



Kamozu & 1133 others v Attorney General & 7 others; Taveta Farmers Association (Interested Party) (Environment and Land Constitutional Petition 6 of 2019) [2023] KEELC 17271 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17271 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 6 OF 2019
SM KIBUNJA, J
MAY 10, 2023
[FORMERLY NAIROBI HC PETITION NO.325 OF 2011]

BETWEEN

MATHENGE RAMATHANI KAMUZU 1ST PETITIONER
WILSON ABIYAH 2ND PETITIONER
ATHUMANI MOZE MSAFIRI & 1131 OTHERS 3RD PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT
SETTLEMENT FUND TRUSTEES 2ND RESPONDENT
KENYA ANTI-CORRUPTION COMMISSION 3RD RESPONDENT
COMMISSIONER OF LANDS 4TH RESPONDENT
TAVETA TOWN COUNSEL 5TH RESPONDENT
PUBLIC SERVICE COMMISSION 6TH RESPONDENT
DIRECTOR LAND ADJUDICATION AND SETTLEMENT .. 7TH RESPONDENT
MINISTER FOR LOCAL GOVERNMENT 8TH RESPONDENT

AND

TAVETA FARMERS ASSOCIATION INTERESTED PARTY



RULING

1. The notice of motion under certificate of urgency dated the February 13, 2023 was filed on the February 14, 2023 through Ms Kinuthia Wandaka & Company Advocates and seeks for among others;
 - a. Stay of execution of the judgement of this court delivered on the January 23, 2023, the decree thereof and any consequential orders thereto pending the hearing and determination of the intended appeal.
 - b. An order that the *status quo* as at January 23, 2023 when the court delivered its judgement be maintained.
 - c. An order extending time for the Applicant to file Notice of Appeal up to the February 13, 2023, and the Notice of Appeal filed on the February 13, 2023 be deemed to have been filed within the time so extended.
 - d. The OCS Taveta Police Station to ensure compliance of the court orders.
 - e. Costs be provided for.

The application is premised on the sixteen (16) grounds marked (a) to (p) on its face and supported by the affidavit sworn by Mathenge Ramathani Kamozi, the 1st petitioner, on the February 13, 2023, in which he deposed inter alia that they had filed the representative petition on behalf of 1,131 persons; that they had shown that the entire government programme of settling squatters at Taveta Settlement Scheme Phase 1 and 2 were marred with irregularities resulting to the genuine squatters, who included the petitioners, who are predominantly from the Kamba and Taita communities being left out; that their petition was dismissed on a technicality of representation and locus standi through the judgement delivered on the January 23, 2023; that being aggrieved, the petitioners intends to file an appeal which has triable issues and high chances of success; that there is threat of the petitioners being evicted from the suit land; that there is a delay of six days in filing the Notice of Appeal that was occasioned by the petitioners' delay giving instructions to the advocates.

2. The application was presented before the duty judge on the February 14, 2023 who certified it urgent and granted *status quo* and stay orders in the interim in addition to issuing directions on service and filing of replies.
3. In response to the above application, Mathenge Ramadhan Kamozi, who I take to be also the deponent of the supporting affidavit, filed a replying affidavit sworn on the February 23, 2023 in which he among others denied that the 2nd and 3rd petitioners and himself had given instructions to the drawing of the supporting affidavit to the application dated February 13, 2023; that the deponent's signature on the said affidavit is not his and he had reported the matter to Taveta Police Station under OB No 49 of February 17, 2023; that the 2nd, 3rd petitioners and himself were satisfied with the judgement delivered on the January 23, 2023 and have no intention of filing an appeal.
4. The notice of motion under certificate of urgency dated the February 22, 2023 was filed on the February 23, 2023 through Ms Munyithya, Mutugi, Umara & Muzna Company Advocates. It seeks for among others the stay of execution of the judgement of the court issued on the January 23, 2023 and for the orders of November 20, 2012, November 29, 2012 and December 17, 2012 by Lenaola J, as he then was, to remain in force pending the hearing and determination of the proposed appeal.



The application is based on the ten (10) grounds marked (1) to (10) on its face and supported by the affidavit of Simon Mwangi, who is one of the 1131 petitioners in the list added on June 17, 2019, in which he *inter alia* deposed that they were aggrieved by the judgement delivered on the January 23, 2023 and filed Notice of Appeal dated the February 2, 2023; that their counsel has also applied for typed proceedings and documents and as it is likely to take time to be supplied, they are apprehensive they may be evicted from the suit land; that it is desirable the orders earlier issued to stay the lower court cases be maintained as well as the status quo before the date the judgement was delivered pending the hearing and determination of their appeal.

5. The 1st, 2nd, 4th, 6th to 8th respondents opposed the application through their fifteen (15) grounds of opposition dated the April 13, 2023 filed through Mr Moimbo Momanyi, Litigation Counsel, Office of the Attorney General, *inter alia* that by dint of Rules 3(1), 3(5)(c), and 32(3) of the [Constitution of Kenya \[Protection of Rights and Fundamental Freedoms\] Practice and Procedure Rules, 2013](#) as read with Article 159 of the [Constitution](#) the application was filed without leave 30 days after delivery of the judgement and is therefore incompetent, fatally defective and should be struck out; application does not have any merit as no draft grounds of appeal have been annexed; that the petitioners are without any registrable rights over any portion of the suit land and were found to be trespassers; the application is solely aimed at extension of the stay orders issued pending the determination of the main suit, which is now not available as the process over the suit land is now complete; the court is now *functus officio* after the delivery of the judgement and cannot issue orders over the criminal trials; the stay orders if issued will deny the legitimate allottees the enjoyment of their right to property under Article 40 of the [Constitution](#); that it is in the public interest that the application be dismissed with costs.
6. The learned counsel for the parties and the 1st petitioner appeared before the court on the February 28, 2023 and the latter denounced the notice of motion dated February 13, 2023 ostensibly filed on his behalf. He informed the court that he was satisfied with the judgement of the court, and when he learnt an application had been filed in his name without instructions, he filed a replying affidavit and reported to the police who had commenced investigations. The counsel also addressed the court on various matters after which the court *inter alia* directed that the *ex parte* orders of February 14, 2023 be vacated for counsel had failed to comply with the directions therein; that the above two applications be served and heard together, and timelines for filing and exchanging replies and submissions were set and matter fixed for further mention on the March 27, 2023. That on that other date, the counsel for the respondents reported that the application dated the February 13, 2023 was yet to be served upon them and they therefore had difficulties filing their replies and submissions. The counsel for the applicants in the notice of motion dated the March 22, 2023 confirmed having served their application and sought for *status quo* to be maintained. The court again reiterated that the two applications would be canvassed together, and gave timelines for filing and exchanging replies and submissions. The court also directed the parties to maintain status quo and fixed a date for ruling.
7. That as I prepare this ruling today, the April 23, 2023, no submissions have been filed by any of the parties herein. The following are the issues for the court's determinations;
 - a. Whether the notice of motion dated and filed on the February 13, 2023 is competent in view of the affidavit filed by 1st petitioner in response thereto.
 - b. Whether the applicants to the notice of motion dated the February 22, 2023 have met the threshold for stay orders sought to issue.
 - c. Who pays the costs in each of the applications.
8. The court has carefully considered the grounds on each of the applications, affidavit evidence, grounds of opposition, the court record and come to the following conclusions;



- a. That in view of the depositions of Mathenge Ramadhan Kamozi in his filed replying affidavit sworn on the February 23, 2023 in which he among others denied having given instructions alone or with others for the drawing of the supporting affidavit to the application dated February 13, 2023, and denouncing the deponent's signature on the supporting affidavit, and noting that he has reported the matter to Police Station under OB No 49 of February 17, 2023, the court has no doubts the police and other investigative agencies will urgently deal with the matter and take appropriate legal action on any person(s) found to have committed any cognizable offence. The court further finds that the deponent of the supporting affidavit having denounced the contents therein, leaves the notice of motion without any evidence in support. That accordingly the notice of motion dated the February 13, 2023 that evidently has never been served upon the Respondents despite the court directions is hereby struck out with costs to the respondents/defendants.
 - b. That the application dated the February 22, 2023 and filed on the February 23, 2023 is brought under Order 42 Rule 6 of the Civil Procedure Rules, sections 1A, 1B, and 3A of the Civil Procedure Act and Article 159 of the Constitution. For a party seeking for stay pending appeal to succeed, Order 42 Rule 6 of the Civil Procedure Rules requires such an applicant to satisfy the court that substantial loss may result if the order was not granted; that the application was made without unreasonable delay; and exhibit readiness to provide security for the due performance of the decree should they not succeed on appeal. The court has carefully considered the application, the supporting affidavit and the judgement delivered on the January 23, 2023 and come to the conclusion that though the application may have been filed without unreasonable delay, the applicants have not shown or attempted to show the court the nature of the substantial loss that they are likely to suffer if the order they seek was not issued. Going through the court's judgement, one cannot fail to note that the petitioners/applicants were found to be without locus and or registrable interests upon which to sue in respect of. Further, the applicants have not offered or expressed their preparedness to offer security for the due performance of the decree. That the applicants having failed to satisfy the court on the test of substantial loss and provision of security, their application is found to be without merit.
 - c. That the respondents having been successful in defending the application are granted the costs of the application.
9. In view of the foregoing the court finds and directs as follows;
- a. That the notice of motion under certificate of urgency dated the February 13, 2023 is struck out with costs.
 - b. The notice of motion under certificate of urgency dated the February 22, 2023 and filed on the February 23, 2023 is without merit and is dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 10TH DAY OF MAY 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PETITIONERS : Absent



RESPONDENTS : Absent

INTERESTED PARTIES: Absent

COUNSEL : M/s Jin for Munyithya for Petitioner/Applicants, Mr. Moimbo for 1st, 2nd, 4th, 6th to 8th Respondents and holding brief for Kihanga and Shamalla for 3rd and interested parties and 3rd respondents respectively.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

