Kamoro v Waweru (Environment and Land Appeal E010 of 2023)
[2025] KEELC 4813 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4813 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E010 OF 2023

JO MBOYA, J

JUNE 26, 2025

BETWEEN

EZEKIEL KAMORO ..... APPELLANT

AND

GEORGE MAINA WAWERU ..... RESPONDENT

RULING

1. What is before me is an Application dated 10th June 2025; brought pursuant to the provisions of sections 1A, 1B and 3B of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; order 42 rules 6 and order 51 rules 1 & 2 of the civil Procedure Rules 2010 and wherein the applicant has sought the following reliefs:

    i. That this Application be certified as extremely urgent and service of the same dispensed with in the first instance.

    ii. That pending inte-rpartes hearing and determination of this application, this Honourable court be pleased to stay execution of the Judgment delivered herein on 18th March 2024 together with the Judgment delivered in Isiolo CMELC No. 96 of 2018 on the 30th May 2023 and all consequential orders emanating therefrom.

    iii. That pending hearing and determination of Nyeri Civil Appeal NO. E077 of 2024 this honourable court be pleased to stay execution of the judgment delivered herein on 18th March 2024, together with the judgment delivered in Isiolo CMELC No. 96 of 2018 on the 30th May 2023 and all consequential orders emanating therefrom.

    iv. That the Costs of this Application be provided for.

2. The instant application is premised on diverse grounds which have been enumerated in the body thereof. In addition, the application is supported by an affidavit sworn by Ezekiel Kamoro [deponent]

on even date. Furthermore, the deponent has annexed various documents, including a copy of the judgment issued by the subordinate court as well as the judgment of this court [differently constituted].

3. The respondent filed a replying affidavit sworn on 25th of June 2025 and wherein same has opposed the subject application. In particular, the respondent has averred that the subject application has been mounted with unreasonable and inordinate delay; the orders of this court were negative in nature; that the orders sought are not merited and that the application constitutes an abuse of the due process of the court.

4. The application came for hearing today 26th June 2025, whereupon the advocates for the parties covenanted to canvass the application by way of oral submissions. Suffice it to state that the submissions rendered on behalf of the respective parties are on record.

5. Learned counsel for the applicant adopted the grounds at the foot of the application and reiterated the contents of the supporting affidavit. Furthermore, learned counsel for the applicant proceeded to and highlighted three [3] key issues namely; that the applicant has established a likelihood of substantial loss arising if the orders are not granted; that the applicant is ready and willing to abide by the conditions that the court may deem fit to grant; and that the appeal filed before the Court of Appeal at Nyeri shall be rendered nugatory unless the orders sought are granted.

6. Regarding the first issue, learned counsel for the applicant has submitted that the respondent herein has since commenced the process of evicting the applicant from the suit property. To this end, learned counsel referenced the grounds contained at the foot of the application and in particular grounds 2 & 3 thereof. In addition, it was contended that if the threatened eviction proceeds, then the applicant shall suffer substantial loss. To this end, the court was implored to grant the orders of stay so as to preserve the status obtaining on the suit property.

7. Secondly, learned counsel for the applicant has submitted that the applicant is ready and willing to abide by and or comply with the conditions that the court may deem just, expedient and appropriate to grant. Furthermore, learned counsel added that the willingness extends to the provision of security for costs, if necessary.

8. Thirdly, learned counsel for the applicant has submitted that the appellant herein has since filed an appeal at the Court of Appeal sitting at Nyeri and hence the said appeal [namely, Nyeri civil appeal No. E077 of 2024] shall be rendered nugatory.

9. In the course of the submissions by the learned counsel for the applicant, the court drew the attention of counsel to the fact that the supporting affidavit had been commissioned by one Mr. Shaffin W.O Kaba Advocate and Commissioner of Oath of P.O Box 1250 – 6200 Meru and yet it is the said advocate who has been prosecuting the subject matter on behalf of the applicant. In response, learned counsel conceded that same is associated with the law firm but posited that same is merely holding brief for Mr. Maranya advocate.

10. Arising from the foregoing, learned counsel for the applicant contended that the commissioning of the subject affidavit drawn by the very law firm for which same is associated with does not contravene the provisions of Section 4 of the Oaths & statutory Declaration Act Cap 15 Laws of Kenya.

11. The respondent adopted the replying affidavit sworn on 25th June 2025; and thereafter highlighted four [4] salient issues. Firstly, learned counsel for the respondent submitted that the supporting affidavit, which has been commissioned by Mr. Shaffin Kaba advocate, contravenes the provisions of section 4 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya. To this end, learned counsel drew the attention of the court to the fact that the advocate Mr. Shaffin Kaba is indeed working in the law firm of M.D Maranya & Co. Advocates, who are the advocates for the applicant herein. Furthermore,

learned counsel submitted that Mr. Kaba Advocate has indeed been holding brief for Mr. Maranya in various matters, including the subject matter. In this regard, it was posited that the supporting affidavit was/is invalid.

12. Secondly, learned counsel submitted that the judgment of this court, which was rendered on 18th March 2024, found the appeal to be devoid of merit[s]. In this regard, the court proceeded to and dismissed the appeal. In so far as the appeal was dismissed, learned counsel for the respondent has posited that what came out of the judgment was a negative decree and thus same is incapable of being stayed.

13. Thirdly, learned counsel submitted that the appeal that was filed before this court has since been disposed of and thus the application for stay is misconceived. To this end, counsel submitted that the application does not meet the conditions envisaged vide Order 42 Rule 6 of the Civil Procedure Rules 2010.

14. Finally, learned counsel for the respondent submitted that the ongoing execution relates to the recovery of costs, which were granted by the court at the time the appeal was dismissed. It was contended that the recovery of costs cannot be subject to an order of stay of execution, either in the manner sought or at all.

15. Having reviewed the application beforehand,; having taken into account the response thereto and upon consideration of the submissions canvassed on behalf of the respective parties, I come to the conclusion that the determination of the subject application turns on four [4] key issues; namely; whether the supporting affidavit contravenes the provisions of section 4 of the oaths and statutory declaration act or otherwise; whether the decree of the court sought to be stayed was/is a negative decree and if so, whether same is capable of being stayed; whether the application has been mounted with unreasonable and inordinate delay and if so, whether same is defeated by the doctrine of laches; and whether execution for costs can be stayed or otherwise.

16. Regarding the first issue, it is instructive to note that learned counsel Mr. Shaffin W.O Kaba advocate, practices in the law firm of M/s M.D Maranya & Co. Advocates, who are the advocates on record for the applicant herein. Furthermore, there is no gainsaying than the said Mr. Shaffin Kaba Advocate, is the one who appeared before this court and canvassed the application on behalf of the applicant.

17. On the other hand, it is also not lost on this court that the said Mr. Shaffin Kaba advocate has affixed a stamp bearing the postal address of 1250 – 60200 Meru; which is the same address used by the law firm ofM/s M.D Maranya & Co. Advocates. Quite clearly, Mr. Shaffin Kaba advocate is either a partner, associate or in one way or the other connected with the said law firm that is acting for the applicant.

18. The question that does arise and which this court must grapple with is whether an advocate/ commissioner for oaths can administer an oath in an affidavit/declaration crafted by the law firm in which same is a partner, associate or connected in one way or the other.

19. To my mind, the provisions of section 4 of the Oaths and Statutory Declaration Act, cap 15, Laws of Kenya, are succinct and apt. The said provisions stipulates as hereunder:

    Powers of commissioner for oaths

    1. A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

20. To my mind, the proviso to section 4 of the Oaths and Statutory Declaration Act [supra] does not admit of in-house commissioning of documents. On the contrary, the said proviso bars and prohibits such conduct. Moreover, where an affidavit is commissioned in contravention of section 4 of the Oaths and Statutory Declaration Act, the subject affidavit is rendered invalid. Such an affidavit is illegal, void and thus incapable of being utilized before a court of law.

21. Flowing from the foregoing, I find and hold that the supporting affidavit sworn on the 10th June 2025 and commissioned by Mr. Shaffin Kaba advocate/commissioner of oaths, is incompetent and thus same be and is hereby expunged from the record. Suffice it to state that the expunction of the said affidavit deprives the application of evidential anchorage. In this regard, the application similarly becomes defective and incompetent.

22. Turning to the issue of whether or not the judgment of this court which is sought to be stayed birthed a negative decree or otherwise, it is instructive to recall and reiterate that the learned judge found and held that the appeal was devoid of merits. Thereafter, the learned judge dismissed the appeal with costs to the respondents.

23. It is the decree that came out of the said judgment that is now sought to be stayed by the applicant pending the hearing and determination of an appeal to the court of appeal, namely; Nyeri Court of Appeal, Civil Appeal NO. E077 of 2024. However, the question that does arise is whether the judge commanded the applicant to do or to abstain from doing anything or otherwise.

24. I hasten to state that what the learned judge did was to dismiss the appeal. The dismissal of the appeal culminates into a negative decree. Such a negative decree cannot attract an order of stay of execution, either in the manner sought or at all. [See the holding[s] in Western College of Applied Science & Technology vs Oranga (1976) eKLR; Charles Barongo Nyakeri vs The county Government of Kisii (2020) eKLR; Oliver Collins Wanyama vs the Engineering Regulatory Board (2019) eKLR; Kaushik Panchamatia & 3 others v Prime Bank Limited & another [2020] KECA 418 (KLR); and the Registered Trustees, Kenya Railways Pension Benefit Staff Scheme vs Milimo Muthomi & Co. Advocates (2022) KECA].

25. In my humble view, the judgment of the learned judge, which underpins the decree sought to be stayed, was negative in nature. To this end, there is no gainsaying that no order of stay can issue or at all.

26. Other than the foregoing, I am also alive to the fact that the lower court did not issue and or grant any eviction order. Suffice it to posit that the decree by the subordinate court only granted an order of permanent injunction. The connotation of the decree of the subordinate court is to the effect that the applicant herein was not in occupation of the suit property and thus same was prohibited from entering.

27. To my mind, even the judgment and decree of the subordinate court [which merely granted an order of permanent injunction and cost] cannot mutate to become an eviction order so as to warrant an order of stay.

28. Whichever way one looks at the decree of this court and that of the subordinate court, it is evident that the application for orders of stay is misconceived. In this regard, I hold the view that the application beforehand has been mounted in a vacuum.

29. Next is the issue of whether the application has been filed with unreasonable and inordinate delay and if so, whether the delay has been accounted for. Instructively, the judgment and decree of this court that is sought to be stayed was delivered on 18th March 2024. The application before the court, was, however, not filed until the 10th of June 2025. The duration under reference amounts to more than 15 months.

30. What I have to ask myself is whether the duration taken is unreasonable and inordinate. Suffice it to state that the duration under reference is ex-facie [on the face of it] unreasonable. In any event, the statement that the duration is unreasonable does not aptly capture the extent of delay.

    The correct terminology is that the delay is grossly unreasonable and thus inordinate.

31. I am alive to the fact that the law does not prescribe what duration is unreasonable and inordinate, but it is ordinarily incumbent upon a party to isolate; identify and thereafter explain every bit of delay. [see Andrew Chemaringo vs Paul Kipkorir Kiplagat (2018) eKLR].

32. Nevertheless, in respect of this matter, there is no gainsaying that the applicant has neither found it just nor expedient to account for the delay. For good measure, there is not even a single paragraph to explain the reason why the application was not made timeously and with due promptitude. In the absence of any explanation, the only inference to be drawn is that there is no explanation. To this end, what comes to the fore is that the delay was intentional, deliberate and thus inordinate.

33. In my humble view, all litigants, the applicant not excepted, are called upon to exhibit due diligence and proactiveness. [See the provisions of sections 1A & 1B of the *Civil Procedure Act*. [see also article 159 [2] [b] of *the Constitution* 2010. Where such diligence is absent, Equity cannot come to the aid of the Applicant. Suffice it to posit that Equity only aids the vigilant and not the indolent.

34. In a nutshell, I come to the conclusion that the current application is defeated by the doctrine of laches. [See the Court of Appeal decision in the case of Chief Land Registrar & others vs Nathan Tirop Koech & Others (2019) eKLR.

35. Finally, there is the question as to whether execution of costs awarded in a suit can be the subject of stay. It suffices to state that costs are consequential orders which ordinarily follow the event unless the court orders otherwise. [See section 27 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].

36. Whenever costs are ordered, it behooves the adverse party to bear the costs. Furthermore, there is no gainsaying that if the adverse party succeeds in [sic] the appeal then same shall [subject to the orders of the court], recover the costs. In any event, it is not lost on this court that costs are monetary in nature and thus payments of same cannot, without more occasion, substantial loss. [See the ratio in the Case of Kenya Shell Limited versus Kibiru [1986] eklr]

37. In a nutshell, I am afraid that the execution proceedings aimed at recovering the costs in accordance with the law does not invite an order of stay. Moreover, it is not lost on me that execution by and of itself cannot be stated to prejudice an adverse party. Notably, execution is a process that is explicitly provided for under the law. [See Order 22 of the Civil Procedure Rules]. [See also Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 Others [2014] eKLR].

38. In my humble view, I hold the position that costs cannot accrue an order of stay of execution unless the applicant demonstrates peculiar and exceptional circumstances. Unfortunately, no such circumstances have been proven, or substantiated in respect of the instant matter.

Final Disposition:

39. Having analyzed the four [4] thematic issues highlighted in the body of the ruling, it must have become evident, nay apparent that the application beforehand is devoid and bereft of merits. Same courts dismissal.

40. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder:

    i. The Application dated 10th June 2025 be and is hereby Dismissed.

    ii. Costs of the Application be and are hereby awarded to the Respondents.

    iii. Costs in terms of clause (ii) shall be a greed upon; and in default be taxed by the Deputy Registrar.

41. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 26TH DAY OF JUNE 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI].

JUDGE

In the presence of:

Mutuma: Court Assistant.

Mr. Shaffin Kaba for the Applicant

Mr. Kariuki for the Respondent