**Nyaisu & 2 others v Kilusu & 6 others (Environment and Land Appeal E008 of 2022) [2023] KEELC 724 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 724 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KILGORIS**

**ENVIRONMENT AND LAND APPEAL E008 OF 2022**

**EM WASHE, J**

**FEBRUARY 2, 2023**

**BETWEEN**

**FRED NYAKUNDI NYAISU ..... 1ST APPELLANT**

**CHARLES ONDARA ..... 2ND APPELLANT**

**KENNEDY BITERIS ..... 3RD APPELLANT**

**AND**

**MEDEYI OLE KILUSU ..... 1ST RESPONDENT**

**NATAIYANGA ENE KILUSU ..... 2ND RESPONDENT**

**NTINA OLE KILUSU ..... 3RD RESPONDENT**

**MBAIYAN OLE KILUSU ..... 4TH RESPONDENT**

**NTUTUNY OLE KILUSU ..... 5TH RESPONDENT**

**UHURU OLE KILUSU ..... 6TH RESPONDENT**

**ELIZABETH KILUSU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOGH OLOISHURO) ..... 7TH RESPONDENT**

**RULING**

1. The 1st, 2nd and 3rd Appellants (hereinafter referred to as "the Applicants") have approached this Court through the Notice of Motion Application dated November 7, 2022 (hereinafter referred to as "the present Application) seeking for the following Orders; -

    i. That the instant application be certified urgent and service be dispensed with in the first instance.

ii. That the Honourable Court be pleased to order stay of the ruling of Hon Mary Immaculate Gwaro Moranga Spm In Kilgoris Elc No 5 of 2021 dated and delivered on the October 6, 2022 and all its consequential orders pending hearing of this application inter-partes.

iii. That the honourable court be pleased to order stay of the ruling of Hon Mary Immaculate Gwaro Moranga Spm In Kilgoris Elc No 5 of 2021 dated and delivered on the October 6, 2022 and all its consequential orders pending hearing and determination of this Application.

iv. That the Honourable Court be pleased to order stay of the ruling of Hon Mary Immaculate Gwaro Moranga Spm In Kilgoris Elc No 5 of 2021 dated and delivered on the October 6, 2022 and all its consequential orders pending hearing and determination of this Appeal.

v. That the costs of this Application be provided for.

vi. Any other orders that this Honourable Court may deem fit and just.

2. The prayers outlined hereinabove have been supported by the grounds contained in the body of the present Application and the supporting Affidavit sworn on the November 7, 2022 together with the annextures attached thereto.

3. The summary of the grounds in support of the prayers sought in the present Application are as follows; -

a. The Trial Court in the proceedings known as Kilgoris Elc Spm Case No 5 of 2021 issued orders in respect to the establishment of the boundaries involving the properties known as LR No Transmara/mapashi/150 169 and 231 as well as LR No Majoge/Magenche/1232 and 1233 through its ruling dated September 6, 2022.

b. The Applicants being aggrieved by the aforesaid Ruling delivered on the September 6, 2022 have now filed an Appeal through a Memorandum of Appeal dated October 21, 2022.

c. In addition to the Memorandum of Appeal dated October 21, 2022, the Applicants are seeking for a stay of execution of the orders issued through the Ruling pronounced on the September 6, 2022 for the following main reasons; -

i. The Trial Court in the proceedings known as Kilgoris Elc Spm Case No 5 of 2021 lacked the pecuniary jurisdiction to entertain any proceedings between the parties herein.

ii. The Orders issued through the Ruling pronounced on the September 6, 2022 were unlawful and/or illegal because the Sub-County Land Registrar, Transmara West did not have statutory jurisdiction to hear and determine inter-County boundary disputes.

iii. Consequently therefore, it was only proper that the Orders issued in the Ruling dated September 6, 2022 be stayed pending the hearing and determination of the pending Appeal before this Court.

4. The present Application was duly served on the Respondents who opposed it by filing a Replying Affidavit sworn on the November 14, 2022.

5. The substantive grounds opposing the present Application contained in the Replying Affidavit dated November 14, 2022 are as follows; -

i. The Respondents are the registered owners of the properties known as LR No Transmara/mapashi/169 ,150 and 231 respectively.

ii. Due to unlawful and illegal occupation of their properties by the Applicants herein, the Respondents instituted a suit against them which was Kilgoris Elc Spm Case No 5 of 2021.

iii. The Applicants upon service of the pleadings in Kilgoris Elc Spm Case No 5 of 2021 responded by filing a Defence and Counter-Claim dated June 24, 2021 as well as a Preliminary Objection dated February 17, 2021.

iv. The Preliminary Objection dated February 17, 2021 challenged the jurisdiction on three main grounds as outlined below; -

1. The Trial Court lacked pecuniary jurisdiction to hear and determine the dispute before it.

2. The Trial Court lacked jurisdiction because the suit had been filed in contravention of Section 18 (2) of the *Land Registration Act*, No 3 of 2012.

3. The suit did not disclose any cause of action against the Applicants herein.

v. Upon hearing and determination of the Preliminary Objection dated February 17, 2021, the Trial Court delivered its ruling on the June 8, 2021 dismissing the Preliminary Objection altogether and granted leave of 30 days for the Applicants herein to prefer any appeal if they so desired.

vi. Consequently therefore, the Respondent's submission is that the present application is Res Judicata and an abuse of the Court process.

vii. In addition to the above, the Respondent stated that the Applicants have filed a Counter-Claim in the same proceedings known as Kilgoris Elc Spm Case No 5 of 2021 seeking adverse possession based on their occupation on the Applicants properties known as LR No Transmara/mapashi/150,169 and 231.

viii. The action of the Applicants to include a Counter-Claim in their Defence in the proceeding known as Kilgoris ELC SPM No 5 of 2021 is an admission to the jurisdiction of the Trial Court thereof.

ix. Similarly, the Applicants herein through their Application dated September 19, 2022 sought Orders from the Trial Court in the proceedings known as Kilgoris Elc Spm No 5 of 2021 for the inclusion of their properties known as LR No Majoge/magenche/1232 & 1233 to be also surveyed so that their boundaries could be established.

x. Indeed, the Trial Court in the proceedings known as Kilgoris Elc Spm No 5 of 2021 through its Orders of October 14, 2022 allowed the Applicants prayer as pleaded in their Application dated September 19, 2022.

xi. In essence therefore, the Respondents' position is that the Applicants recognised the jurisdiction of the Trial Court in the proceedings known as Kilgoris ELC SPM Case No 5 of 2021 and well as the mandate bestowed on the Sub-County Land Registrar in the establishment of the boundaries demarcating the Applicants and Respondents properties.

xii. The Respondents conclusion therefore is that the present Application is simply to inhibit the implementation of lawful Orders issued by the Trial Court in the

proceedings known as Kilgoris ELC SPM Case No 5 of 2021 and deprive them their lawful properties.

xiii. The Respondents therefore have termed the pending Appeal as well as the present Application to be bad in law, fatally defective and an abuse of the Court process.

6. Upon service of the Replying Affidavit sworn on the November 14, 2022, the Applicants filed a Supplementary Affidavit on the November 15, 2022.

7. In this Supplementary Affidavit filed on the November 15, 2022, the Applicants further stated as follows; -

a. The Sub-County Land Registrar, Transmara West in the implementation of the Trial Court's Orders emanating from the proceedings known as Kilgoris Elc Spm Case No 5 of 2022 issued summons to persons who were already deceased.

b. The Sub-County Land Registrar, Transmara West even after issuing summons to the persons affected by the Orders from the Trial Court in the proceedings known as Kilgoris Elc Spm Case No 5 of 2022 has been unable to undertake the establishment of the boundaries as the same is within the jurisdiction of the Director of Survey.

c. The Summons being issued by the Sub-County Land Registrar, Transmara West were being served on strangers and therefore likely to be abused.

d. Lastly, the Applicants stated that the orders issued by the Trial Court in the proceedings known as Kilgoris Elc Spm Case No 5 Of 2022 were irregular, null and void.

8. The Court on the November 15, 2022 gave directions that the present application be canvassed by way of written submissions.

9. Consequently thereof, the Applicants filed their submissions on the November 29, 2022 while the Respondents did so on the January 16, 2023.

10. This Court having gone through the pleadings herein regarding the present Application and the submissions thereof, the main issues for determination are substantively two and can be identified as follows; -

Issue No1- whether or not this present application is res judicata to the preliminary objection filed on February 17, 2021?

Issue No2- if the answer to issue No 1 is to the negative, are the applicants entitled to a stay of execution as sought in the present application?

11. The Court having identified the issues for determination as outlined hereinabove, then it will proceed to discuss the merits of each one of them as hereinbelow; -

Issue No1- whether or not this present application is res judicata to the preliminary objection filed February 17, 2021?

12. The issue of Res Judicata has been raised by the Respondents in the Replying Affidavit sworn on the November 14, 2022.

13. However, in the substantive submissions, the Respondents did not make any submissions on the issue of Res Judicata.

14. Similarly, the Applicants in their Supplementary Affidavit did not make any response to the claim of Res Judicata by the Respondents.

15. However, in their submissions dated November 28, 2022, the Applicants discussed the issue of Res Judicata.

16. The Applicants submissions on the issue of Res- Judicata was that the ruling pronounced by the Trial Court on the June 8, 2022 touched only on the pecuniary jurisdiction of the Respondents properties known as LR No Transmara/mapashi/169,150 & 231.

17. The present Application on the other hand deals with the pecuniary jurisdiction of both the Applicants properties known as LRNo Transmara/mapashi/169, 150 & 231 and the Respondents properties known as LR No Majoge/ Magenche/1232 & 1233.

18. Consequently therefore, the Applicants submissions is that the ruling by the Trial Court pronounced on the June 8, 2022 dealt with different properties as compared to the properties which are contained in the present Application.

19. The principle of Res Judicata is expressly provided for under Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and reads as follows; -

> " No court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they claim 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."

20. In the case of *Invesco Assurance Company Limited v Auctioneers Licensing Board & Another; Kinyanjui Njuguna &company Advocates & Another (interested Parties) 2020 eKLR*, the Court made the following observations

> " The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
>
> A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

i. The suit or issue raised was directly and substantially in issue in the former suit.

ii. That the former suit was between the same party or parties under whom they or any of them claim.

iii. That those parties were litigating under the same title.

iv. That the issue in question was heard and finally determined in the former suit.

v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit."

21. . This Court also refers to decision of the Supreme Court of Kenya in *John Florence Maritime Services Limited & Another v Cabinet Secretary of Transport & Infrastructure & 3 Others (petition No 17 of 2015 (2021) Kesc 39 (KLR)* (civ) (August 6, 2021) which held as follows; -

> " The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine 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."

22. Guided by the principles outlined in the two authorities cited hereinabove, the Court and the litigants herein are reminded of the fact that the present Application is founded on the Memorandum of Appeal dated October 21, 2022.

23. An Appeal filed by an aggrieved party against a ruling or judgement pronounced by Trial Court is effectively a legal avenue provided under Article 50 dealing with the right to a fair hearing for a Court of higher hierarchy to re-evaluate the same issues determined in the lower Court and make its own determination.

24. The principle of Res Judicata technically caters for two distinct suits by the same persons, litigating under the same title and having the same issues but filed in different courts with similar competent jurisdictions or lower jurisdictions.

25. In conclusion therefore, the present Application being one brought on the basis of the Memorandum of Appeal filed on the October 21, 2022 to a court of higher jurisdiction, then it is the Court's considered opinion that the same is not Res- Judicata.

> Issue No2- if the answer to issue No 1 is to the negative, are the applicants entitled to a stay of execution as sought in the present application?

26. The court having made a finding that the present application is not Res Judicata to the Preliminary Objection filed on the February 17, 2021, the next issue for determination is whether or not this Court should exercise its discretion and grant a stay of the orders from the trial court in the proceedings known as Kilgoris Elc Spm Case No 5 of 2022 delivered on the October 6, 2022.

27. For avoidance of doubt, the Orders of the Trial Court in the proceedings known as Kilgoris Elc Spm Case No 5 of 2022 issued on October 6, 2022 were as follows; -

> " A. Boundary establishment be done in parcels of land namely; -
>
> i. LR No Transmara/mapashi/150,169 & 231
>
> ii. LR No Majoge/magenche/1232 & 1233.
>
> B. The Land Registrar and the District Land Surveyors of Transmara West and Land Registrar, Kisii & District Land Surveyor Kisii to be engaged in the exercise with the Notice of the Director of Surveys Kenya.
>
> C. The respective Regional Commissioners of both Nyanza and Right Valley do provide security during the said exercise.

D. This matter be mentioned on the December 8, 2022 to confirm the position and for the various reports to be filled in Court."

28. The Orders issued on the October 6, 2022 by the Trial Court in the proceedings known as Kilgoris ELC SPM Case No 5 of 2021 were on the application of the Applicants in the present Application.

29. Be as it may, the substantive statutory provision for applications of Stay pending Appeal is under Order 42 Rule 6 of the *Civil Procedure Rules,2010*.

30. The principles of granting a stay of execution pending Appeal have been discussed extensively in our Kenyan jurisdiction and concluded to be the following; -

    a. The Court should be 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.

31. In the case of *RWW v EKW [2019] eKLR*, the Court was of the considered view that; -

> "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.
>
> 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."

32. In another case of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*, the Court discussed the issue of substantial loss as follows; -

> "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."

33. Turning to this present application, the Court has gone through the Orders issued on the October 6, 2022 by the Trial Court in Kilgoris Elc Spm No 5 of 2022 and in its considered view, these Orders did not touch on any rights of the parties or the issues to be determined in the substantive suit.

34. The Orders of October 6, 2022 by the Trial Court in the proceedings known as Kilgoris ELC SPM Case No 5 of 2022 were trying to establish and/or identify all the parties' properties so as to give clarity to the cause of actions between the Plaintiffs therein and the Defendants.

35. The Orders of October 6, 2022 by the Trial Court in the proceedings known as Kilgoris ELC SPM Case No 5 of 2022 did not alienate, interfere, alter and/or compromise any rights of the Applicants herein and/or the parties to that suit in any manner whatsoever.

36. The Applicants submissions that the Trial Court in the proceedings known as Kilgoris ELC SPM Case No 5 of 2021 did not have the necessary pecuniary jurisdiction and/or the Sub-County Land Registrars and Sub-County Land Surveyors were not mandated to undertake the demarcation exercise are issues to be canvassed at the substantive Appeal.

37. All that the applicants were expected to persuade this Court in exercising its discretion was principally one fact.

38. The fact to be proved was in what manner the implementation of the Orders issued on the October 6, 2022 by the Trial Court in Kilgoris ELC SPM Case No 5 of 2021 would cause a substantive loss to the Applicants.

39. Both in the substantive Application and/or their submissions, the applicants have not demonstrated any substantive loss that will be occasioned by the placing of the boundary marks in their properties known as LR No Majoge/magenche/1232 & 1233 as prayed for in their own application dated September 19, 2022 and allowed by the Ruling of October 6, 2022.

40. Consequently therefore, this Court is of the considered view that the Applicants herein have failed to meet the requirements of granting a stay of execution pending appeal in this present application.

41. In conclusion thereof, the Court hereby makes the following orders as appertains the Application dated November 7, 2022; -

    A. The Notice of Motion application dated November 7, 2022 be and is hereby dismissed.

    B. The Applicants shall bear the costs of this Application.

**DATED, SIGNED & DELIVERED** Virtually in **KILGORIS ELC** Court on **2ND FEBRUARY 2023.**

**EMMANUEL M WASHE**

**JUDGE**

**IN THE PRESENCE OF:**

COURT ASSISTANT: NGENO

ADVOCATES FOR THE APPLICANT: OKEMWA HOLDING BRIEF

NYAMBATI

ADVOCATES FOR THE RESPONDENTS: KAMWARO