



**Masai v Land Control Board, Mukaa Sub-County & another; Muia (Suing as the legal representative of Mary Vose Muia) (Applicant) (Environment and Land Judicial Review Case E002 of 2021) [2023] KEELC 21466 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21466 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2021**  
**TW MURIGI, J**  
**NOVEMBER 1, 2023**

**BETWEEN**

**LABAN NDUVA MASAI ..... EXPARTE APPLICANT**

**AND**

**LAND CONTROL BOARD, MUKAA SUB-COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ISAAC MAWEU MUIA (SUING AS THE LEGAL REPRESENTATIVE OF MARY VOSE MUIA) ..... APPLICANT**

**RULING**

1. By a Notice of Motion dated 17<sup>th</sup> January, 2023 brought under Order 10 Rule 11, Order 22 Rules 22 and 25, Order 51 Rules 1,3,4 and 10 of the [Civil Procedure Rules, 2010](#) and Sections 1A, 1B, 3, 3A and 63 (e) of the [Civil Procedure Act](#) the Applicant seeks the following orders: -
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of the objection and/or reference lodged in Makueni ELC MISC Application No. 11 of 2022, this Honourable Court be pleased to issue an order of stay of execution of the Ruling delivered on 14/11/2022, the consequential decree issued thereto and/or any subsequent orders therefrom.
  4. That this Honourable Court be pleased to set aside the proclamation, warrants of attachment and sale herein.



5. That costs of this application be provided for.
2. The application is supported by the affidavit of Isaac Maweu Muia sworn on even date.

### **The Applicant's Case**

3. The Applicant averred that he is aggrieved by the Ruling of the taxing officer delivered on 14<sup>th</sup> November, 2022 with regards to the bill of costs dated 9<sup>th</sup> May, 2022. He averred that he instructed his Advocates to lodge a Notice of Objection against the taxing officers' decision and consequently, his Advocate filed a reference vide Makueni ELC Misc Application No. 11 of 2022 on 25/11/2022 to challenge the decision of the taxing officer.
4. The Applicant further averred that on 17/01/2023, he was served with a 7-days' proclamation notice together with warrants of attachment of movable property while the reference was still pending for hearing and determination. He further averred that there has been no delay in the filing the instant application. The Applicant contended that the Ex-parte Applicant will execute if the orders sought are not granted. In addition, he averred that he will suffer irreparable loss and damage in addition to rendering the instant application and the reference nugatory if the order of stay is not granted. The Applicant contended that it is in the interest of justice and fairness that the application herein is allowed as prayed.

### **The Respondent's Case**

5. In opposing the application, the Ex-parte Applicant/Respondent filed a replying affidavit sworn on 2<sup>nd</sup> February, 2023. The Respondent averred that the Applicant's Advocate is a stranger to the proceedings herein because he failed to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. For that, the Respondent urged the Court to expunge the instant application with costs. He added that the present application is a waste of judicial time as the Applicant was all along aware of the bill of costs dated 09/05/2022 and the subsequent ruling delivered on 14/11/2022.
6. Lastly, it was averred that the application is devoid of merit as the Applicant has not adduced satisfactory reasons to warrant the setting aside of the ruling nor proposed any security to warrant the grant of an order of stay of execution as sought. The Respondent urged the court to dismiss the application with costs.

### **The Response**

7. In a Supplementary Affidavit sworn on 24<sup>th</sup> February, 2023, the Applicant averred that his Advocate is properly on record as a Notice of Change of Advocates was filed in court together with a consent between his former Advocates and his current Advocates.
8. The application was disposed of by way of written submissions.

### **The Applicant's Submissions**

9. The Applicant's submissions were filed on 1<sup>st</sup> March, 2023, Counsel identified the following issues for the court's determination: -
  - i. Whether the application for stay of execution is merited;
  - ii. Whether the application for setting aside is merited;



- iii. Whether this is a suitable case for the Court to exercise its discretionary powers; and
  - iv. Whether the Applicant's advocates are properly on record.
10. On the first issue, Counsel submitted that the application is premised upon Order 22 Rule 25 of the [Civil Procedure Rules](#) which provides as follows: -

‘Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.’
11. It was argued that the Applicant has given sufficient reasons to warrant the grant of the orders sought since he had filed a reference against the Taxing officer's decision vide Makueni ELC MISC Application No. 11 of 2020. Counsel argued that the instant application had been filed promptly as per the law. Counsel explained that the Taxing Officer's decision having been delivered on 14/11/2022, the Applicant was served with proclamation notices and warrants of attachment and sale by Kande Auctioneers on 17/01/2023. Meanwhile, the instant application was filed on 18/01/2023.
12. Counsel further argued that the pending execution is irregular because the Applicant was not served with a draft decree and certificate of costs for his approval. It was further argued that if the stay orders are not issued while the reference is still pending determination, the Applicant will suffer a miscarriage of justice because he would have been condemned unheard.
13. On the second issue, Counsel submitted that the Applicant was never served with a draft decree and certificate of costs by the Respondent as per the provisions of Order 21 Rule 8 (2) of the [Civil Procedure Rules](#) and that the Respondent had not rebutted the said position. Counsel insisted that the failure by the Respondent to comply with the law rendered this as a special case for the exercise of the Court's discretion to set aside the warrant notices by Kande Auctioneers.
14. On the third issue, Counsel contended that Section 1A and 1B of the [Civil Procedure Act](#) empowers this Court to facilitate the overriding objectives and to exercise its inherent jurisdiction to do justice and prevent abuse of the court process.
15. On the last issue, Counsel contended that the Applicant had complied with Order 9 Rule 9 of the [Civil Procedure Rules](#). That the Applicant's current advocates had elected to file a consent alongside a Notice of Change of Advocates. Counsel urged the Court to allow the application as prayed.

### **The Respondent's Submissions**

16. The Respondent's submissions were filed on 24<sup>th</sup> March, 2023. Counsel argued that the Court's discretion to order stay of execution is fettered by three conditions namely: -
  1. sufficient cause;
  2. substantial loss; and
  3. Security.
17. Counsel argued that the Applicant was granted an opportunity to defend the bill of costs dated 09/05/2022. That the Applicant's previous advocates, R.K. Mutua & Co. Advocates, filed submissions dated 05/10/2022 in response to the bill of costs.



18. That the Applicant is seeking to set aside the proclamation notice and warrants of attachment and sale on a misplaced argument that it is in the interest of justice. Counsel contended that the Applicant is bent on delaying the realization of the Respondent's fruits of the ruling herein.
19. Moreover, Counsel argued that the Applicant has not offered to pay security pending the determination of the instant application as contemplated under Order 22 Rule 25 of the Civil Procedure Rules. Counsel argued that the Applicant has failed to demonstrate sufficient cause to warrant stay of execution as set out under Order 22 Rule 22 of the Civil Procedure Rules, 2010. Counsel urged the Court to dismiss the application herein with costs. To buttress his submissions, Counsel relied the case of Elena Doudoladova Korir Vs Kenyatta University [2014] eKLR.

### **Analysis And Determination**

20. Having considered the application, the respective affidavits and the rival submissions, the following issues arise for determination: -
  - i. Whether the Applicant's Advocates are validly on record;
  - ii. Whether the Applicant has established a case for stay of execution of the Taxing Officer's ruling delivered on 14/11/2022; and
  - iii. Whether the Applicant has established a case for setting aside of the proclamation notice and the warrants for attachment and sale.
21. The Respondent contended that the application ought to be expunged from the record because it has been made by an Advocate who has not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The law governing change of advocates when a judgment and decree has been passed is founded under Order 9 Rule 9 of the Civil Procedure Rules, 2010 which provides as follows: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

  - (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
22. The record shows that the Applicant's Advocates filed a Notice of Change of Advocates together with a duly executed Consent with the previous Advocates, R. K. Mutua & Company Advocates. Both the Consent and the Notice of Change of Advocates were signed on 25/11/2022 and filed in Court on 30/11/2022. Service was effected upon the Respondent's Advocates herein on 12/1/2023 and the application herein was filed on 18/01/2023. The consent and the Notice of change of Advocates preceded the filing of the instant application.
23. It is crystal clear that the firm of Stanley Nthiwa & Company Advocates complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 hence the firm is not a stranger to the proceedings herein.
24. The next issue for determination is whether the court ought to stay execution of the costs. Taxation of Costs is part of the execution process.



25. In an application for stay of execution pending the hearing and determination of a reference to a Judge, the court is generally guided by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides that:-
- “(1) The Applicant must show that he or she has filed the notice of appeal and that the stay of execution has been filed without undue delay.
  - (2) Secondly, from the facts of the case appealed from the Applicant would suffer substantial loss unless stay of execution is granted.
  - (3) That the Applicant has provided security for due performance of the decree or any such order which may be issued by the court at the end of the determination of the appeal.”
26. That then means that this Court must of necessity consider whether the Applicant is likely to suffer substantial loss, whether the reference has been filed without undue delay and the provision of suitable security for the due performance of the terms of the decree or order that may eventually be binding upon the Applicant.
27. In the instant application, the Bill of Cost was taxed on 14/11/2022. The Applicant filed his application on 17/01/2023 which was not inordinate delay in my opinion. The Applicant has also demonstrated promptness in the filing of the instant application which was done one day after service of the proclamation notice and warrants for attachment and sale by Kande Auctioneers.
28. The Applicant contended that he will suffer substantial loss if the orders sought are not granted. It is not in dispute that the Applicant was served with a 7 day proclamation notice together with warrants of attachment of movable property. The Applicant fears that the Respondent may execute before the hearing and determination of the reference are not baseless. I find that the Respondent has demonstrated that he will suffer substantial loss if the order of stay is not granted.
29. On the last condition as to provision of security, the Applicant has not offered security for the performance of the decree which is a condition precedent in granting the application. Although this is a mandatory legal requirement under the provisions of Order 42 Rule 6(2)(b) of the Civil Procedure Rules, however it should be noted that the court has been called upon to exercise its discretion and consider the application in the interest of justice. This court is enjoined under Article 159 (2 (d) of the Constitution to dispense justice without undue regard to procedural technicalities. In light of the foregoing, I am not persuaded that the Respondents will suffer any prejudice if the application is allowed as long as they can be compensated in costs in respect to this application.
30. Accordingly, the Applicant has duly demonstrated the merit in the application for stay of execution pending the determination of the reference stated above.
31. As for the setting aside of the proclamation notice and the warrants for attachment and sale, the law on costs is that they form part and parcel of the decree. Order 21 Rule 9 (1) and (2) provide as follows: -
- (1) Where the amount of costs has been—
    - (a) agreed between the parties;
    - (b) fixed by the judge or magistrate before the decree is drawn;
    - (c) certified by the registrar (Sub. Leg. Cap. 16); or
    - (d) taxed by the court, the amount of costs may be stated in the decree or order.



- (2) In all other cases, and where the costs have not in fact been stated in the decree or order in accordance with subrule (1), after the amount of the costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or, in a subordinate court, by the magistrate.
32. The Respondent did not rebut the Applicant's assertion that a decree was not served upon the Applicant together with the certificate of costs when Kande Auctioneers proceeded for execution. Evidently, the Applicant has demonstrated merit in the application for setting aside of the proclamation notice and the warrants for attachment and sale on the basis of irregularity.
33. In light of the foregoing, the Application dated 17/01/2023 is merited and the same is allowed in terms of prayers (3) and 4) of the application. Each party to bear its own costs.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2023.**

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**HON. T. MURIGI**

**JUDGE**

