



REPUBLIC OF KENYA



**Wambua v Musyoki (Civil Appeal E003 of 2020)
[2022] KEELC 2783 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
CIVIL APPEAL E003 OF 2020**

**CG MBOGO, J
JULY 6, 2022**

BETWEEN

JEREMIAH WAMBUA APPELLANT

AND

PIUS MBENGI MUSYOKI RESPONDENT

*(Being an Appeal from the Ruling of Honourable Mwaniki SPM in
Misc. Civil App. No 13 of 2020 at Makueni delivered on 11.11.2020)*

RULING

1. The application for determination is dated 16th November, 2020 and was filed under certificate of urgency. It is brought under Order 42 Rule 6 and Order 51 of the [Civil Procedure Rules](#), 2010 (CPR). It seeks;
 - a) Spent.
 - b) Spent.
 - c) That the Honorable Court do issue a stay order of orders made on 11th November, 2020 pending the hearing and determination of the appeal.
 - d) That costs do abide the application.
2. The application is supported by the grounds on its face, the applicant's supporting affidavit sworn on the same date and his supplementary affidavit sworn on 16th November, 2020.
3. The applicant deposed that the orders of sub-division and transfer are founded on a non-existent suit hence his rights have not been fairly adjudicated upon. A copy of the order is exhibited as JW1. That he has filed an appeal with high chances of success and a copy of the memorandum of appeal is exhibited as JW2. Further, he deposed that Makueni ELC No. 450 of 2018 relates to the same subject matter



and is still pending in Court. He deposed that the functions of a legal representative have been given to the Court Executive Officer without a justifiable cause. It is also his deposition that the learned Magistrate ignored the law, submissions and authorities cited. The submissions are exhibited as JW3. In his supplementary affidavit, he deposed that one of the decisions used by the respondent, to obtain the orders, has been stayed. He has exhibited the stay order as JW1.

4. The application is opposed through the respondent's replying affidavit sworn on 15th February, 2021. The gist of the opposition is that the application filed in the lower Court (Misc Application No. 13 of 2020) was for execution of orders to facilitate implementation of the grant dated 29th November, 2016 and issued by Machakos High Court on 11th July, 2016 in the Estate of the late Musyoki Mwini.
5. He deposed that the confirmed grant has never been challenged by the applicant or anybody else since 2016 yet the applicant has made it totally impossible for it to be implemented. That there is no stay of execution of the confirmed grant but the applicant has been using physical force and threats to totally bar its implementation.
6. He deposed that the issue of property distribution was properly dealt with and determined in Machakos High Court Succession Cause No 558 of 2009 and the orders were never challenged, stayed or appealed. Accordingly, he deposed that the honourable Magistrate cannot be said to have dealt with issues of sub-division and transfer.
7. He deposed that being a grandson, the applicant is not a direct beneficiary of the estate yet he has managed to hold all the other beneficiaries at bay. That the applicant cannot own land parcel No. Mbooni/Kalawani/827 alone and is only entitled to his father's share. That the applicant utilizes the land alone to the detriment of the other beneficiaries hence his baseless applications are only meant to delay implementation of the grant.
8. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
9. The applicant relied on the case of *Mandavia -vs- Raltan Singh* (1968) EA 146 for the submission that execution proceedings are a 'suit' and that no provision of the law permits a suit to be connived by way of a miscellaneous application. He submitted that Order 1 Rule 1 of the [Civil Procedure Rules](#) prescribes that a suit can only be instituted by plaint, petition, originating summons or judicial review.
10. He submitted that where clear procedure for redress of any particular grievance has been prescribed by [the Constitution](#) or an Act of Parliament, the same should be followed strictly. That section 3A of the [Civil Procedure Act](#) is an enabling provision and can only be applied where there is a proper suit before Court. He cited the case of [Adala -vs- Anjene](#) (1988) eKLR where the Court of Appeal stated;

“There is no procedure whereby a claim of any sort can be commenced by chamber summons. Applications are interlocutory matters in a suit. Any claim has to be commenced by plaint or where rules provide for originating summons. That the defendant has to file a defence or affidavit in answer to a claim. There are steps to be taken rather than applying wrong procedure.”



11. He submitted that Article 159 (2) of *the Constitution* is not an automatic cure of all ills and it has not rendered statutory and subsidiary legislation useless. He cited the case of *Kakuta Maimai Hamisi – vs- Peris Tobiko & 2 Others* (2013) eKLR where the Court of Appeal held;

“We don’t consider Article 159(2) (d) of *the Constitution* to be panacea, nay a general whitewash that cures and mends all ills, misdeeds and defaults in litigation.”
12. The applicant has also cited *Vilisila Kanini William –vs- Mbiti Nthuka* (2018) eKLR where the Court held that;

“Refusing to sign mutation form is a dispute itself. Applicant has not shown the Court the provision of the law that mandates him to commence current action by way of notice of motion instead of plaint. Miscellaneous Application is hereby dismissed with costs.”
13. He submitted that the Court lacks jurisdiction and cited the case of *Kenindia Assurance Co. Ltd –vs- Oriende* (1989)2 KLR 162 where it was held that the normal rule that a party cannot raise for the first time on appeal a point he had failed to raise in the High Court does not apply when the issue sought to be raised for the first time on appeal goes to jurisdiction.
14. In his further submissions, he submitted that orders of transfer, partition and sub-division were not included in the certificate of grant and can only be granted in a pure civil suit because they are substantive orders. He contends that if the sub-division is implemented, then the appeal will be rendered useless.
15. The respondent’s submissions are a replica of his replying affidavit. Additionally, he submitted that the applicant objected to the application for execution but the honourable magistrate considered the objection and made orders which he deemed fit for justice to prevail. He contends that the applicant wants this Court to give stay orders against implementation of its own orders yet there is no appeal against them.
16. Having read the application, the supporting and supplementary affidavits as well as the replying affidavit and the rival submissions, I do note that it is not in dispute that land parcel Mbooni/ Kalawani/827 (suit land) belongs to the estate of Musyoki Mwini. Machakos Succession Cause No 558 of 2009 was filed with respect to the estate and was initially determined in 2010 resulting in the certificate of confirmation of grant dated 2nd October, 2010. The respondent herein, a grandson of the deceased, applied to have the grant revoked and through a ruling delivered on 11th July, 2016, Nyamweya J ordered that the suit land be shared equally among eight beneficiaries including the applicant and respondent.
17. It is also not in dispute that no appeal has ever been filed against the ruling. It is that ruling which the respondent sought to implement through his application in the lower Court and it is that lower Court application which gave rise to the impugned orders of 11th January, 2020. The applicant contends that they were founded on a non-existent suit.
18. Separately, the suit land is the subject matter in Makueni ELC No. 450 of 2017 in which the respondent is seeking a declaration that he has acquired it through adverse possession. The respondent filed a preliminary objection (P.O) to have the suit struck out and while a ruling on the same was pending, the applicant filed another application seeking to arrest the ruling on the P.O. Unfortunately, the new application was never brought to the Court’s attention and the Court proceeded to deliver its ruling. Vide a ruling dated 26th May, 2020, the Court upheld the P.O and proceeded to strike out the suit with costs.



19. Shortly thereafter, the application seeking to arrest the ruling was brought to the Court's attention. One of the grounds in the application was that the applicant had filed an appeal against the order to strike out the suit. This Court proceeded to stay the decision made on 26th May, 2020 on the following condition;

“...that the plaintiff/applicant files his record of appeal at the Court of Appeal within the next 120 days from the date hereof (19th November, 2020) failure of which the order of stay will lapse.”

20. The period of 120 days given by this Court lapsed on or about 19th March, 2021. The application currently under consideration was filed on 16th November, 2020 and parties were last in Court on 12th May, 2021 when the Court informed them that the ruling would be delivered on notice. As at that date (12th May, 2021), no material or information had been furnished to this Court to show compliance with the 120-days condition. Accordingly, this Court can safely conclude that the default clause has kicked in and as such, Makueni ELC No. 450 of 2017 stands struck out.

21. Having said that, I see no other reason for staying the Orders issued by the Lower Court. As correctly submitted by the respondent, the matter before the lower Court did not require a suit because the substantive matter had already been dealt with by the Machakos High Court. The lower Court was simply dealing with implementation and the fact that the High Court decision has never been appealed, it is really untidy to expect this Court to stand in the way of its implementation yet the High Court and Environment and Land Court are Courts of equal status.

22. The upshot is that the application dated 16th November, 2020 has no merit and is hereby dismissed. Costs to the respondent.

SIGNED AND DELIVERED AT NAROK VIA EMAIL ON THIS 6TH DAY OF JULY, 2022

C. MBOGO

JUDGE

6/7/2022

In the presence of:-

CA:T.Chuma

