loss or inconvenience should the orders or stay of execution not be granted.
44. This court therefore finds that the Appellant has not satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules. The prayer to stay execution of the Judgment dated 11th October 2022 is hereby declined.
45. The Appellant has challenged the order issued by Hon. SA Opande dated 7th November 2023, in which the Honourable Magistrate directed the police to maintain law and order as the Respondent/deeree holder effected the Judgment of the court in evicting the Appellant from the suit property.
46. The Appellant asserts that neither itself nor its advocates on record were served with the application that gave rise to the purported court order, nor have they been served with a copy of the purported court order. The Appellant submits that the execution of the Judgment was done in secret as he was not given an opportunity to be heard.
47. The application which predicated the issuance of orders by Hon. SA Opande was for police assistance in executing the Judgment of this court. Such an application is provided for under Rule 9 of the [Auctioneers Act](#), which allows such an application to be heard ex parte:

“Police assistance

- (1) Where an auctioneer has reasonable cause to believe that—
- (a) he may have to break the door of any premises where goods may be seized or repossessed; or
 - (b) he may be subject to resistance or intimidation by the debtor or other person; or
 - (c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.
- (2) An application under this rule shall be by motion by way of a miscellaneous application supported by an affidavit and may be heard ex parte”

48. The failure to serve the Appellant the application for orders of the court for police assistance did not in any way prejudice the Appellant, since this application was in the course of execution of the Judgment of the trial court, of which the Appellant had full knowledge of. The orders dated 7th November 2023 were therefore lawfully issued.
49. In conclusion, the court finds that the application dated 27th December 2023 lacks merit and the same is dismissed. Costs shall be borne by the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE



In the presence of
Mr. Kimutai holding brief for Kago for Respondent
No appearance for Applicant
Court Assistant - Tracy

