



**Omwenga v Chebet (Environment & Land Case 256 of 2013)  
[2022] KEELC 2688 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2688 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 256 OF 2013**

**EO OBAGA, J**

**JULY 7, 2022**

**BETWEEN**

**EVANS MAIRURA OMWENGA ..... PLAINTIFF**

**AND**

**DANIEL C. CHEBET ..... DEFENDANT**

**RULING**

1. This is a ruling in respect of two separate applications brought by the Defendant/Applicant. The first application is dated June 28, 2021 and it seeks the following orders:-
  1. Spent
  2. Spent
  3. This honourable court be pleased to grant an order of stay of execution of the proclamation by Hegeons Auctioneers and all consequential orders arising therefrom pending the hearing and determination of the application to the Court of Appeal.
  4. The costs of this application be provided for.
2. The second application is dated September 21, 2021 and it seeks the following orders:-
  1. Spent
  2. Spent
  3. Spent
  4. Spent



5. This Honourable court do grant an order of stay of execution of the judgement and/or the decree and all consequential orders and /or proceedings arising therefrom pending the hearing and determination of Eldoret CMCR No 6586 of 2014.
6. Costs be provided for.
3. In a judgement delivered on 5<sup>th</sup> November, 2014, the Plaintiff/Respondent was declared the rightful owner of Eldoret Municipality/Block 14/783. The Respondent was also awarded general damages of Kshs 200,000/= The Applicant filed a notice of appeal which notice was subsequently withdrawn. The Applicant sought leave to appeal against the judgment but the application was dismissed. The Applicant has since filed an application for review of the application for leave which had been dismissed.
4. The Respondent then moved to execute for the taxed costs and general damages. This is what prompted the Applicant to file the two applications.
5. I will deal with the two applications together as they raise similar grounds. The Applicant contends that his notice of appeal before the Court of Appeal was dismissed as hearing notice of the application to dismiss it was served upon his previous lawyer and that this was unprocedural. The Applicant contends that he has since filed an application for review of the application which dismissed his application for leave to file appeal out of time. He states that the said application has high chances of success.
6. On the application which seeks stay of execution of the taxed costs and general damages, the Applicant contends that there is a criminal case which is pending before the lower court where he is a complainant and the accused is the Respondent in this case. He argues that the outcome of the criminal case will determine the issue of ownership of the suit property.
7. The Applicant argues that if execution is allowed to proceed and he pays the costs and decretal sum, it might be difficult to recover the same.
8. The Applicant's applications were opposed by the Respondent based on a replying affidavit sworn by the Respondent on February 10, 2022. The Respondent contends that the Applicant had filed a notice of appeal which notice was withdrawn at the instance of the Respondent. The Applicant's application for leave to appeal out of time was dismissed. The Respondent therefore argues that there is nothing pending before the Court of Appeal which will stop the execution to go on.
9. The Respondent further contends that the criminal proceedings were initiated after conclusion of the Civil case and that these applications are only meant to delay him from realizing the fruits of his judgement.
10. I have carefully considered the Applicant's two applications as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The issues which emerge for determination are firstly whether the execution herein should be stayed pending the outcome of the criminal case before the lower court. Secondly, whether there should be stay of sale pending the outcome of the criminal case.
11. It is important to note that there is no appeal pending before the Court of Appeal. What is pending before the Court of Appeal is an application for review of the ruling delivered dismissing the Applicant's application for leave to file an appeal out of time. The fact that there is a criminal case pending against the Respondent is not a reason to stay the execution process. The Respondent has a judgement in his favour which judgement has not been appealed against.



12. The execution which has been put in place is a lawful process which has to go on. Already the rights of the Respondent regarding the suit property have been determined. The criminal proceedings which are said to be in respect of a different property have no bearing to these civil proceedings. In any case, the law is clear that criminal proceedings can go hand in hand with Civil proceedings. In the case of *Alfred Lumiti Lusiba –vs- Pethad Ranik Shantilal & 2 others* (2016) eKLR, Justice Ngaah stated as follows:-

“section 193A of the Criminal Procedure Code contemplates the two processes running concurrently where facts which give rise to a cause of action are the same facts that constitute the particulars of an offense...

...the law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor not in his subsequent conviction...

...The conclusion that one can draw from section 193A of the Criminal Procedure Code together with the decisions of the learned judges in a aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.

13. The Applicant has come under the provisions of order 42 Rule 6 (1) and (2). This deals with stay of execution pending appeal. This provisions are not applicable in this case as there is no appeal pending against the judgement. There was no reference filed against the taxed costs. There is no evidence that the Respondent is incapable of refunding the costs and decretal sum in case the Applicant is allowed to appeal and the appeal goes through. This being the case, I find that the two applications are devoid of any merit. The same are hereby dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 7<sup>TH</sup> DAY OF JULY, 2022.**

**E. OBAGA**

**JUDGE**

**In the virtual presence of;**

Mr. Nyachiro for Plaintiff/Respondent.

Mr. Miyiinda for Defendant/Respondent.

Court Assistant -Albert

**E. OBAGA**

**JUDGE**

**7<sup>TH</sup> JULY 2022**

