



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC APPEAL NO. 24 OF 2020**

**DAUDI ISINGI.....APPELLANT**

**VERSUS J**

**OSEPH MUTHINI WAMBA..... RESPONDENT**

**R U L I N G**

What is before Court for determination is the Appellant's Notice of Motion application dated the 2<sup>nd</sup> September, 2021 brought pursuant to Order 42 Rule 6(1) & (4) of the Civil Procedure Rules and sections 1A, 1B & 3A of the Civil Procedure Act. The Appellant seeks the following orders:

1. Spent
2. That pending hearing and determination of this application dated 2<sup>nd</sup> September, 2021, execution of the trial Court's Ruling dated 16<sup>th</sup> June, 2020 and 26<sup>th</sup> August, 2021 as well as all consequential orders thereto be stayed.
3. That execution of the trial Court's Rulings dated 16<sup>th</sup> June, 2020 and 26<sup>th</sup> August, 2021 as well as consequential orders thereto be stayed pending the hearing and determination of the Appeal herein (Environment and Land Court Civil Appeal No. 24 of 2020).
4. That costs of this application be provided.

The application is premised on the grounds on the face it and the supported by the affidavit of DAUDI ISINGI where he deposes that he is co administrator of the estate of his late father ISINGI KIKUMBI KAMALA who was the registered proprietor of land parcel numbers Mwala/ Mango/ 28 which was subdivided to Mwala/ Mango/ 1232 and 1233 respectively. He confirms that the deceased sold Mwala/ Mango/ 1233 to the Respondent but retained Mwala/ Mango/ 1232 which is still registered in the deceased's name. He explains that subsequent to the transfer, the Respondent sought a portion of Mwala/ Mango/ 1232 to use as an access road to his land and sued the deceased vide Machakos CMCCC No. 1026 of 2004 but the suit was dismissed with costs. Further, the Respondent is yet to pay the said costs assessed at KShs. 26,250 including interest thereon. He avers that after the dismissal of Machakos CMCCC No. 1026 of 2004, the Respondent lodged an Appeal being Machakos High Court Civil Appeal No. 18 of 2006 but subsequently withdrew it, vide a Notice of Withdrawal dated the 31<sup>st</sup> July, 2006. He insists the Respondent concealed material facts as the issues raised in Machakos CMCCC No. 214 of 2016 are similar to the ones raised in Machakos CMCCC No. 1026 of 2004. Further, that the impugned proceedings in Machakos CMCCC No. 214 of 2016 are hence res judicata as the subject matter and parties are the same. He claims an application dated the 17<sup>th</sup> July, 2019 filed by the firm of FM Mulwa Advocate was dismissed on 3<sup>rd</sup> December, 2019 yet the orders sought in the aforesaid application were different from the orders sought in the instant application. He states that his Advocate did not notify him of a hearing date and since the subject matter of the Appeal involves land, his father's estate cannot be made to suffer injustice because of errors, omissions including mistakes of his erstwhile Advocate. He reiterates that he has on record a Defence on merit that raises triable issues. Further, the Respondent claims a portion of the deceased land Mwala/ Mango/ 1232 which he unlawfully purported to take. He reaffirms that he has an arguable appeal with high chances of success.

The Respondent opposed the application and filed a replying affidavit sworn by JOSEPH MUTHINI WAMBA where he deposes that the application is unmeritorious and an abuse of the court process. He confirms that the lower court issued Judgement in his favour on 11<sup>th</sup> September, 2018. He insists the Appellant confirms the suit land Mwala/ Mango/ 1233 indeed belongs to him hence this means the Appellant is indeed a trespasser on it. He avers that the Appellant has not proven how he will be affected if he is evicted from the suit land. He states that the issues raised in the instant application are res judicata as the same were dealt with in two previous application. He contends that the Appellant is relitigating on issues already heard and determined. He explains that Machakos CMCC 1026 of 2004 was never heard and determined but struck out due to jurisdiction and is therefore not res judicata. Further, that the Appellant has not complied with the law. He reiterates that he is a successful litigant and entitled to the fruits of his judgement and the Appellant filed the instant application to deny him the same. Further, that he stands to be prejudiced if the application is allowed as litigation must come to an end.

The Appellant filed a further affidavit, reiterating his averments above, insisting he has a right to be heard as he will be greatly prejudiced if

he is evicted from the suit land which belongs to the deceased.

The application was canvassed by way of written submissions.

### **Analysis and Determination:**

Upon consideration of the Notice of Motion application dated the 2<sup>nd</sup> September, 2021 including the respective affidavits, annexures thereon and rivaling submissions, the only issue for determination is whether the execution of the Lower Court's Rulings dated 16<sup>th</sup> June, 2020 and 26<sup>th</sup> August, 2021 respectively as well as consequential orders thereto ought to be stayed pending the hearing and determination of the instant Appeal.

The Appellant in his submissions reiterated his averments and insisted Machakos CMCCC No. 214 of 2016 was res judicata. He explained that even if there was an application by F M Mulwa Advocate dated the 17<sup>th</sup> July, 2019 which was dismissed on 3<sup>rd</sup> December, 2019, the orders sought therein as compared to the application dated the 18<sup>th</sup> December, 2019 are considerably different. He insisted parties are bound by their pleadings and the Respondent never sought eviction orders in the Plaintiff yet the same was granted vide a Ruling to the application dated the 18<sup>th</sup> December, 2020 which was delivered on 26<sup>th</sup> August, 2021. He reiterated that the orders sought in the instant application are hence merited. To support his arguments, he has relied on the following decisions: **Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others (2017) eKLR; Aga Wanjiru Mwaniki V Jane Wanjiru Mwaniki (1997) eKLR; Victory Construction V BM (a minor suing through next friend one PMM) (2019) eKLR; Century Oil Trading Company Vs Kenya Shell Limited (Milimani) HCMA No. 1561 of 2007; and Gulf Fabricators V County Government of Siaya (2020) eKLR.**

The Respondent in his submissions insist the Appellant has not met the threshold set for grant of the orders sought. He avers that the Appellant has not demonstrated he will suffer irreparable harm or any harm whatsoever if the orders sought are not granted. He reiterates that the Court has to balance the interest of the Appellant vis a vis the Respondent who seeks to enjoy the fruits of his judgement. He contends that the instant application is res judicata. He claims that the suit he filed is not res judicata. To support his arguments, he relied on the following decisions: **Butt Vs Rent Restriction Tribunal (1982) KLR 417; Duncan Nduracha V Fuad Mohammed & 2 Others Nairobi Court of Appeal Civil Application No. 24 of 2011 (2011) eKLR; Nguruman Limited V Jan Bonde Nielsen & 2 Others CA No. 77 of 2012; Charles Wahome Gethi V Angela Wairimu Gethi (2008) eKLR; Mohammed Salim t/a Choice Butchery Vs Nasserpuria Memom Jamat (2013) eKLR; Henderson V Henderson ( 1843 – 60) ALL ER 378; The Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others Nairobi CA Civil Appeal No. 105 of 2017 (2017) eKLR; Enock Kirao Muhanji V Hamid Abdala Mbarak (2013) eKLR; Wzo Konjit Tedla & Another V Osborne Ashiono Mutumira; Water Painters International V Benjamin Ko'goo t/a Group of Women in Agriculture K'ochieng (Gwako) Ministries (2014) eKLR; Savings and Loan Limited Vs Susan Wanjiru Muritu Nairobi ( Milimani ) HCCS No. 397 of 2002 and Eric Oluoch Olele V Kenneth O. Obae ELC No. 322 of 2009.**

As to whether the execution of the Lower Court's Rulings dated 16<sup>th</sup> June, 2020 and 26<sup>th</sup> August, 2021 respectively as well as consequential orders thereto ought to be stayed pending the hearing and determination of the instant Appeal. The Appellant has sought for stay of the aforementioned two Rulings pending outcome of the instant Appeal. The Appellant claims he will suffer irreparable harm if the orders sought are not granted.

The Legal provisions governing stay pending Appeal is contained in Order 42 of the Civil Procedure Rules. Order 42 rule 6(1) of the Civil Procedure Rules provides that:

***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”***

While Order 42 Rule 6(2) of the Civil Procedure Rules states inter alia:

***“ 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”.***

Section 7 of the Civil Procedure Act, stipulates as follows in relation to res judicata:

***“”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 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”.***

In the current scenario, I note the Lower Court in its two impugned Rulings dismissed the Appellant's Applications to set aside the exparte judgement, stay execution and also declined to grant leave to enable the Appellant file an Amended Defence. From a perusal of the annexures herein, I note the Respondent had initially filed Machakos CMCCC No. 1026 of 2004 against the Appellant's father, in respect to the suit land but the said case was struck out and he later filed a fresh case in 2016 whose decisions form the fulcrum of this Appeal. The Appellant explains that his erstwhile advocate never informed him of the hearing date hence he failed to attend court to testify. The

Respondent insists the instant application is res judicata as the Appellant had filed two similar applications previously which were dismissed. Be that as it may, I have had a chance to take a cursory look at the Appellant's Defence in the lower court and I note it actually raised triable issues. Further, in one of the proceedings, I note the Respondent actually admitted that he obtained title to the suit land, sold to him by the Appellant's father but he was yet to fully settle the purchase price. Article 50 of the Constitution provides for a right to a fair hearing. The Appellant having explained that he had already filed a Defence, to my mind I find that he was indeed entitled to be heard. Insofar as the Respondent contends that the Appellant was responsible for his case in the lower court and had a Counsel, it is trite that mistake to Counsel should not be visited upon a party. I note the Appellant had already filed a Memorandum of Appeal dated 23<sup>rd</sup> June, 2020 against the impugned Rulings. Even though the Respondent is indeed the registered proprietor of the suit land and was granted orders to that effect, this court cannot ignore certain issues that were raised in the Defence touching on his title, which were never determined on merit.

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal while dealing with an issue of stay of execution pending appeal held that it is a discretionary power, a stay must be granted so that an appeal may not be rendered nugatory and judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

See the decisions in James **Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR**

In the case of **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** the Court of Appeal while dealing with the issue of res judicata stated 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”.*

While in the case of **Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa [2016] eKLR**, it was held that:

*“Counsel for the Respondent submitted on the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules and argued that the Appellants had been granted a stay of execution by the trial court and in bringing the present application it was an abuse of the court process. In my view, Order 42 Rule 6(1) allows a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the court appealed from. I appreciate the argument by the learned counsel and this court shares the same sentiment in that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be filed before another court as that would be an abuse of the court process or at best, res judicata. Unfortunately, that legal provision is part of our laws and until the same has been amended, we have no choice but to live with it as it is.”*

See also the decisions of **New Wide Garments EPZ (K) Ltd v Ruth Kanini Kioko [2019] eKLR** and **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR**.

From a perusal of the annexures in the respective affidavits which include the impugned application and Rulings, it is my considered view that since the Respondent is still on the suit land and holds it title, the orders sought will not prejudice him in any way. Further, he never sought for eviction orders in the Plaint filed in the lower court but the same were granted at an application stage.

Based on the foregoing, while relying on the legal provisions cited above and associating myself with the decisions quoted, I find that the Appellant has demonstrated he has an arguable Appeal. Further, that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Appeal. I further find that this application is not res judicata as claimed by the Respondent as under Order 42 Rule 6 (1) of the Civil Procedure Rules, a party is allowed to file a fresh application for stay of execution where the previous one had been determined by a trial court. To my mind I find that the Appellant has met the **threshold set for granting stay of execution pending appeal and will grant the orders as sought.**

It is against the foregoing that I find the Appellant's Notice of Motion application dated the 2<sup>nd</sup> September, 2021 merited and will allow it.

I will proceed to make the following final orders:

1. That the execution of the trial Court's Rulings dated 16<sup>th</sup> June, 2020 and 26<sup>th</sup> August, 2021 respectively as well as consequential orders thereto be and are hereby stayed pending the hearing and determination of this Appeal.
2. Costs will abide the outcome of this Appeal.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF MARCH, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**