



**Tunoi v Wekesa & 5 others (Environment & Land Case E023 of 2018)  
[2023] KEELC 21484 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21484 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE E023 OF 2018  
FO NYAGAKA, J  
NOVEMBER 14, 2023**

**BETWEEN**

**RACHEAL WANJIKU TUNOI ..... PLAINTIFF**

**AND**

**ENES SITACHI WEKESA ..... 1<sup>ST</sup> DEFENDANT**

**AGNES NAFULA WAFULA ..... 2<sup>ND</sup> DEFENDANT**

**FRANKLINE WAFULA ..... 3<sup>RD</sup> DEFENDANT**

**WILLIAM WEKESA MUCHELE ..... 4<sup>TH</sup> DEFENDANT**

**MAURICE WANJALA WEKESA ..... 5<sup>TH</sup> DEFENDANT**

**JOHN WEKESA WABUKE ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

**Background**

1. On 8<sup>th</sup> March 2023, this Court made the order that the Applicants herein would not be entertained post Judgment unless and until they complied with the Orders of the Court issued on 17<sup>th</sup> October 2022.
2. In disregard of the orders of 17<sup>th</sup> October 2022, the Applicants lodged the Application dated 17<sup>th</sup> March 2023. The said Application was heard and in its Ruling of 19<sup>th</sup> April, 2023, this Court found the Defendants in Contempt of its earlier Orders and dismissed it with costs.
3. The foregoing dismissal yielded the instant Notice of Motion Application, (hereinafter ‘The Application’). It is dated 25<sup>th</sup> April, 2023 and is supported by the Affidavit and further of William Wekesa Muchele deposed to 25<sup>th</sup> April, 2023 and 24<sup>th</sup> May, 2023 respectively.



4. It seeks the following Orders:
  1. ...spent
  2. That this Honourable Court be pleased to set aside its Ruling of 20.04.2023 dismissing the Defendant's Application dated 17.3.2023 and Order the dismissed Application be reinstated for hearing and determination on merit.
  3. That pending the hearing and determination of this Application in the first instance and thereafter pending its hearing and determination there be issued an order of stay of eviction of the Applications an or there be stay of execution against the Judgment of the Honourable Justice Dr. IUR Fred Nyagaka in Kitale Environment and Land Court No.23/2018 delivered on 8.3.2023
  4. That Costs of this Application be provided for.
5. As can be discerned from the grounds in support of the Application and the Supporting Affidavit, it is the Applicants case that they were never informed of the Honourable Court's Orders of 8<sup>th</sup> March 2023 until 10<sup>th</sup> March 2023 when they attended their Advocates Chambers.
6. It was their case that upon being informed of the Court's decision, they made payment of Kshs. 20,000/- for costs that were owing in the cause of trial, for onward transmission to the Plaintiff Counsel and accordingly a receipt was issued to them.
7. In his Affidavit, Mr. Muchele deposed that they were not engaged in acts to frustrate the process only that they had internal differences with Advocates that eventually necessitated engaging a different counsel during trial and to that end, they were surprised when they were informed that their motion was dismissed for disobedience of Orders in the Ruling of 20<sup>th</sup> April, 2023.
8. It was deposed that if they were to be given an opportunity to show cause or file an affidavit, they would have exemplified the failure of their advocates to communicate thus making them appear contemptuous.
9. It was their case that they were keen to prosecute the Application dated 17<sup>th</sup> March 2023 and that in order to purge the contempt they had instructed their advocates to buy a banker's cheque No. 78xxx4 in compliance with the Court Order.
10. They urged the Court not to visit the mistakes of their advocates on them. It was their case that the no prejudice will be suffered if the application herein is allowed and that it is just and fair that it is allowed.
11. It was deposed that substantial loss will be occasioned to them if the Courts Judgment is to be enforced rendering the intended appeal nugatory as they shall be evicted from the land they have known as home.

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

12. Racheal Wanjiku Tonui opposed the Application through her Replying Affidavit deposed to on 2<sup>nd</sup> May, 2023.
13. She deposed that the Application is vexatious and an abuse of Court process that denies her the opportunity to enjoy the fruits of the Judgment.
14. It was her case that the Application sought to be revived was heard and determined by this Court. She deposed that Application dated 17<sup>th</sup> March, 2023 was made in contempt of Court Order and was dismissed.



15. The Respondent deposed further that the issues raised in the Application have been heard and determined by this Court and the allegations being raised against their Advocates ought to have been raised at the hearing of the Application dated 17<sup>th</sup> March, 2023 and not after the ruling had been delivered.
16. In reference to the payment of costs, she deposed that the Application herein was made on 25<sup>th</sup> April, 2023 and payment was made on 27<sup>th</sup> April, 2023 an indication that the application was made before the curing the contempt.
17. It was her case that the Application is a delaying tactic that does not warrant this Court to exercise its discretion in favour of the Applicants.
18. In conclusion, the Defendant urged the Court to dismiss the application and in the event, it is inclined to allow it, to compel the Applicants to pay costs within a specific time line failure which the intended reinstatement would lapse.

### **Analysis**

19. I have carefully appreciated the Applicants' case as pleaded. It is anchored on Order 45 rule 1(1) and Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 80 of the [Civil Procedure Act](#).
20. The only issue that arises for determination is whether the Application is merited.
21. Section 80 of the [Civil Procedure Act](#) provides as follows;
  - “ 80. 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 their 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”.
22. Further to the foregoing, Order 45 of the [Civil Procedure Rules](#) allows for review application in the following manner;
  - “(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.



- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”
23. The context within which the Applicants seek for review must be of first be appreciated. The Orders they seek to have this Court review haven error. The Applicants do not deny that they were aware of the Orders issued on 8<sup>th</sup> March, 2023.
24. Court proceedings cannot be argued by any Advocate, let alone the ones herein, that they are new as to warrant the invocation of Order 45 of the *Civil Procedure Rules*.
25. I say so because the primary occupation of Litigators is to keep abreast with every development in all matters they appear in Court.
26. That responsibility encompasses the duty to ensure Court Orders are complied with to the letter.
27. Despite the change in Advocates, it is not enough for the Applicants herein that they should be excused for disobedience of Court orders.
28. As can be gleaned from the record, as of 10<sup>th</sup> March, 2023, the current Advocate for the Applicants herein were aware of contempt of Court Orders. They nonetheless filed the instant Application even before the curing the contempt.
29. That being the scenario the Applicant’s case is not under the purview contemplated by Order 45 Rule 1 of the *Civil Procedure Rules*. There is no error that this Court can distil from its Ruling. Additionally, there is no information that is new to the Applicants that can be said could not be discovered even after exercise of due diligence.
30. The Applicants herein are simply seeking for a fresh hearing, a function not envisioned by Order 45 of the *Civil Procedure Rules*. Litigation must come to an end.
31. As I come to a close, I do note that the Application seeks stay of Execution of the judgment of the Court delivered on 8<sup>th</sup> March, 2023.
32. Under Order 42 Rule 6 of the *Civil Procedure Rules*, conditions precedent to granting stay of execution are set out as hereunder
- “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.”
33. In the case of *Elena D. Korir v Kenyatta University* (2012) eKLR the principles under Order 42 Rule 6 were discussed as follows:
- “The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another v Thornton & Turpin Ltd* where the Court of Appeal (Gicheru JA, Cheoni & Cockar Ag. JA) held that ‘The High Court’s discretion to order stay of



execution of its order or decree is fettered by three conditions, namely: Sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo v Straman EA Ltd* (11) (2013) as follows:-

‘In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.’

34. The foregoing principles must be established contemporaneously. As aptly captured in the foregoing case, these twin principles go hand in hand and failure to prove one dislodges the other.
35. The failure by the Applicants to furnish security for the due performance of decree given makes the quest for stay of execution unavailable.
36. In the premises, I find that the Application dated 25<sup>th</sup> April 2023 to be without merit. I hereby dismissed it with costs.
37. It is so Ordered.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE**

