



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA NO.1 OF 2017**

**1. LOICE KHANCENDI ONYANGO.....APPELLANT**

**VERSUS**

**1. ALEX INYANGU**

**2. CHRISTABEL OLANDO KUS.....RESPONDENTS**

**RULING**

1. By a notice of Motion dated 13<sup>th</sup> November 2017 the Appellant is seeking the following orders:

**1. Spent**

**2. Spent**

**3. That this Honourable court be pleased to enlarge the time within which the Appellant/Applicant is to deposit the security either in court or in an interest bearing account in the respective parties' Advocates names pending the hearing and determination of the Appellant's intended appeal following the lapse of the period fixed by the Chief Magistrate's Court on 7<sup>th</sup> February, 2017.**

**4. THAT further to (3) above, this Honourable Court be pleased to revive and reduce/lower the security to be furnished.**

**5. THAT this Honourable Court be pleased to restore the stay of execution of the decree on such conditions as it deems right in view of the mandatory provisions of Article 148 of the Constitution and the jurisprudence of the court of Appeal and this Honourable Court in matters of stay of execution.**

**6. THAT this Honourable court be pleased to stay the execution of the decree of the Chief Magistrate's Court in Mombasa Civil Case No. 3443 of 2013 until further orders of this court.**

**7. THAT this Honourable Court be pleased to stay the execution of the decree of the Chief Magistrate's Court in Mombasa Chief Magistrates' Civil Case No. 3443 of 2013 pending the hearing and determination of this appeal.**

**8. THAT the costs of this application be provided for.**

2. The Application is based on the grounds on the face of the motion and supported by the affidavit of Loice Khachendi Onyango, the Applicant sworn on 13<sup>th</sup> November 2017. The Applicant was the objector in **Mombasa CMCC No.3443 of 2013** but her objection was dismissed and the Applicant filed this appeal. The Applicant made an application before this court for stay of execution of the decree in **Mombasa CMCC No.3443 of 2013** but her application was dismissed on 7<sup>th</sup> November 2017. The applicant then filed the present application. The Applicant avers that she is able and ready to deposit the sum of Kshs.1,500,000.00 either in court or in an interest bearing account in the joint names of the advocates on record.

3. The Application is opposed by the 1<sup>st</sup> Respondent who filed a Replying Affidavit sworn by Fred Adhoch on 27<sup>th</sup> February 2018 in which he deposes inter alia, that the application is aimed at delaying, frustrating and obstructing the course of justice and that it is unmeritorious and a clear abuse of the court process because the applicant made a similar application dated 22<sup>nd</sup> February 2017 which was determined by this court vide its ruling on 7<sup>th</sup> November, 2017. That the application has been made after undue delay.

4. The application was prosecuted by way of written submissions which were duly filed by the applicant and the 1<sup>st</sup> Respondent in which they both reiterated the contents of their respective affidavits. Counsel also relied on various authorities. Counsel also highlighted on those submissions.

5. I have considered the application, the affidavits on record, the submissions filed and the authorities cited. The application is basically seeking stay of execution of the decree in **Mombasa CMCC No.3443 of 2013** and enlargement of time within which to deposit the sum of Kshs.1,500,000.00 as ordered by the trial court. The applicant filed an application dated 22<sup>nd</sup> February 2017 before this court seeking stay of execution of the same decree. That application was heard and determined and on 7<sup>th</sup> November, 2017 the same was dismissed. On 13<sup>th</sup> November, 2017, the applicant filed the present application.

6. Section 7 of the Civil Procedure Act provided as follows:

***7. No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

7. Section 28 of the Environment and Land Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction. It has also been stated that the principle applies to applications with the same force whether the application be final or interlocutory.

8. I have perused the application dated 13<sup>th</sup> November 2017 and the application dated 22<sup>nd</sup> February 2017 as well as the ruling delivered by the court on 7<sup>th</sup> November 2017. There is no dispute that the parties are the same in all these proceedings. Both applications are seeking orders of stay of execution of the decree in **Mombasa CMCC 3443 of 2013**. The issues are similar in all forms and this court determined them in the earlier decision. Even the issue of the deposit now raised was discussed. Indeed the same is clearly in the ruling of 7<sup>th</sup> November 2017.

9. The statutory provision under Section 7 of the civil proceedings Act is clear and bars a court from hearing a suit or issue if the same was substantially in issue in a former suit between the same parties, if the issue was determined in the former suit after a hearing. The parties in this application were the same parties in the previous application. Indeed the applicant is the same in both applications. Whatever issue being raised now could have been raised in the previous application. By virtue of Section 7 of the Civil Procedure Act, this application is barred by the doctrine of res judicata. The application for enlargement of time within which to deposit the security is being made about nine months after the order was made. No plausible explanation for such long delay was given by the applicant. Moreover the same issue could have been raised in the previous application. Even if the rules permitted, this court would not have exercised its wide and unfettered discretion in favour of the applicant in this case. The power of the court should be exercised judiciously and should not be used to aid a litigant who slept on her rights for so long and deliberately sought to delay the course of justice. The overriding objective of the court would not come to the aid of the applicant in this case.

10. For the above reasons, I find that the appellant's Notice of motion dated 13<sup>th</sup> November 2017 lacks merit. The same is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**Delivered, signed and dated at Mombasa this 20<sup>th</sup> September, 2018.**

**JUDGE**