



**Nasambu v Sifuna & another (Civil Suit E041 of 2023)
[2024] KEHC 10965 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E041 OF 2023
JK NG'ARNG'AR, J
SEPTEMBER 23, 2024**

BETWEEN

**JOSELYNE NASAMBU JUMA ALIAS JOSELYNE NASAMBU
SIFUNA PLAINTIFF**

AND

**DAVID KINISU SIFUNA 1ST DEFENDANT
NELSON MUTURI DUMBEYIA 2ND DEFENDANT**

RULING

1. The Plaintiff/Applicant filed a Notice of Motion Application dated 8th December 2023 under Certificate of Urgency pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 Rule 15 (1) (d) and Order 42 Rule 6 and Order 43 (1) (h) (y) of the Civil Procedure Rules and all other enabling provisions of the law.
2. The Applicant prays for an order for stay of execution of the order for the payment of costs of Kshs. 220,000/- to the 2nd Defendant in the tune as ordered in the ruling dated 21st November 2023 pending the hearing and determination of the intended appeal. The Applicant also prayed that costs of the application be in the intended appeal.
3. The application was premised on grounds set out therein and on the Supporting Affidavit of sworn by the Applicant that the Plaintiff/Applicant's case was dismissed for want of jurisdiction on 21st November 2023 where the Plaintiff/Applicant was condemned to pay costs in the sum of Kshs. 220,000/-. That the Plaintiff/Applicant being aggrieved filed a Notice of Appeal challenging the entire decision. That the appeal has high chances of success, that if the orders of stay are not granted the 2nd Defendant will execute rendering the entire appeal nugatory, that the application has been made without unreasonable delay, that the Plaintiff/Applicant's right to matrimonial property will be greatly prejudiced in the event that stay is not granted, that the Plaintiff is willing and ready to abide by terms



and conditions for satisfaction of the grant of the orders sought herein and in particular are ready to deposit the entire sum of Kshs. 220,000/- in court forthwith.

4. The 1st Defendant/Respondent filed an affidavit in reply sworn on 20th December 2023 that in its decision of 21st November 2023, the court ordered him and the Plaintiff/Applicant jointly and severally to pay costs to the 2nd Defendant in the tune of Kshs. 220,000/- within 30 days from the date of the ruling. That under the law, the 2nd Defendant who is acting in person in this matter is not entitled to the costs and if at all he is entitled to any costs, then the same is limited to filing fees and photocopying charges incurred. That the award of costs of Kshs. 220,000/- was therefore on the higher side and will definitely form a ground of appeal in the intended appeal.
5. The 1st Defendant averred that the 2nd Defendant on several occasions categorically declined an offer from the 1st Defendant to release the 1st Defendant's Mombasa title in exchange for payment of his legal fees under lien and have the pending matter between them settled out of court is now making frantic efforts to recover costs which would not have arisen had he accepted his payment in the first place. That the 2nd Defendant is in possession of the title of the suit property and that is sufficient security for the 2nd Defendant's awarded costs. That it is only fair that security be deposited in court so as to be accessed easily depending on the outcome of the intended appeal.
6. The 2nd Defendant/Respondent filed a Replying Affidavit sworn on 13th December 2023 that the law on stay of execution of money decrees is well settled and that the test is in the ability of the money decree holder refunding money once paid. That the Plaintiff's fear that the suit property is a matrimonial home have been secured by an order of stay pending appeal in ELC Case No. 280 of 2015 Nairobi. That the 1st Defendant in the said suit conceded that the 2nd Defendant is capable of refunding the value of the suit property in the event the appeal succeeds. That the Plaintiff is not candid to this court by saying that paying Kshs. 220,000/- out of the millions they have been reaping from L.R. TRANS-NZOIA/KAPOMBOI/193 will make her suffer substantial loss, and that she would rather deposit the sum in court than pay the 2nd Defendant. The 2nd Defendant therefore prayed for dismissal of the application.
7. The application was canvassed by way of written submissions. The Plaintiff/Applicant in their submissions dated 23rd January 2024 relied on Order 42 Rule 6 and Order 43 Rule 1 (h) (y) of the Civil Procedure Rules which requires that for an application to succeed, he/she ought to demonstrate that the Applicant will suffer substantial loss unless the order is made, that the application has been made without unreasonable delay, and the Applicant is willing to provide security as the court may order as was held in the case of *Antoine Ndiaye v African Virtual University (2015) eKLR*. The Plaintiff/Applicant also urged the court to be guided by the decision in *RWW v EKW (2019) eKLR* to preserve the subject matter so that the appeal is not rendered nugatory, and the holding in *Vishran Rarji Halai v Thomson Turpin (1990) KLR 365, Civil Application No. 15 of 1990* on whether the appeal has triable issues to warrant stay of execution.
8. The Plaintiff/Applicant submitted that the order for payment of costs was made by the court suo moto and the Applicant was not granted an opportunity to oppose the order for costs and the amount assessed. The Plaintiff/Applicant relied on the decisions in *Malkinson v Trim (2003) ALL ER*, *Charles Lutah Kasamani t/a Kasamani & Co. Advocates v Patrick Johnson Okwaro & Anor.* and *Republic v Preliminary Committee & 5 Others (Nairobi JR APP No. 45 of 2019)* where the courts have been consistent that a party who did not instruct an advocate cannot recover or be awarded costs based on the Advocate's Remuneration Order. That the Plaintiff also intends to challenge the decision of this court on jurisdiction and that the dispute was not over ownership or use of land but a clear issue of



commercial transaction where the 1st Defendant failed to obtain an express consent from the Plaintiff before entering into such transaction with the 2nd Defendant.

9. The 1st Defendant/Respondent in their submissions dated 18th January 2024 contended that the costs awarded to the 2nd Defendant were not merited and remains largely an error on the face of the court record. That the 2nd Defendant appeared in this matter as a litigant and not as an advocate representing himself and as such he is only entitled to disbursements incurred in the case. The 1st Defendant/Respondent also argued that the intended appeal is merited with overwhelming chances of success and hence it is only proper and just that the disputed amount for costs be deposited in court as security pending the intended appeal. That the court's power to grant costs to any party to a suit is provided for under Section 27 (1) of the *Civil Procedure Act*. That however, the powers ought to be exercised judiciously as was observed by the Supreme Court in *Petition No. 4 of 2012* (Jabir Singh Rai Case) in citing the case of *Joseph Oduor Anode v Kenya Red Cross Society (2012) eKLR, Nairobi High Court Civil Suit No. 66 of 2009*. The 1st Defendant/Respondent prayed that the application herein be allowed.
10. The 2nd Defendant/Respondent in their submissions dated 23rd January 2024 argued that the Plaintiff has not alleged anywhere in her application that the 2nd Defendant would be incapable of refunding the decretal amount for costs if her appeal was successful.
11. After considering the Plaintiff/Applicant's Notice of Motion application dated 8th December 2023, Replying Affidavits by the 1st and 2nd Defendants and submissions by all the parties, the issue for determination is whether the instant application is merited.
12. The court herein dismissed the Plaintiff/Applicant's case for want of jurisdiction on 21st November 2023 where the Plaintiff/Applicant and the 1st Defendant/Respondent were condemned to pay costs in the sum of Kshs. 220,000/- to the 2nd Defendant/Respondent within 30 days from the date of the ruling.
13. I find that this court having delivered the ruling dismissing the Plaintiff/Applicant's case discharged its duty on the appeal and therefore became functus officio as was held in *Election Petitions Nos. 3, 4 & 5 Raila Odinga & others v IEBC & others (2013) eKLR* cited with approval an excerpt from an article by Daniel Malan Pretorius, in 'The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law' (2005) 122 SALJ 832 that: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”
14. This court therefore has downed its tools and cannot consider whether the conditions for grant of the order of stay pending appeal have been met. The proper forum to consider the merits or otherwise of the application for stay is the Court of Appeal where the Plaintiff/Applicant intends to file the appeal.
15. The upshot is that the application dated 8th December 2023 lacks merit and is dismissed with costs to the 2nd Defendant/Respondent.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD SEPTEMBER 2024.

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J.K. NG'ARNG'AR, HSC



JUDGE

In the presence of: -

Takah Advocate for the Plaintiff/Applicant (holding brief)

No appearance Advocate for the 1st Defendant/Respondent

Muturi Advocate for the 2nd Defendant/Respondent

Court Assistant – Mr. Samuel Shitemi

J.K. NG'ARNG'AR, J.

