



Gatemo ((Suing as the Legal Representative of the Estate of Joseph Muguna - Deceased)) v M'Rwito & 10 others (Environment & Land Case 70 of 2012) [2023] KEELC 423 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 423 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 70 OF 2012
CK NZILI, J
FEBRUARY 1, 2023**

BETWEEN

**GEORGE GATEMBO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH MUGUNA - DECEASED) PLAINTIFF
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH MUGUNA - DECEASED)**

AND

**ELIJAH MUTEKI M'RWITO 1ST DEFENDANT
M'MUGAMBI M'MARETE 2ND DEFENDANT
HENRY KIAMBI 3RD DEFENDANT
JAPHET GAKURU M'ABURIA 4TH DEFENDANT**

AND

SHEDRACK KIRUKI M'LAARIA RESPONDENT

AND

**M'KIRERA M'ANGARE 1ST DEFENDANT
RUFU M'ARIGO 2ND DEFENDANT
FRANCIS M'IKIUGU M'MUTHURI 3RD DEFENDANT
JOSPHAT MURIUKI KIURA 4TH DEFENDANT
FREDRICK KIOGORA GITONGA 5TH DEFENDANT
GEOFFREY KOOME MBAYA 6TH DEFENDANT**



RULING

1. This ruling relates to three applications dated July 28, 2022, September 20, 2022 and September 21, 2022 herein the 1st, 2nd and 3rd applications.
2. In the 1st application, the court is asked to lift the caution, inhibition and any other restrictions placed over the Parcels No's Ntima/Igoki/2601, 2602, 5471, 5472 and 2209 to enable execution of the decree of this court since the matter was concluded and the stay of execution issued by the court for 10 months has since lapsed. The application is supported by an affidavit in support of George Gatembo.
3. The 4th defendant has opposed the application by a replying affidavit sworn on September 21, 2022 on the basis that an order for the maintenance of *status quo* was granted and limited to 10 months only on condition that a deposit of Kshs 500,000/= be made in court as per a receipt marked J "6".
4. The application is opposed by the 5th defendant/respondent through grounds of opposition dated September 20, 2022 and a replying affidavit sworn on September 20, 2022 the basis that there is a pending appeal and an application for stay of execution at the appellate court; the applicant is out to sell, destroy or charge, or evict the 5th respondent while the appeal is pending and that the court has overriding obligations to preserve the property pending the appeal and do justice to the parties.
5. That the application is made based on the lack of humility. The 5th respondent relied on *African Safaricom club Ltd vs Safe Rentals Ltd* (2010) eKLR *BOG Moi High School Kabarak & another vs Malcolm Bell* (2013) eKLR *UHDL vs CBK & 2 others* (1995) eKLR, *Assanad vs Pettite* (1989) KLR 243, *Madhupapers International Ltd vs Kerr* (1985) KLR 840, Mombasa Court Civil Suit No 274 of 2009 *Emma Muthoni Wambaa & another vs Joseph Kibaara Kariuki, Charles Oloo vs KPTC* (1995) eKLR & *Hassan Nyanje Charo vs Khatib Mwasbetani & 3 others* (2014) eKLR.
6. That the 5th respondent followed up for the typed proceedings but due to factors beyond his control he was unable to prosecute the appeal. That the applicant wants to dispose of the land yet they have a right of appeal. That the applicant has nothing on the land which is a prime plot unlike the 5th respondent who has 10 commercial business houses and about 15 residential rental houses after the others were burned down in March 2020 is occupied by his son who has a young family, and some tenants.
7. In the 2nd application dated September 20, 2022 the 5th defendant/respondent seeks for the review of the orders made on May 26, 2021 staying the decree for 10 months and to replace it with an order granting the 5th defendant stay pending hearing and determination of the appeal or in the alternative, a stay of execution until his application and cross appeal in Nyeri Civil Appeal No E108 of 2021 is heard and determined. The reasons as contained on the face of the application and the affidavit in support of Shadrack Kiruki M'Laaria sworn on September 20, 2022 are that the stay orders are spent; that after the appeal was filed on September 29, 2021 by his co -respondents, he on July 8, 2022 sought to be joined in the appeal and for leave to file a cross appeal; that the has an undoubted right to access justice.
8. The application was opposed by the plaintiff through a replying affidavit sworn on November 16, 2022. The grounds are that the initial stay orders expired on April 26, 2022 with no request for an extension; an application has been filed herein to lift the inhibition orders which has triggered this move and the application is an afterthought meant to forestall his application.
9. In the 3rd application dated September 21, 2022, the 4th defendant prays for an extension of the orders for the maintenance and the preservation of the *status quo* or the stay of execution orders granted on May 26, 2021 until the appeal in Nyeri is heard and determined. The application is supported



- by an affidavit of Japhet Gakuru M'Aburia sworn on September 21, 2022, on his own behalf and that of his co-defendants as per the attached authority marked JG "1". The reasons given are that a conditional stay was granted and a deposit of Kshs 500,000/= promptly paid; that he pursued the typing of proceedings and filed the appeal which is yet to be heard and determined for reasons beyond his control despite doing all what was humanly possible. The applicant attached copies of the authority to swear the affidavit, consent to come on record, the stay order, bundle of typed proceedings, notice at the Court of Appeal and photographs of his developments as annexures marked JG 1 – 8 respectively. The application is also supported by the 5th defendant through a replying affidavit sworn on November 21, 2022 which essentially repeats his earlier replying affidavit dated September 20, 2020.
10. With leave of court parties opted to canvass the application through written submissions dated October 26, 2022 by the 2nd, 4th, 6th, 9th, 10th & 11th defendants respectively and two dated 14.11.2022 by the 5th respondents hereinafter the 1st, 2nd and 3rd submissions.
 11. In the 1st submission by C.P Mbaabu & Co. Advocates, it was submitted that under Order 42 Rule 6(1) and 5 (6) of the Civil Procedure Rules as read together with Sections 1A, 1B, 3A & 63 (a) of the Civil Procedure Act, Section 13 (2) e, 18 and 19 Environment and Land Court Act and Article 50(2) (9) of the Constitution, the court has wide powers to grant and extend stay orders in the interest of substantive justice. Reliance was placed on G vs SM (2020) eKLR, Gianfranco Manenthi & another vs Amaco (2019) eKLR, Focia Water Cycle Co. Ltd vs Ann Wambui Wangui & another (2018) eKLR.
 12. Further, it was submitted that no injustice will be occasioned to the plaintiff if the orders sought were issued, since he has not demonstrated any such prejudice and given that he has never utilized or developed the subject plots. Reliance was placed on Richard Muthusi vs Patrick Gituma Ngomo & another (2017) eKLR.
 13. The 5th defendant regarding the application dated 28.7.2022 submitted that the same was an abuse of court process aimed at defeating the appeal and his application for stay in the Court of Appeal since he has undoubted right to access justice under Article 48 of the Constitution. Based on UHDL vs CBK (*supra*) it was submitted that the applicant had failed to disclose material facts hence deserves no discretion and that as held in Hassan Nyanje Charo (*supra*), the 5th defendant should not be victimized for the slow wheels of justice at the Court of Appeal in Nyeri.
 14. The 5th defendant submitted that the court guided by African Safari Club (*supra*) should act fairly and justly in the interest of substantive justice and weigh the competing rights of the two parties. Relying on Malcom Bell (*supra*) the 5th defendant urged the court to exercise its inherent powers to do justice and keep the status quo as held in Assanad vs Pettit (*supra*).
 15. As to the application dated September 20, 2020, the 5th defendant submitted that the same was filed after his application at the Court of Appeal was served so as to deny him access to justice. Reliance was placed on Assanad (*supra*) African Safari club (*supra*) Madhupaper (*supra*) Emma Muthoni Wambaa (*supra*), Equity Bank Ltd vs WestLink Mbo Ltd civil application No 78 of 2011 and Malcom Bell (*supra*).
 16. The court has gone through all the three applications and the written submissions. There is no dispute that this court determined the application for stay of execution and gave conditional orders which expired and none of the parties sought for their extension before expiry or so soon thereafter. Similarly, none of the defendants/applicants have given any justifiable reason(s) why though aware that the stay orders were about to expire waited until the expiry and subsequently took more than 3 months to make an application for review, for the extension and or issuance of fresh stay orders.



17. The 5th defendant has admittedly stated that there is already a pending application for stay of execution at the Court of Appeal. While aware of the said application, the 5th defendant has returned to this court to seek for review. Order 45 of Civil Procedure Rules and Section 80 of the *Civil Procedure Act* requires that such an application be filed where there is no pending appeal against the order or decree and the same be filed without inordinate delay. There must also be errors apparent on the face of the record, or new and important evidence which was not in the custody of the applicant by due exercise of diligence and with disclosed sufficient reasons.
18. Already the 5th applicant has admitted the existence of a similar application at the Court of Appeal. A party cannot undertake two parallel processes in both courts. Once the application was mounted at the Court of Appeal, the applicants lost the option of a review. This court has already pronounced itself on stay of execution which orders are already spent. The court cannot revisit such an application on the same issues. The court cannot sit on appeal over its own ruling.
19. The applicants have opted to go to the Court of Appeal to seek for a stay order after the one granted by this court expired. To approach this court for a second time amounts to an abuse of the court process to return to this court while a similar application is pending before the appellate court. As much as the court has inherent powers to preserve the subject matter and abide by the overriding objectives on substantive justice, the court cannot ignore the law and the powers bestowed upon the appellate court. The argument that the applicants should not be penalized or made to suffer due to the slow wheels of justice at the Court of Appeal does not hold water in the circumstances since the applicants knew that time was running out and therefore, they should not have waited for the 10 months to expire and for another three months to rush to court to extend orders already spent. The blame is on the applicants and not the court for the court does not move itself. The applicants should have been more vigilant.
20. As to the lifting of the inhibition orders and the alleged intention to destroy the subject properties, the plaintiff is an undoubted holder of a lawful decree issued by this court. The lifetime of the restriction orders was pegged on the pendency of this suit. In line with Section 68 of the *Land Registration Act*, the event has occurred and therefore it serves no purpose to maintain the restrictions. The applicants have not demonstrated that they have been served with the mandatory three months' notice of eviction from the suit lands by the decree holder.
21. In the premises I find the applications by the defendants/applicants lacking merits. As to the application for lifting of the caution and restrictions, the same is hereby allowed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1ST DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Koech for 4th, 6th, 9th, 10th & 11th defendants

Mrs Mwanzia for respondents/plaintiff

Ndugu Kuria holding brief for Dr Kamau Kuria for 5th applicant

HON C K NZILI

ELC JUDGE

