



**Lagat v Lagat (Environmental and Land Originating Summons
182 of 2017) [2024] KEELC 1136 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 182 OF 2017
EO OBAGA, J
FEBRUARY 29, 2024**

BETWEEN

SAMMY KIRWOK LAGAT PLAINTIFF

AND

CHRISTOPHER KIMARU LAGAT DEFENDANT

RULING

1. This is a ruling in respect of two separate applications. The first application is dated 14.11.2023. It is brought by the Decree Holder/Applicant. It seeks the following order:-
 1. Spent.
 2. That this Honourable court be pleased to direct the officer in charge of Moi's Bridge Police station to provide security for purposes of maintaining peace and order during the physical eviction of the plaintiff/Respondent and his family from the suit parcel of land known as LR. No. Moi's Bridge Block 2 (Tuiyobei)/72 and demolition of any structures that may have been illegally erected thereon.
 3. That the plaintiff/Respondent do bear the costs of this application.
2. The second application is dated 11.12.2023. It is brought by the Judgement Debtor/Applicant. It seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to grant stay of execution of the judgement of 20th March, 2023 by Honourable Justice E. O Obaga and any Decree or other consequential orders pending hearing and determination of the intended appeal.



- d. That this honourable court be pleased to grant any other relief that may be just to meet the ends of justice in this case.
- e. That costs of the application be provided for.

Background:

3. The Applicant in the first application had filed a suit against the Applicant in the second application. The Applicant in the first application was seeking orders of eviction against the applicant in the second application. The Applicant in the second application filed an originating summons in which he sought for orders that he had acquired the suit property by way of adverse possession.
4. On 11.4.2018 the Advocates for the parties filed a consent in which they agreed that the outcome of the originating summons was to determine the suit which was file by the Applicant in the first application. On 20.3.2023 the originating summons by the Applicant in the second application was dismissed and the suit by the Applicant in the first application was allowed. This is what triggered the filing of the two applications.

The first application;

5. The Applicant in this application states that he obtained a judgment in his favour and tried to fence off the suit property but he was prevented from doing so by the Respondent who has stationed goons at the suit property who belt him with stones whenever he tries to fence the suit property. Efforts to have the Respondent vacate the suit property amicably have failed and that it is necessary for police to provide security during the eviction as the Respondent is a man of violent character.
6. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 8.12.2023. He states that the has developed the suit property and has sentimental attachment to it. He further states that he has preferred an appeal against the judgment of this court and has already filed an application for stay pending determination of the appeal.
7. The Respondent contends that this court is *functus officio* and that the court cannot grant any order. He also states that an eviction order has to be sought in a substantive suit and not through an application. He contends that he has never been served with any decree arising form the judgement delivered on 20.3.2023.
8. In a further affidavit sworn on 13.12.2023 the Applicant states that the Respondent is not being truthful when he claims that he was never served with any decree or was not aware of the same. He states that the Respondent would not have filed an appeal if he had not seen the decree. He further states that filing of an appeal does not constitute stay of execution.
9. The Applicant further states that the respondent forcefully moved on to the suit property after judgement. The Respondent had been enjoined from interfering with the suit property in ELC 42 of 2017 and that the Deputy Registrar of this court had been sent to the site and made a report on the status on the ground.
10. The Applicant went on to state that this court is not functus officio and is bound to ensure that its orders are complied with.
11. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the court should grant the orders for provision of security during the eviction exercise.



12. The Respondent is arguing that this court is functus officio. In support of this submission, he relied on the decision of the Supreme Court of Kenya in *Menginya Salim Murgani –Vs- Kenya Revenue Authority* (2014) eKLR where it was held as follows: -

“It is a general principle of law that a court after passing judgement, becomes functus officio and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

13. This court is not being asked to revisit the judgment on merits. The court is only being asked to order that security be provided by the police during the eviction. It has been demonstrated that the Respondent is a violent man. He can cause a breach of peace if there is no security. During the hearing, the Respondent admitted that he forcefully entered the suit property. He did not deny the applicant’s averments that he had stationed goons who belt the applicant with stones whenever he attempts to fence the suit property.

14. An injunction was granted against him in ELC 42 of 2017 but he disobeyed it and went on to occupy the suit property. There is a contention by the Respondent that there was no eviction order sought by the Applicant. The court clearly granted the Applicant’s prayers in the amended plaint dated 20.4.2017. One of the reliefs which was sought therein was eviction and which was granted. The Respondent cannot therefore argue that the eviction is being sought in this application for the first time.

15. From the above analysis, I find that the applicant’s application is well merited. The same is allowed in terms of prayer 2 and 3.

It is so ordered.

The second application;

16. The Applicant in this application contends that he has preferred an appeal against this court’s judgement delivered on 20.3.2023. The applicant states that if there is no stay granted, he will suffer substantial loss as he has structures on the suit property where he has sentimental attachment. He further states that his appeal has overwhelming chances of success and that if stay of execution is not granted, it will render the appeal nugatory.

17. The Applicant further contends that if the Respondent was to be granted possession, he will sell the suit property and that no damages will adequately compensate him.

18. The Respondent opposed the Applicant’s application based on a replying affidavit sworn on 28.12.2023. The Respondent contends that the Applicant’s application is an afterthought which has been brought belatedly with intention to have the applicant prolong his stay on the suit property. The delay has not been explained.

19. The respondent contends that the applicant has come to this court with unclean hands as he in contempt of the valid court orders which were granted from which he has not applied to set aside or review the same.

20. The Respondent denies that he has any intention to dispose of the suit property and undertakes not to do so. The Respondent states that what the court granted was a negative order which is not capable of being stayed. The Respondent pleads that he should be allowed to enjoy the fruits of his judgement.



21. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has met the threshold for grant of stay pending appeal.
22. The conditions which the court should consider in an application of this nature are set out in order 42 Rule 6 of the Civil Procedure Rules. First an applicant has to file the application for stay without unreasonable delay. Second, an applicant must demonstrate that he will suffer substantial loss should stay not be granted. Third, there has to be such security given as may ultimately be binding upon the applicant on the decree.
23. In the instant case the impugned judgment was delivered on 20.3.2023. This application was filed on 11.12.2023. This is a period of almost nine months. This delay of almost nine months has not been explained. I find that this delay is unreasonable in the circumstances. It is apparent that this application was filed to counter the one filed by the Respondent on 14.11.2023.
24. On whether the applicant will suffer substantial loss, there is no demonstration that he will suffer any substantial loss. The Respondent had obtained an injunction restraining the Applicant from interfering with the suit property. Evidence which emerged during the hearing is that the applicant had built his houses on land which he purchased from a third party to whom the Respondent had sold land to. In response to the applicant's application, the Respondent stated that the applicant invaded the suit property after judgment herein was delivered.
25. There is therefore no demonstration that the Applicant will suffer any substantial loss. Should he succeed in his appeal, he will simply go back to the suit property. The Respondent has indicated that he has no intention of disposing of the suit property. Demonstration of substantial loss is the cornerstone for grant of stay. If one does not demonstrate substantial loss as in the present case, no stay can be granted.
26. I would have addressed the issue of security if the Applicant had brought his application without unreasonable delay and demonstrated substantial loss. Before I conclude, I must comment on the Respondent's contention that what was given in the judgment was a negative order. In the impugned judgment, there were two suits for determination. There was an originating summons by the Applicant which was dismissed. There was ELC 42 of 2017 by the Respondent which succeeded against the Applicant. The Applicant had liberty to file an application for stay because there were orders adverse to him.
27. From the above analysis, I find that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 29TH DAY OF FEBRUARY, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Isiaho for Applicant.

Court Assistant –Laban

E. O. OBAGA

JUDGE



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