



REPUBLIC OF KENYA



KENYA LAW
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**Athman & 24 others v Kenya Airports Authority (Environment & Land
Case 78 of 2014) [2022] KEELC 14564 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 78 OF 2014
MAO ODENY, J
NOVEMBER 1, 2022**

BETWEEN

MOHAMED BWANA OBO ATHMAN 1ST PLAINTIFF
SWALEH ATHMAN BULO 2ND PLAINTIFF
PETER KINYAJUI 3RD PLAINTIFF
SAKINABAI AMIRALI 4TH PLAINTIFF
FATUMA OMAR 5TH PLAINTIFF
MOHAMED BAKARI KUCHI 6TH PLAINTIFF
KHADIJA MZEE 7TH PLAINTIFF
FATUMA SHARIFF 8TH PLAINTIFF
HASSAN BAUSI 9TH PLAINTIFF
STAMBULI SHALLY 10TH PLAINTIFF
DAVID MWANDIKWA 11TH PLAINTIFF
JOSEPH KYALO 12TH PLAINTIFF
JOSEPHAT MUSYOKA 13TH PLAINTIFF
CHRISTOPHER MWENDAKA MUKITI 14TH PLAINTIFF
ABDALLA MOHAMED SAID 15TH PLAINTIFF
MARYAM SWALEH AHMED 16TH PLAINTIFF
BEATRICE MUUSI KASINA 17TH PLAINTIFF
SAID KIDALA 18TH PLAINTIFF
FRANCIS NJENGA MWANGI 19TH PLAINTIFF



JUMA ALI 20TH PLAINTIFF
CHRISTINE CHAO 21ST PLAINTIFF
ALI GUBO 22ND PLAINTIFF
OMAR BAKA 23RD PLAINTIFF
BWARAHATI ALI MOHAMED 24TH PLAINTIFF
AHMED MOHAMED OBO 25TH PLAINTIFF

AND

KENYA AIRPOTS AUTHORITY RESPONDENT

RULING

1. This ruling is in respect of a notice of motion dated December 10, 2021 by the 25th plaintiff/applicant seeking the following orders; -
 - a. Spent
 - b. That pending inter-partes hearing of the instant application, this honourable court be pleased to issue temporary order of stay of the execution of the judgment delivered by Hon Justice J Olola on the September 25, 2020 and in particular stopping or restraining the defendant/respondent by itself, agents, employees, servants, assignees and all other any person claiming under it from forcibly evicting the 25th plaintiff/applicant herein from all that portion of land he is settling on and occupying by right of prescription and/or or by way of adverse possession of portion of land Number 21 Lamu and registered as CR 35XXX.
 - c. That upon inter-partes hearing, this honourable court do review and set aside the said judgement delivered on September 25, 2020 and do order for direct reassessment and reevaluation of the interests, development and property on the suit property belonging and owned by the 25th plaintiff/applicant be done and/or be carried out for just, adequate and proportionate compensation as provided for in law.
 - d. That upon considering prayer (3) above and before making a determination and delivery of the ruling, this honourable court do make a site visit (locus quo) at Manda Island in Lamu County for observation and ascertainment of the ground status and the prevailing conditions in order to adequately adjudicate and make a good finding in the interest of justice.
 - e. That upon granting of prayer (4) above this honourable court be pleased to order and direct that the 25th plaintiff/applicant do cater for all the expenses of making the site visit (locus quo) in terms of transport, accommodation and subsistence of the judge and her judicial team.
 - f. That the court be pleased to make such other interlocutory orders as may appear to the court to be just and convenient.
 - g. That costs of this application be in the cause.
2. Counsel agreed to canvas the application by way of written submissions but only the respondent filed the same.



3. The applicant relied on the grounds on the face of the application together with the supporting affidavit of Ahmed Mohamed Obo who deponed that he is the owner of the suit property by right of prescription and/or by way of adverse possession which suit property is a subject of compulsory acquisition by the defendant for the proposed extension of the Lamu (Manda) Airport with a resolution that the defendant/respondent would compensate him together with the other plaintiffs.
4. It was the applicant's case that he had done extensive developments which were undervalued for compensation and that he occupies the suit property together with his family by virtue of the allotment letter dated September 24, 1998 and if evicted he stands to suffer irreparable loss as the commercial value of the property and interests is Kshs 55,89,000/-.
5. The applicant urged the court to allow the application as prayed.
6. In response to the application, the respondent filed a replying affidavit dated March 16, 2022 sworn by Margaret Munene the Ag corporation secretary who stated that the applicant together with his fellow plaintiffs filed a suit on April 25, 2014 together with an application seeking injunctive orders which application was heard and dismissed.
7. That following the dismissal of the application, the plaintiffs lost interest in the suit and the respondent moved the court vide an application dated June 6, 2018 to dismiss the plaintiffs' suit for want of prosecution which application was allowed on July 10, 2018 and the defendant's counterclaim was set down for hearing which was determined in favour of the defendant on September 25, 2020 thus the application for stay is inordinately late.
8. The respondent urged the court to dismiss the plaintiff's application with costs.

Respondent's submissions

9. Counsel gave a background to the suit and submitted that after dismissal of the plaintiff's suit for want of prosecution the court set the hearing of the defendant's counter-claim and that the applicant's counsel on record then, was served with a hearing notice but failed to appear in court when the court heard the defendant's counter-claim and judgment was delivered on the September 25, 2020 in favour of the defendant.
10. It was counsel submission that it is now over two (2) years from the date of delivery of the said judgment and the applicant has never moved the court with any application for setting aside and/or to vary the said judgment hence this application was not filed expeditiously.
11. Counsel for the defendant submitted that the plaintiff had previously filed another suit touching on the subject matter being Malindi HC ELC No 141 of 2013, in which suit the plaintiff's application seeking injunctive orders to restrain the defendant was dismissed on November 1, 2013 and further that the plaintiff thereafter withdrew the suit on November 1, 2016.
12. Ms Kaguri submitted that it is not in dispute that the defendant is the legal and beneficial owner of the suit property having been conferred with grant number CR35XXX/1 on June 14, 2002 and a title was issued to the authority by the government of Kenya for the property measuring 194.0 Hectares for the operations of an airport; airport taxiways, parking aprons and airport terminals.
13. According to counsel the squatters including the applicant were made aware by Kenya Airport Authority, local government and the local leaders that the subject property was public land and advised to vacate with immediate effect to enable expansion of the airstrip and also for security purposes as the suit property is located within the Manda airport land which belongs to the defendant but they did not take heed.



14. Counsel submitted that it is on record that October 8, 2012, the defendant commissioned the Ministry of Lands, Housing and Urban Development to carry out a valuation for compensation of improvements owned by people within the Manda Airport area purely on humanitarian grounds (CSR) as the subject property was a public land owned by the defendant and further that it is also of great public interest that the Manda Airstrip is expanded as the economic benefits as it will afford the locals and Lamu County at large is quite enormous.
15. Ms Kaguri submitted that pursuant to the request, the Ministry of Lands proceeded to carry out the said valuation setting out precisely the amount payable to each squatter but the 25th plaintiff/applicant herein refused to cooperate for inspection of his improvements as seen in the said report and that the respondent prepared payment cheques in favour of the squatters named in the report for their collection.
16. According to counsel at no time has the 25th plaintiff been the registered owner of the subject land as alleged and the 25th plaintiff's claim through adverse possession and/or prescription cannot stand the scrutiny of the law, as a person cannot in law claim adversely against the government.

Analysis and determination

17. The issues for determination is whether the applicant has met the threshold for grant of stay of execution and whether the orders sought for review of can be granted.
18. I must say that the orders sought in this application are a mouthful and warped. It is not clear exactly what the Applicant is seeking for. The application is brought in a way that seems to be arguing the main suit which was dismissed.
19. The application is seeking for stay of execution and review of the judgment but from the wording as earlier stated is warped.
20. Order 45 rule 1 of the [Civil Procedure Rules](#) provides that: -

' 1.

- (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'



21. The court can only review its orders or decree if there is any discovery of new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or there was a mistake or error apparent on the face of the record; or there were other sufficient reasons; and finally that the application must be made without undue delay.
22. This application has been brought after more than 1 year and no explanation has been advanced as to why the applicant did not make the application timeously.
23. Further the applicant does not say that there was an error on the face of the record or that the applicant has discovered a new and important matter which after the exercise of due diligence, was not within his knowledge at the time the decree was passed or the order was made.
24. This application therefore does not meet the threshold for review. In the case of *Muyodi vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*, the Court of Appeal described an error apparent on the face of the record as follows:

' In *Nyamogo & Nyamogo -vs- Kogo (2001) EA 174* this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.'

25. It is also trite that what may be sufficient grounds of appeal may not be reasons for a review. The court cannot sit in appeal over its own judgment.
26. As regards the prayer for stay, it is stay pending what as the orders sought are for review are not tenable and have already been disallowed. The principles governing applications for stay of execution are well settled and are governed by the provisions of order 42 rule 6 which states as follows: -
 - (2) No order for stay of execution shall be made under subrule (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.
27. Similarly in the case of *Equity Bank Ltd vs Taiga Adams Company Ltd [2006] eKLR* and also in *Elena D Korir vs Kenyatta University [2012] eKLR*, the court 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 vs Straman EA Ltd (2013) eKLR and Hassan Guyo Wakalo vs Straman FA Ltd [2013/eKLR in which it was held thus; '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'

28. The court has discretion to allow an application for stay of execution if an applicant's meets the conditions set under order 42 rule 6 of the Civil Procedure Rules. The applicant has not stated why it took him more than 1year to file this application and therefore the applicant was indolent as the court delivered the judgment on September 25, 2020 while the instant application was filed on December 10, 2021.
29. I have considered the application, the submissions by counsel and find that the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

