



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCC No. 65 OF 2013**

**THOMAS MUTERE KUSIENYA.....PLAINTIFF**

**VERSUS**

**JAMIN JUMA WEKESA AND 12 OTHERS.....DEFENDANTS**

**RULING**

1. Judgment was delivered in this matter on 26<sup>th</sup> September 2018 by N.A. Matheka J. The plaintiff's suit was struck out with costs to the defendants. Subsequently, the plaintiff filed Notice of Motion dated 17<sup>th</sup> March 2020 seeking the following orders:

*a) There be stay of execution of the judgement and or decree and all consequential orders and proceedings herein pending the hearing and determination of KISUMU C.A.C.A NO. 157 OF 2018.*

*b) Costs of this application be in the cause.*

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he filed KISUMU C.A.C.A NO. 157 of 2018 being an appeal against the judgment herein. That his appeal has overwhelming chances of success and that it is in the interest of justice that he be granted the orders sought.

3. Jamin Juma Wekesa, the 1<sup>st</sup> defendant, opposed the application through a replying affidavit in which he deposed that the defendants are in possession of the suit property and that they will suffer substantial loss if stay is granted. That the Court of Appeal dismissed a similar application for stay on 5<sup>th</sup> March 2021 in KISUMU C.A.C.A NO. 157 of 2018.

4. The application was canvassed through written submissions. Only the applicant filed submissions.

5. Although the 1<sup>st</sup> defendant asserted that a similar application for stay of execution pending appeal had been dismissed by the Court of Appeal, none of the parties exhibited a copy of the ruling. If indeed the issue of stay of execution of the judgment has been determined by the Court of Appeal, I would have to down my tools as is demanded by **Section 7 of the Civil Procedure Act**.

6. Despite the parties' failure to provide the necessary information as regards the status in the Court of Appeal, I am not entirely helpless. Under **Section 19 of the National Council for Law Reporting Act, 1994** all superior courts are required to, as soon as practicable after delivering a judgment, ruling or an opinion, cause a copy of it to be furnished to the editor of the Kenya Law Reports for publishing in the Kenya Law Reports pursuant to **Section 3** of the Act.

7. A perusal of the Kenya Law Reports reveals a ruling of the Court of Appeal reported as **Thomas Mutere Kusiienya v Jamin Juma Wekesa & 12 others [2021] eKLR**, being a ruling on "An application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Environment and Land Court of Kenya at Kakamega (N. A. Matheka, J.) dated 26<sup>th</sup> September, 2018 in Kakamega ELC Case No. 65 of 2013". The court sated as follows in the ruling which was delivered on 5<sup>th</sup> March, 2021:

*[1] The instant Notice of Motion, dated 29<sup>th</sup> June, 2020 is taken out by Thomas Mutere Kusiienya (the applicant). He is seeking an order of stay of execution of the judgment delivered on 28<sup>th</sup> September, 2018 in Kakamega ELC No 65 of 2013 (N. A. Matheka J.,) ...*

*[8] The applicant having not demonstrated how an appeal from a negative order striking out a suit will be rendered nugatory, we have come to the conclusion that the motion dated 29<sup>th</sup> June, 2020 cannot succeed and is for dismissal. We make no order as to costs since the motion was not opposed.*

8. I therefore agree with the 1<sup>st</sup> defendant that the issue of whether or not the judgment herein could be stayed pending appeal has been determined by the Court of Appeal. In the circumstances Notice of Motion dated 17<sup>th</sup> March 2020 offends **Section 7** of the **Civil Procedure Act** and is therefore *res judicata*. I strike it out with costs to the 1<sup>st</sup> defendant.

**Dated, signed and delivered at Kakamega this 9<sup>th</sup> day of November 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Akwala for the Plaintiff/Applicant

No appearance for the 1<sup>st</sup> Defendant/Respondent

No appearance for the 2<sup>nd</sup> to 13<sup>th</sup> Defendants/Respondents

Court Assistant: E. Juma