



**Kisenger v Kiptulwo (Environment & Land Case 49 of 2022)
[2024] KEELC 172 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 172 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 49 OF 2022**

**L WAITHAKA, J
JANUARY 26, 2024**

BETWEEN

JOSHUA KISENGER PLAINTIFF

AND

DANIEL KIPTULWO DEFENDANT

RULING

1. This ruling is in respect of the notice of motion application dated October 16, 2023. Through the application, the applicant seeks stay of execution of the judgment delivered on September 19, 2023 in this matter and/or any consequential orders thereof pending the hearing and determination of the application and the Appeal emanating therefrom.
2. The application is premised on the grounds that the applicant who was dissatisfied with the judgment has since appealed against the judgment; that unless the orders sought are granted, the respondent may execute the judgment/decreed issued in its favour thereby occasioning the defendant/applicant irreparable loss and prejudice.
3. The application is supported by the affidavit of the defendant/applicant sworn on 16th October 2023, in which the grounds on the face of the application are reiterated.
4. The application is opposed through the grounds of opposition dated October 26, 2023 in which the plaintiff/respondent contends that the application is bad in law as the orders appealed from are negative in nature hence incapable of execution; that the application is res judicata the oral application made by the defendant/applicant on September 19, 2023; that the court is functus officio as no notice of appeal has been filed and/or served upon the plaintiffs/respondents which ought to give this court jurisdiction to entertain the application; that the application is devoid of merit, frivolous, abusive of the court process and ought to be dismissed with costs.



5. The plaintiffs/respondents also filed a replying affidavit, sworn by Fredrick Kirui Arap Killen on 26th October 2023, reiterating the contentions in the grounds of opposition. Besides reiterating the grounds on the grounds of opposition, the plaintiffs/respondents have averred that they will be prejudiced/prevented from realizing the fruits of their judgment if the orders sought are granted.
6. The defendant/applicant swore a further affidavit dated 27th October 2023 in which he has deponed that the appeal was served on the plaintiffs/respondents' advocate through his email address. The applicant acknowledges that he made an oral application for stay which application the court refused to grant and explains that refusal was because counsel for the plaintiffs/respondents informed the court no order of eviction was given. Terming the information given to the court by the plaintiff's counsel false and stating that there is a real threat of eviction of the respondent from the suit property, the applicant argues that the circumstances are different hence the application is not res judicata. The applicant further contends that res judicata does not apply to applications.
7. Maintaining that he stands to suffer great loss and prejudice if the orders sought are denied, the applicant urges the court to allow the application to avoid rendering his appeal nugatory.
8. The applicant offers Kshs. 50,000/- as security for costs.
9. The defendant/applicant filed submissions dated 1st November 2023 in which he points out that he has been in use and occupation of the suit property for over 20 years and asserts that if he is evicted, he stands to suffer substantial loss, destruction of his homes and the property may be disposed off to third parties.
10. He further submits that the application has been filed timeously/without undue delay.
11. He reiterates his contention that res judicata does not apply to applications and submits that the application is not res judicata because circumstances are different.
12. On security, he reiterates his offer of Kshs. 50,000/- as security for costs.
13. In their submissions filed on November 9, 2023, the plaintiffs/respondents have made reference to section 7 of the *Civil Procedure Act* and the case of *John Florence Maritime Services Limited & Another v. Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) e KLR and submitted that this court having denied the applicant's oral application for stay, the instant application is res judicata.
14. It is further submitted that order 42 rule 6 of the *Civil Procedure Rules* does not contemplate a situation where a party whose oral application for stay is denied, would file a formal application before the same court.
15. It is submitted that having pronounced itself on the applicant's oral application for stay, this court became functus officio on that issue. In that regard, reliance is placed on the case of *Chembe Katana Changi vs. Minister for Lands and 4 others* (2014)e KLR where it was stated:-

“the only occasion that the trial court can deal with a matter it has already heard and determined is during execution process or when an application for review of the judgment has been filed pursuant to the provisions of order 45 or when an application for stay of execution pending appeal has been filed pursuant to the provisions of order 42 rule 6 of the *Civil Procedure Rules*.”
16. Concerning conditions set in order 42 rule 6(1) of the *Civil Procedure Rules* for grant of an order of stay of execution, it is acknowledged that the instant application was filed timeously. As to whether the applicant will suffer substantial loss if the orders sought are not granted, it is submitted that the



applicant whom the court found to have unlawfully acquired a portion of the suit property and in circumstances that amounted to contempt of court, is not deserving of the orders sought.

17. On security, it is submitted that, should the court be inclined to grant the orders sought, it should direct the defendant/respondent to deposit the title he illegally acquired in court.

Analysis and determination

18. Denial of the oral application for stay made on September 19, 2023, does not render the instant application res judicata for the reason that this court did not consider the oral application for stay of execution pending Appeal on its merits and render a reasoned decision in respect thereof to warrant the instant application being adjudged res judicata the former.
19. On whether the applicant has made up a case for being granted the orders sought, having considered the peculiar circumstances of this case where the subject matter of the Appeal is land that is not only registered in the name of the defendant but also occupied by the applicant and his family, I am satisfied that the applicant, if evicted from the suit property, in the event he succeeds in his Appeal, would have suffered substantial and irreparable loss and prejudice.
20. The court also notes that the application was filed timeously, barely 20 days after the decision appealed from was made and the applicant has demonstrated willingness to offer security for costs.
21. In the circumstances, I am inclined to allow the application on condition that the defendant/applicant shall deposit in a joint interest earning account to be opened in the names of the advocates for the parties, Kshs. 50,000/- as security for costs. The applicant shall also deposit the title deed for the parcel of land he was found to have unlawfully acquired from the suit property in court. The deposit of the title deed in court and the money at bank shall be made within 21 days from the date of delivery of this ruling failing which, the application shall be deemed to have been dismissed with costs to the plaintiffs/respondents.
22. Costs of the application shall abide the outcome of the appeal.
23. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 26TH DAY OF JANUARY, 2024

L. N. WAITHAKA

JUDGE

