



**Njoroge v Kanyia ((Suing as a trustee of and on behalf of Redeemed Gospel Church))
(Environment and Land Appeal E001 of 2021) [2023] KEELC 17310 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E001 OF 2021**

CA OCHIENG, J

MAY 8, 2023

BETWEEN

GATERU NJOROGE APPELLANT

AND

STEPHEN M KANYIA RESPONDENT

**(SUING AS A TRUSTEE OF AND ON BEHALF OF REDEEMED GOSPEL
CHURCH)**

RULING

1. What is before Court for determination is the Appellant's Notice of Motion Application dated the 3rd October, 2022 where he seeks the following orders:
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this Appeal the court do grant a stay of execution of the Judgment and Decree of the Honourable Court delivered on 17th November, 2020.
 4. That this Honourable Court do Review /or Set aside or vary the Ruling of this Honourable Court delivered on the 15th November, 2021.
 5. That cost of this Application be in the Cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Rev. Gateru Njoroge. The Applicant deposes that Judgment was delivered against him at Kangundo Senior Principal Magistrate on the 17th November, 2020 and he did file the instant Appeal. He explains that since the subject matter is the suit land which is emotive, the court should grant him a stay pending



Appeal. He avers that he already filed a Memorandum of Appeal as well as a Record of Appeal and is in the process of setting down the said Appeal for hearing. He states that he was called by the OCS Kangundo Police Station on the afternoon of 29th September, 2022 and informed of the intended eviction to be carried out on the 3rd October, 2022. He insists that they have never been served with an Eviction Notice. He reiterates that if the stay is not granted, he will be evicted from the suit land and the Appeal will be rendered nugatory. He deposes that through his Advocate, he had filed an Application for stay and a Ruling was delivered on 15th October, 2021 which they seek to be reviewed. He reaffirms that no prejudice will be occasioned on the Respondent as he has always been in possession of the suit land.

3. The Respondent opposed the instant Application by filing a Replying Affidavit where he deposes that the said Application is misconceived and amounts to a waste of the court's time as the Applicant had filed a similar Application before the lower court dated the 4th December, 2020 and a Ruling was delivered on 16th February, 2021. Further, the Applicant filed another Application before this Court dated the 26th February, 2021 seeking a stay of execution of the lower Court Judgment and after inter partes hearing, the said Application was dismissed vide this Court's Ruling dated the 15th October, 2021. He contends that the Court in its Ruling cited that the Applicant did not prove satisfactorily that he would suffer irreparable harm and the same was also cited by the learned trial Magistrate. He reiterates that the instant Application has already been disposed of and a Ruling delivered. Further, that after the Ruling, the Respondent proceeded to execute the Judgment of the Lower Court and the Applicant was evicted from the suit land, with the entire property reverted back to the Redeemed Gospel Church. He avers that a party cannot seek to prosecute an already concluded Application as the same will amount to *res judicata*. He states that the Applicant is using the Application as a smokescreen and a delaying tactic. Further, that the instant Application has been overtaken by events.
4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures and submissions, the following are the issues for determination: Whether the Court should grant a stay of execution of the Judgment and Decree in Kangundo CMCC No. 204 of 2018, delivered on 17th November, 2020, pending the outcome of this Appeal. Whether the Court should review, set aside or vary its Ruling delivered on the 15th November, 2021.
6. As to whether the Court should grant a stay of execution of the Judgment and Decree in Kangundo CMCC No. 204 of 2018, delivered on 17th November, 2020, pending the outcome of this Appeal.
7. The Appellant seeks a stay of execution of the Judgment and Decree delivered on 17th November, 2020 which has been opposed by the Respondent. The Respondent explains that the Appellant had filed a similar Application before the lower court dated the 4th December, 2020 and a Ruling was delivered on 16th February, 2021. Further, he filed another Application dated the 26th February, 2021 before this Court, seeking a stay of execution of the lower Court Judgment which Application was dismissed vide this Court's Ruling dated the 15th October, 2021. I have had a chance to peruse the Ruling of this Court dated the 15th October, 2021 and I note that this Court indeed determined an Application for stay pending the instant Appeal. For the avoidance of doubt, I will reproduce an excerpt hereunder:

The record shows that the Appellant did file an Application for stay of execution in the trial court. While dismissing his Application, the learned Magistrate found that the Appellant had not demonstrated that he will suffer irreparable loss unless an order of stay is granted...it



is my finding that the suit property herein has always been used by the Respondent and not the church the Applicant represents, JCC. That being so, the Applicant will not suffer any substantial loss if the Redeemed Gospel Church which has been using the church since its inception continues to do so. The Appellant having not substantiated the substantial loss that he will suffer unless an order of stay is granted, and in view of the evidence that was adduced in the lower court showing that it is the Respondent's Church that purchased the suit property in the year 2004, which property they were using until the year 2017 when the Appellant changed the name to 'JCC'. It is my finding that the Appellant's Application dated 26th February, 2021 is not meritorious."

8. The Appellant being dissatisfied with the said Ruling instead of lodging an Appeal has filed a fresh Application. Section 7 of the Civil Procedure Act makes provisions on the doctrine of *res judicata* and stipulates inter alia:

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

9. On *res judicata*, the Court of Appeal in the case of Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996 held that: -

In order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit."

10. In relying on the legal provisions cited above as well as applying the standards set in the aforementioned case to the instant Application, I find that the issue of stay of execution pending Appeal has been directly and substantially in issue in the two previous Applications dated the 4th December, 2020 and 26th February, 2021 respectively, which were between the same parties, litigating under the same title. Further the two Applications were determined on 16th February, 2021 and 15th October, 2021 respectively. In the foregoing, I find the instant Application is indeed *res judicata*.

11. As to whether the Court should review, set aside or vary its Ruling delivered on the 15th November, 2021.

12. The Appellant has sought for review of the Ruling delivered on 15th November, 2021 which is opposed by the Respondent. On review, Section 80 of the Civil Procedure Act 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."

13. While Order 45 Rule 1 (1) of the Civil Procedure Rules stipulates thus:

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.”

14. I have perused the Court Record and note that there were no orders issued on 15th November, 2021 but the impugned Ruling was delivered on 15th October, 2021. Be that as it may, I note the Appellant in the instant Application including Supporting Affidavit has not demonstrated the grounds upon which he seeks the review of the alleged order. In the circumstances, while relying on the legal provisions I have cited above, I find that the Appellant is not entitled to orders of review as sought.
15. It is against the foregoing that I find the Notice of Motion dated the 3rd October, 2022 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF MAY, 2023

CHRISTINE OCHIENG

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

