



**Pasha Enterprises Ltd v Kenya Farmers Association Ltd & another;
County Government of Machakos (Interested Party) (Environment & Land
Case 130 of 2015) [2023] KEELC 18714 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 130 OF 2015**

**A NYUKURI, J
JULY 5, 2023**

BETWEEN

PASHA ENTERPRISES LTD PLAINTIFF

AND

KENYA FARMERS ASSOCIATION LTD 1ST DEFENDANT

JANE ITEMBE 2ND DEFENDANT

AND

COUNTY GOVERNMENT OF MACHAKOS INTERESTED PARTY

RULING

1. Before court is a Notice of Motion dated June 2, 2019 filed by the Defendants seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That there be a stay of execution of the judgment and decree dated January 31, 2019, pending the hearing and determination of the Appeal to the Court of Appeal.
 - d. That costs of this application be provided for.
2. The application was supported by the affidavit sworn on February 6, 2019 by Symon K. Cherogony, the Managing Director of Kenya Farmers Association Ltd the 1st Defendant. The Applicants' case is that they were aggrieved with the judgment and decree of this court delivered on January 31, 2019 and filed a Notice of Appeal on February 1, 2019. The deponent stated that the judgment decreed that the suit property was owned by the Plaintiff and ordered the eviction of the Defendants. The Applicants'



position was therefore that there was imminent danger of the Defendants eviction unless execution is stayed.

3. It was asserted for the Applicants that the 1st Defendant had numerous employees on the suit property having been on the property since 1974 and that if eviction is carried out, the defendants stood to suffer irreparable loss and damage. The 1st Defendant stated that the suit property belongs to the Intended Third Party namely Machakos County Government and that the judgment was entered without giving the Defendants and the Intended Third Party an opportunity to be heard. They held the view that their appeal had overwhelming chances of success. He deponed that the Defendants' application dated February 14, 2018 be heard first before the instant application as the former application had sought to arrest judgment herein. He attached search certificates for the suit property, single business permits issued to the Defendant and a list of 13 members of staff.
4. The application was opposed. The Plaintiff filed grounds of objection dated March 6, 2019. The grounds of objection were listed as follows;
 - a. Judgment the execution of which is sought to be stayed was regularly obtained based on the evidence availed to court. The application for stay of execution is therefore unmerited.
 - b. The ground advanced by the Defendants to justify a stay of execution that the suit property is registered in the name of County Government of Machakos is a total misconception as the ownership of the title has never been an issue in the case. On the contrary, the whole case only relates to the leasehold interest purchased by the Plaintiff in a public auction and duly registered in the name of the Plaintiff with the written consent of the County Government of Machakos.
 - c. The application is merely an afterthought brought to cover-up the Defendants' acts of indolence in neglecting and/or failing to attend court to conduct the Defendants' defence.
 - d. The application supposedly seeking to enjoin the County Government of Machakos as a party to the suit is of no consequence as it was filed after the conclusion of the hearing of the case.
 - e. The Defendants are plainly and obviously bent on clinging onto the Plaintiff's property without any justifiable cause and thus defeat the course of justice.
 - f. The Defendants' application is otherwise an abuse of the court process.
 - g. The Defendants are not entitled to the orders sought.
5. In addition, the Plaintiff through their Managing Director, Samuel Kimondo Theuri filed a replying affidavit sworn on March 4, 2019, as well as a further affidavit sworn on March 6, 2019. It was the Plaintiff/Respondent's case that the issue of ownership of Parcel No Machakos Town Block 1/67 (suit property) does not arise as the Plaintiff purchased leasehold interest in the said title, the same was registered in the Plaintiff's name with the consent of the Municipal Council of Machakos and the Plaintiff lawfully acquired lease of the suit property through a public auction in respect of execution of the judgment and decree in Nakuru HCCC No 560 of 1998 (*[Kepha Nyaberi & 189 Others v. Kenya Farmers Association Ltd.](#)*).
6. It was the Respondent's position that the question raised by the Defendant in regard to why the judgment was delivered when two applications to arrest the judgment were pending reeks of mischief and bad taste. He maintained that the proceedings herein were not about ownership but only in relation to leasehold interest. He stated that County Government of Machakos is the absolute proprietor of the title but the Plaintiff has a registered leasehold. That the case was heard in the



absence of the Defendants who were duly served and therefore the Plaintiff is entitled to the fruits of the judgment. He stated that the appeal was frivolous. He attached a letter dated September 13, 2012 written by the Town Clerk Municipal Council of Machakos giving consent for transfer of the suit property and Parcel 1/68 from Kenya Farmers Association Ltd to Pasha Enterprises Ltd, lease certificate, certificate of official search, letter dated 25th January 2011 from Survey of Kenya amending RIM for Parcel 1/67, decree in Nakuru HCC No 560 of 1998, Notification of sale in respect of the suit property dated June 9, 2009, Public Auction Advertisement, Memorandum of Sale, certificate of sale and order made on October 29, 2009 in Nakuru HCC No 560 of 1998 and a search certificate date 6th March 2019.

Analysis and Determination

7. I have carefully considered the application, as well as the grounds of objection and the replying and further affidavits, and the issue that arise for determination is whether the Defendant has met the threshold for grant of stay of execution pending appeal.
8. Order 42 Rule 6 of the [Civil Procedure Rules 2010](#), grants this court power to grant stay of execution pending appeal where it is demonstrated by the Applicant that they stand to suffer substantial loss if stay of execution is not granted; and where the application is made without undue delay. In addition, the Applicant ought to show willingness to provide security for the due performance of the decree.
9. In the case of [Samvir Trustee Limited v. Guardian Bank Limited](#) Nairobi (Milimani) HCCC No 795 of 1997, the court held as follows;

Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the court should not put unnecessary hindrance to the enjoyment and exercise of that right by the Defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court ... The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successfully party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The Respondent in asserting that matured right against the Applicant...for the Applicant to obtain stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support each contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.....

10. As regards substantial loss, the Defendant deponed that they stood to suffer loss of business and goodwill built for over 45 years at the suit premises and that their Machakos Branch served the whole of the Eastern region and that if judgment is executed the same will attract multiple law suits from its employees over imminent loss of employment. Does this constitute proof of substantial loss? I do not think so. This is because apart from mere allegations the Defendant did not demonstrate empirically the nature and extent of loss they stood to suffer in terms of business or the nature and extent of claim that may arise from a suit from their employees. In any event the allegation that they would be sued



if execution is not stayed are mere speculations and does not indicate the nexus between execution of the judgment and the likely suits by their employees.

11. Most importantly however, the fact that the Defendants were sued vide Nakuru HCCC No 560 of 1998 and subsequently execution issued against them whereof the suit property was sold to the Plaintiff in execution of the decree against them is not disputed. It is also not disputed that no appeal was filed to contest the order of court allowing the sale of the suit property to the Plaintiff. The issues raised by the Defendant on ownership of the suit property are matters determined in Nakuru HCCC No 560 of 1998 and confirmed by this court in its judgment and this court is therefore functus officio in relation thereto as the same can only be addressed at the Court of Appeal in the event an appeal is filed before that court.
12. In the premises, I am not convinced that the Defendants deserve the orders sought and I therefore dismiss the application dated June 2, 2019 for lack of merit. Costs are awarded to the Plaintiff/ Respondent.
13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Muli for Plaintiff

Ms. Magana for Defendant

Josephine – Court Assistant

