



**Wilson v M'mboroki (Environment and Land Appeal 55 of 2022)
[2023] KEELC 20510 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 55 OF 2022**

CK NZILI, J

OCTOBER 4, 2023

BETWEEN

MUCHERA WILSON APPELLANT

AND

DAUDI M'MBOROKI RESPONDENT

RULING

1. By an application dated 26.5.2023, the court is asked to review, vary, or set aside its ruling delivered on 3.5.2023 and stay the lower court decree pending the appeal's hearing and determination. The reasons are contained on the application and a supporting affidavit of Wilson Muchera sworn on 26.5.2023. The applicant avers that a conditional stay order was granted that he deposits Kshs.250,000 within 14 days in default for the stay to lapse. The applicant avers that he was taken ill and admitted at Kanyakine Sub-County Hospital for two weeks, and in the circumstances, he was unable to comply with the orders as per a discharge summary attached as annexure marked WM "1". The applicant avers that he has recovered from the illness and was in a position to comply and that if the application is allowed, the respondent would not be prejudiced.
2. The respondent opposes the application through a replying affidavit sworn on 29.5.2023 by Daudi Murungi M'Mboroki. It is averred that no new and important matter or evidence that after the exercise of due diligence was not within his knowledge or could not be produced by him when the orders were made is available. Further, it was averred that the admission was between 22.2.2023 and that the applicant had not explained why he did not offer any security when the ruling was delivered on 3.5.2023.
3. The respondent avers also that there has been an inordinate delay in applying for a stay, substantial loss has been demonstrated, no mistake or error was apparent on the face of the record, and no sufficient reason to warrant why a review has been made. Therefore, the respondent urges the court to find no



good reason why he should be denied the enjoyment of the fruits of his judgment, more so when the application was out to obstruct the course of justice.

4. On 30.1.2023, the court certified urgent the applicant's application dated 30.1.2023, and pending its hearing, ordered the applicant to deposit Kshs.20,000/= as security within seven days in default of which the conditions of stay would lapse automatically. When the matter came up for hearing inter-partes on 27.2.2023, the court was informed that the applicant had failed to meet the requirements; hence, the stay orders lapsed. No application was made for the extension of the stay orders. In the ruling dated 3.5.2023, the court dismissed the application for lack of merits.
5. Order 45 of the Civil Procedure Rules, as read together with section 80 of the Civil Procedure Act, grants this court power to review its order or decree on three conditions. One, where there is new or fresh evidence that was not within the court's knowledge when it made the order or decree. Two, where there was an error or mistake on the face of the record, and lastly, for any other sufficient reasons. The application must also be made without undue delay.
6. In this application, the order for a conditional stay pending interparty hearing was made on 30.1.2023 and lapsed by 7.2.2023. On 28.2.2023, no material was placed before the court that the applicant had been taken ill and or admitted to hospital between 5th – February 22, 2023, yet the information was within the applicant's knowledge.
7. Further, at the ruling on 3.5.2023, the applicant still did not bring any information to the court that he had been admitted to the hospital, the reason why he had not complied with the earlier orders. Be that as it may, the court proceeded to hear and determine the application on merits.
8. The information being relayed to the court cannot, by any stretch of the imagination, amount to fresh and new evidence that the applicant could not have obtained through due diligence. The orders for conditional stay became spent through effluxion of time and were never revived before the ruling on 3.5.2023.
9. After the court pronounced itself on whether or not stay orders were merited, the court became functus officio on the issue of stay. The court cannot sit on appeal of its judgment. The stay issue is now res-judicata; therefore, the respondent is out of order to invite this court to determine the issues that were canvassed and determined in the ruling delivered on 3.5.2023. Unfortunately, the respondent has raised the same issues in paragraph 7 of the replying affidavit, yet the court made specific findings in its previous ruling. The upshot is that the application dated 26.5.2023 is not only an abuse of the court process but also lacks merits. It is dismissed with costs. The lower court file is called on for a mention before the deputy registrar.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4TH DAY OF OCTOBER 2023

In presence of

C.A Kananu

No appearance

HON. CK NZILI

ELC JUDGE

