



**Republic v County Government of Homa Bay & another; Liech (Exparte) (Environment and Land
Judicial Review Case E003 of 2023) [2024] KEELC 7338 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7338 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2023**

GMA ONGONDO, J

NOVEMBER 6, 2024

**IN THE MATTER OF AN APPLICATION FOR
LEAVE TO APPLY FOR AN ORDER OF MANDAMUS**

AND

IN THE MATTER OF SECTION 21(5) OF THE GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF ORDER 29 RULE 3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ORDER 53 RULE 1(2) OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF EXECUTION OF A DECREE
AGAINST THE COUNTY GOVERNMENT**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT

**THE CHIEF FINANCE OFFICER COUNTY GOVERNMENT OF HOMA
BAY 2ND RESPONDENT**

AND

OKELLO JOHN ROBERT LIECH EXPARTE



RULING

1. This ruling is in respect of an application by way of Notice of Motion dated 20th November 2023 brought under, inter alia, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 22 Rules 51 and 52, Order 42 Rule 6, Order 43 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Article 50 of the Constitution of Kenya by the respondents, through Wilberforce Akello and Company Advocates seeking the following orders;
 - a. Spent
 - b. That the firm of Wilberforce Akello and Company Advocates be deemed as properly on record on behalf of the respondents.
 - c. That this Honourable court be pleased to grant an order of stay of proceedings of the instant matter herein pending the hearing and determination of the Court of Appeal; Kisumu Civil Appeal No. E046 of 2023- Homabay County Government vs. Dr. Robert Okello Liech.
 - d. That the costs of and incidental to this application be provided for.
2. The application is founded upon seven grounds which include:
 - a. That the Environment and Land Court entered judgment on 7th December 2022 and dismissed the appeal flowing from the Chief Magistrate judgment dated 15th July 2021 (the first appeal herein).
 - b. That dissatisfied with the Environment and Land Court decision, the respondents herein proceeded to the Court of Appeal at Kisumu and filed Civil Appeal No. E046 of 2023 Homabay County Government vs Dr. Robert Okello Liech (hereinafter referred to as the second appeal), which matter is still pending before the Court of Appeal.
 - c. That the matter herein is directly related to the substratum of the second appeal and concerns the impugned Environment and Land Court judgment dated 7th December 2022 (the first appeal).
 - d. That stay of proceedings is necessary to prevent conflicting decisions noting that the substratum suit is within the purview of the Court of Appeal.
3. The application is anchored on the applicants' supporting affidavit of thirteen paragraphs sworn on even date, by George Ila, alongside the annexed document marked as GI-1 being a copy of the Memorandum and Record of Appeal in respect to the appeal.
4. In summary, the applicants lament that the Judicial Review application before court concerns the first appeal judgment and is thus, directly related to the substratum of the second appeal. That the ex parte applicant did not disclose the existence of the second appeal, at the time of filing the Judicial Review Application. That therefore, it is imperative upon this court to stay the Judicial Review proceedings pending the outcome of the second appeal, to avoid rendering conflicting decisions.
5. The ex parte applicant through G. S. Okoth and Company Advocates, opposed the application by way of Grounds of Opposition dated 1st February 2024 and duly filed herein on 9th April 2024. Counsel deponed in part that the second appeal does not operate as a stay of execution or proceedings under a decree or order appealed from. That in any case, this court is functus officio and cannot grant the



orders sought herein, since the second appeal is filed at Kisumu Court of Appeal. Thus, counsel urged the court to dismiss the application with costs.

6. Hearing of the application proceeded by way of written submissions pursuant to the court's directions of 26th February 2024.
7. The applicants' counsel filed submissions dated 1st October 2024 and identified two issues for determination thus: whether the 1st and 2nd respondents/applicants should be granted the stay of proceedings and who is entitled to costs? In a nutshell, Learned counsel submitted inter alia; that the second appeal raises triable issues. That allowing the Judicial Review application to proceed alongside the second appeal may result into conflicting decisions and duplication of judicial efforts. That the ex parte applicant will not suffer any prejudice if the orders sought herein are granted.
8. Further, counsel submitted that disallowing the application would occasion substantial loss to the applicants. That the same would lead to the waste of public funds if the ex parte applicant is allowed to execute the decree at this stage. That the instant application was made within a reasonable time frame. That the applicants are willing to abide by any terms that the court sets, including security for costs. Thus, counsel urged the court to allow the application as prayed. To reinforce the submissions, reliance was placed on various authoritative pronouncements including the case of Butt -vs- Rent Restriction Tribunal (1982) KLR 417, among others.
9. Counsel for the ex parte applicant filed submissions dated 12th August 2024 on 14th August 2024 and stated that the Judicial Review application is not a fresh suit but rather a mode of execution of a decree against the 1st applicant, in line with Section 21(5) of the *Government Proceedings Act*. That this court is functus officio and cannot issue the orders sought herein since the applicants have already lodged the second appeal at the Court of Appeal. That therefore, the proper forum for the applicants to seek orders of stay would be the Court of Appeal, which is presently seized of the matter.
10. On that score, counsel urged the court to dismiss the application with costs to the ex parte applicant. Reliance was placed on the case of Dickson Muricho Muriuki v Timothy Kagundu Muriuki & 6 others [2013] eKLR, to fortify the submissions.
11. In the foregone, the following issues fall for determination;
 - i. Whether the instant application is merited.
 - ii. What orders can the court issue herein, to meet the ends of justice?
12. The applicants have prayed that this Honourable court be pleased to grant an order of stay of proceedings of the Judicial Review application, pending the hearing and determination of the second appeal. Notably, the said Judicial Review application is not a fresh suit but rather a mode of execution of a decree against the 1st applicant, in line with Section 21(5) of the *Government Proceedings Act*. Essentially, the applicants are seeking a stay of execution of this court's judgment rendered on 7th December 2022 in respect to the first appeal and ultimately the decision in Homabay Chief Magistrate's Court Environment and Land Case No. 18 of 2018.
13. It is noteworthy that the conditions under which an order for stay of execution can be granted are clearly spelt out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which provides thus:
 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.
14. It is trite law that an appeal or a second appeal does not operate as a stay of execution or proceedings under a decree or order appealed from. Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 stipulates that:
 - (1) 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. (Emphasis laid)
15. The applicants have lodged a second appeal at the Court of Appeal in Kisumu, which appeal is still pending hearing and determination. However, that second appeal does not operate as an automatic stay of execution of this court's judgment rendered on 7th December 2022 in respect to the first appeal and ultimately the decision in Homabay Chief Magistrate's Court Environment and Land Case No. 18 of 2018.
16. So, is this court the proper forum to issue stay orders in the circumstances?
17. I am persuaded by the submissions of counsel for the ex parte applicant that this court is functus officio, having partially allowed the applicants' first appeal vide its judgment rendered on 7th December 2022. In *Telkom Kenya Limited -vs- John Ochanda* (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR, the Court of Appeal stated the following with respect to the doctrine of functus officio:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”
18. In the circumstances, this court lacks jurisdiction to grant any further orders herein. Therefore, it is my considered view that the proper forum to seek stay orders is the Court of Appeal in Kisumu.
19. In the case of *Republic -vs- Karisa Chengo and 2 others* (2017) eKLR, the Supreme Court of the Republic of Kenya was emphatic that:

“...Lack of jurisdiction thus renders a court's decision void as opposed to it being merely voidable...”



20. To that end, it is my considered view that the instant application originated by way of a Notice of Motion dated 20th November 2023 is without merit. The same is hereby struck out with no order as to costs.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 6TH DAY OF NOVEMBER 2024.

G.M.A ONGONDO

JUDGE

Present

1. Mr. W. Akello, Learned Counsel for the 1st and 2nd respondents/ applicants
2. Ms. P. Odhiambo holding brief for Mr. G. S. Okoth, Learned Counsel for the ex parte applicant
3. Luanga, Court Assistant

