



**Kimani v Kimani & 2 others (Environment & Land Case
E076 of 2022) [2023] KEELC 17214 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17214 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E076 OF 2022**

MD MWANGI, J

MAY 3, 2023

BETWEEN

MARY WACUKA KIMANI PLAINTIFF

AND

MARK NG'ANG'A KIMANI 1ST DEFENDANT

AUSTIN MAINA KIMANI 2ND DEFENDANT

THE LAND REGISTRAR, NAIROBI 3RD DEFENDANT

(In respect of the application dated 20th February 2023 by the 2nd Defendant seeking joinder of a proposed Interested Party, application by the Plaintiff dated 20th February 2023 seeking a stay of proceedings and execution of the court ruling of 23rd January 2023 pending appeal and application by the 1st Defendant dated 16th February 2023 seeking review of the court's ruling of 23rd January 2023)

RULING

Background

1. I make this ruling conscious of the fact that the suit herein is still pending hearing. I will therefore be deliberately frugal with my words in order not to embarrass or prejudice the fair hearing of the case.
2. Before I delve into the matters at hand, I wish to highlight this background of the matter briefly.
3. On the January 23, 2023, this court delivered a ruling setting aside a consent order dated March 10, 2022, and the resulting judgment thereof of March 15, 2022, in its entirety together with all consequential orders. The court directed the Land Registrar, Nairobi to cancel all the entries made in the Register of the suit property LR No 209/9888, Nairobi Dam comprised in grant IR 39258 which had been made pursuant to the said judgment of March 15, 2022 and reinstate the 1st and 2nd defendants as the owners as joint tenants forthwith.



4. The court also made an order regarding the collection of rent and management of the suit property directing that reverts as it were prior to the judgment of January 15, 2023.
5. I must point out, for clarity that the consent of March 10, 2022 had five (5) clauses replicated here below verbatim:-
 - i. That a declaration be and is hereby made that the plaintiff is the lawful and legally entitled owner of the property LR No 209/9888 Nairobi dam comprised in grant number IR 39258 having purchased the same for valuable consideration.
 - ii. That the title of the 1st and 2nd defendant, Mark Ng'ang'a and Austin Maina Kimani as joint tenants, to the LR No 209/9888 Nairobi dam, be and is hereby cancelled.
 - iii. That the register of the property LR No 209/9888 Nairobi dam comprised in grant number IR 39258 be and is hereby rectified, so as to remove the entries in favour of Mark Ng'ang'a and Austin Maina Kimani as joint tenants, and title be issued in the name of the plaintiff, Mary Wacuka Kimani forth with.
 - iv. That the honorable court be pleased to issue a permanent injunction restraining the 1st, 2nd defendant/respondents, their agents, servants and or employees and or any person, claiming under them or any other third party not under the instructions of the plaintiff, from managing, trespassing upon, charging, mortgaging, demanding and or collecting rent from the tenants on the subject property LR No 209/9888 Nairobi dam (Peach Court Apartments).
 - v. That the Officer Commanding Langata Police Station ensures compliance with order 4 above.
6. The three (3) applications now before me arise from court's decision contained in the ruling of January 23, 2023.
7. The court's directions were that all the three applications be heard concurrently and be dispensed with by way of written submissions. All the parties complied and filed their respective submissions in respect of the applications. The submissions form part of the record of the court and the court has had occasion to keenly peruse the same.

Application dated 16th February, 2023 by the 1st Defendant

8. The 1st defendant prays that the court reviews and sets aside the ruling and orders of January 23, 2023. The application is principally brought under the provisions of order 45 of the *Civil Procedure Rules*. The basis of the application is that there is an error apparent on the face of the record as the court's ruling does not indicate what was indicated by the applicant in court amongst the other grounds on the face of the application. The other ground stated by the 1st defendant/applicant is that the court ruled and made orders on the collection of rent when the same had not been canvassed by the parties and particularly without considering what the actual position was before the impugned consent order was made and after.
9. The application is supported by the plaintiff but opposed by the 2nd respondent.
10. The substantive powers for review of a judgement or an order made by a court are provided for under section 80 of the *Civil Procedure Act*; while order 45 of the *Civil Procedure Rules* 2010, provide the procedural requirements. Section 80 of the *Civil Procedure* provides that:-

“ Any person who considers himself aggrieved—



- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
6. Order 45 rule 1(1) of the *Civil Procedure Rules* 2010, on the other hand is explicit that;
 - (1) Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
12. What comes out from the sub rule 1(b) above is that the grounds for review are discovery of new and important matter or evidence, mistake or error apparent on the face of the record any other sufficient reason.
13. The 1st defendant’s cites ‘error on the face of the record’ as his reason for seeking a review of the ruling of court.
14. My reading of the 1st defendant’s application however, is that he accuses the court of failing to take into consideration the evidence and submissions placed before the court and going beyond the prayers sought in the application by the 2nd defendant that led to the ruling of the court setting aside the consent order.
15. Those grounds, in my view are not proper grounds for review of the ruling. They are grounds for an appeal not a review, in my opinion. If I were to go into the details of the same, I would be literally sitting in appeal of my own ruling.
16. In the case of *Francis Origo & another v Jacob Kumali Munagala* [2005] eKLR, the court emphasized the point and stated that;

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction.”
17. The 1st defendant like any other party in litigation has an unfettered right to appeal to a higher court whenever dissatisfied with the decision of the court. That is the avenue he should have considered.
18. The consent order that this court set aside at clause 4 thereof, purported to permanently bar the defendants from amongst other things managing, demanding or collecting rent from the tenants on the subject property. This consent was set aside in its entirety. Automatically, this meant that the things were to go back as they were prior to the judgment of March 15, 2022 reverted. The court pronounced



that position as it did regarding the management and collection of rent consciously as one of the consequences arising from the setting aside the impugned consent order.

19. The court therefore finds the application by the 1st defendant lacking in merits and hereby dismisses it with costs to the 2nd defendant.

Application dated 20th February, 2023 by the Plaintiff seeking stay of proceedings in this matter and execution of the orders of 23rd January 2023

20. The plaintiff seeks to stay execution of the ruling of this court of January 23, 2023 and the resultant orders pending hearing and final determination of the appeal she has filed at the Court of Appeal. Secondly that the court be pleased to order a stay of proceedings in this case pending hearing and final determination of the appeal.

21. The grounds upon which the application is based are on the face of the application and the supporting affidavit of the applicant, Mary Wacuka Kimani sworn February 20, 2023.

22. The plaintiff avers that she stands to suffer substantial loss for reasons that she has been and continue to battle with breast cancer and she has been undergoing chemotherapy from June 2021, at the Nairobi Hospital. She will be on medication to the next ten (10) years to be able to manage the cancer. She had no insurance cover at the time of the diagnosis and as such has to depend on the the income from the rental units on the suit property to pay her medical bills.

23. The plaintiff further avers that the 1st and 2nd defendants stands to suffer no prejudice. She states that she continues to pay the 2nd defendant’s schools fees and upkeep and all basic necessities. She further points out that the 1st defendant did not contest and or dispute the consent and has indicated that he does not object to the plaintiff being registered as owner of the subject property.

24. The law as regards both stay of execution and proceedings is order 42 rule 6.

25. Order 42 rule 6(1) provides as follows;-

“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 an 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.”

26. Order 42 rule 6(2) of the [Civil Procedure Rules](#) on the other hand provides that:

“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.”



27. In the case of *Vishram Ravji Halai v Thornton & Turpin* civil application No Nai 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
28. Substantial loss is, as was observed in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the cornerstone for the grant of the order of stay of execution. The court in the said case stated 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.”
29. Platt, Ag JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 41 expressed himself as follows in regard to the centrality of substantial loss:
- “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”.
30. In this case, as I have already pointed out, the plaintiff's cites her health condition as the reason why the court should order a stay of execution of the ruling of January 23, 2023 since she requires the money for her treatment. She in my view is seeking mercy from the court. The court of course sympathizes with the plaintiff/applicant. I do not however think that that is the kind of substantial loss contemplated under the law cited above. That ought not to be the basis upon which a court exercises its discretion.
31. Lord Mansfield in *R v Wilkes*, 1770 (98) ER 327 clarified that ‘discretion’ when applied to courts of justice, means sound discretion guided by law.
- “It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, ‘but legal and regular’.”
32. Substantial loss is the corner stone of the jurisdiction for granting an order for stay of execution. That is what has to be prevented by issuance of the order. Without evidence of substantial loss there would be no basis for grant of an order of stay even where the application was filed without undue delay as in this case.
33. Regarding the application for stay of execution, I am guided by the holding of Ringera J (as he then was) in the case of *Re Global Tours & Travel Ltd*, High Court winding up cause No 43 of 2000.



34. In the said case, Ringera J was categorical that the sole consideration for the court in exercising its discretion in an application for stay of proceedings should be whether it is in the interest of justice to stay proceedings. He stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

35. Article 159 of the *Constitution* as well as section 3 of the *Environment and Land Act*, enjoin this court to render justice in a just, expeditious, proportionate and affordable cost to parties. In this case, I am not convinced that it is in the interest of justice to grant the order of stay of proceedings sought by the plaintiff/applicant.

36. Consequently, I disallow the plaintiff's application with costs to the 2nd defendant.

37. Finally is the application by the 2nd defendant also dated February 20, 2023 seeking to join Muigai Commercial Agencies Limited as an interested Party in this matter. The application is brought under the provisions of order 1 rule 10 of the *Civil Procedure Rules*. The application is premised on the basis that the proposed interested party is the property agent who collects rent and manages the suit property and is therefore a necessary party in these proceedings.

38. In the case of *Habiba W. Ramadhan & 7 others v Mary Njeri Gitiba* (2017) eKLR; Nairobi High Court ELC Case No 119 of 2014 the court stated as follows;

“As already observed by the court, under order 1 rule 10(2) the court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute....”

39. In this case the court finds the presence of the proposed interested party in these proceedings necessary to enable the effectual and complete adjudication and settlement of the dispute in this matter. The court therefore allows the 2nd defendant's application as prayed but with no orders as to costs.

40. Consequently, the court makes the following orders:-

- a. The plaintiff's application dated February 20, 2023 is dismissed with costs to the 2nd defendant.
- b. The 1st defendant's application dated February 16, 2023 is dismissed with costs to the 2nd defendant.
- c. The 2nd defendant's application dated February 20, 2023 is allowed with no orders as to costs. It is further ordered that Muigai Commercial Agencies Limited be and is hereby as an interested party in this case.

41. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MAY, 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Juma for the Plaintiff

Mr. Munaawa for the 1st Defendant

Mr. H. Karanja for the 2nd Defendant

No appearance for the 3rd Defendant

Court assistant - Yvette

M.D. MWANGI

JUDGE

