



Waithira & 13 others v Wambui (Environment and Land Appeal E027 of 2023) [2024] KEELC 960 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E027 OF 2023**

JG KEMEI, J

FEBRUARY 22, 2024

BETWEEN

- TERESIA WAITHIRA 1ST APPELLANT**
- ESTHER WAMBUI NJERI 2ND APPELLANT**
- LUCY WANJIRU P KUNGU 3RD APPELLANT**
- HANNAH NJERI GATHORO 4TH APPELLANT**
- DANIEL KINUTHIA NGURE 5TH APPELLANT**
- SAMUEL RITHO MWANGI 6TH APPELLANT**
- WILLIAM NJOROGE KARANJA 7TH APPELLANT**
- DOMINIC KIMANI WAITHIRA 8TH APPELLANT**
- JOHN MWANGI WAITHIRA 9TH APPELLANT**
- STEPHEN WACHIRA WAIRAGU 10TH APPELLANT**
- MERCY MUTHONI KAGWI 11TH APPELLANT**
- JUDY WANJIKU CHEGE 12TH APPELLANT**
- MARTIN WAINAINA WAITHIRA 13TH APPELLANT**
- ANDREW THANDI THIONGO 14TH APPELLANT**

AND

- HANNAH WAMBUI WAHIGI ALIAS HANNAH WAMBUI
MUHIGI RESPONDENT**



RULING

1. Dissatisfied with the trial Court's Judgement delivered on 28/3/2023 in Thika CM ELC No. 23 of 2018, the Appellants moved this Court vide an Application dated 23/10/2023 seeking in the main stay of execution of the Judgment pending the hearing and determination of their appeal.
2. Objecting to the Motion, the Respondent filed a Replying Affidavit and raised a Preliminary Objection both dated 2/11/2023. The said Preliminary Objection is the subject of this Ruling.
3. It is based on the grounds that;
 - a. The instant Application is *res judicata* as it offends section 7 of the [Civil Procedure Act](#) given that the trial Court heard and determined a previous similar Application which sought inter alia an order for stay of execution filed in Thika MCLE Case no. 23 of 2018 – Teresia Waithira & 10 others vs Hannah Wambui Wahigi alias Hannah Wambui Muhigi and that the said Application was dismissed in its entirety with costs to the Respondent therein by Hon. S. Atambo (CM) *vide* her Ruling of October 17, 2023.
 - b. The instant Application is therefore bad in law, vexatious, scandalous, frivolous and that it amounts to an abuse of the Honorable Court process and is a proper candidate for dismissal and or striking out with costs.
4. The Preliminary Objection is opposed. On 6/11/2023 directions were taken to canvass the Preliminary Objection by way of submissions.
5. The Respondent through the firm of Mwamuye, Kimathi & Kimani Advocates filed submissions dated 2/11/2023 in support of the Preliminary Objection. It was submitted that the Preliminary Objection raises a pure point of law touching on section 7 [Civil Procedure Act](#) as outlined in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.
6. In rebuttal, through the firm of E.P & Co. Advocates the Appellants filed submissions dated 10/11/2023. They submitted that the Preliminary Objection does not meet the threshold of a Preliminary Objection as elucidated in the case of *Mukisa Biscuits* (Supra). That a Preliminary Objection must be a pure point of law and cannot be raised if any facts have to be ascertained or what is sought is the exercise of judicial discretion. That the Application alluded to in the trial Court in the main sought a prayer for setting aside Judgment and therefore calls for analysis of evidence. The Court was urged to dismiss the preliminary objection with costs.
7. The germane issue for determination is whether the Preliminary Objection is merited.
8. The [Black's Law Dictionary](#), 10th Edition defines a Preliminary Objection as; -

“... in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”
9. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal



in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

10. At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion ...”

11. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Moreover, a valid Preliminary Objection should, if successful, dispose of the suit. See the case of [David Karobia Kiiru v Charles Nderitu Gitoi & another](#) [2008]eKLR.

12. The gist of the present Preliminary Objection is that the Appellants’ Application dated 23/10/2023 is *res judicata*; a similar Application having been determined by the trial Court and a Ruling rendered on 17/10/2023.

13. For a plea of *res judicata* to succeed, the ingredients of section 7 of the [Civil Procedure Act](#) must be satisfied namely;

“7. Res Judicata

No Court shall try any suit or issue 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 a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. - (2) For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation. - (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. - (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation. - (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

14. The doctrine of *res judicata* applies to bar subsequent proceedings when there has been adjudication by a Court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy. See the Supreme Court Judgment in [*John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others*](#) [2021]KESC 39 (KLR).
15. The test to determine whether a matter is *res judicata* was well laid in the case of *DSV Silo v The Owners of Sennar* [1985] 2 All ER 104 and repeated in the Kenyan case of [*Bernard Mugo Ndegwa v James Nderitu Githae and 2 others*](#) [2010]eKLR. The Court held the position that *res judicata*, must show that;
 - (a) The matter in issue is identical in both suits,
 - (b) That the parties in the suit are substantially the same,
 - (c) There is a concurrence of jurisdiction of the Court
 - (d) That the subject matter is the same and finallyThat there is a final determination as far as the previous decision is concerned.”
16. Denying that the Application is *res judicata*, the Applicants submitted that the Application in the trial Court sought in the main a prayer for setting aside the Court’s Judgement. That the Preliminary Objection is blurred with factual contestations that would require this Court to call for evidence.
17. Having considered the submissions and points of contestation by each party, it is the view of the Court that the nature of an Application for stay of execution, like the instant one amount to an exception of the general rule of *Res Judicata*. This is because a reading of order 42 rule 6 (1) [*Civil Procedure Rules*](#) highlights that an Application for stay of execution can rightly be filed in the trial Court and further as the case maybe (whether allowed or dismissed) in the appellate Court. It states;

“ 6. Stay in case of appeal [order 42, rule 6.]

 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.” [Emphasis added]
18. Rule 6 (1) above gives liberty to a party who succeeds or fails to obtain stay of execution before the Court appealed from to approach the Court appealed to and seek exactly similar orders. It follows therefore that the instant Application is properly before this Court and the plea of *Res Judicata* cannot stand.



19. The Respondent relied on the case of *Moyale Liner Bus Services v Gachui Ibrahim* [2021]eKLR to support the position that such an Application for stay is Res Judicata and the Court is functus officio. That facts of that case are distinguished with the instant one. In *Moyale case* the HC (Gikonyo, J) had earlier on granted conditional stay of execution which the Applicants failed to comply with and in a further Application seeking similar orders, the Court (Muriithi, J) declined the Application citing Res Judicata.
20. The upshot of the foregoing is that the Preliminary Objection is un-merited; it is for dismissal with costs.

Appellants' Application dated 23/10/2023

21. In the main, the Appellants pray for an order of stay of execution of the decree and consequential warrants issued in Thika MCELC No. 23 of 2018 pending the hearing and determination of the appeal. The Application is based on the grounds thereat and Supporting Affidavit of Teresia Waithira, the 1st Appellant.
22. She deponed with the authority of the rest of the 13 Appellants that sometime in 1998, they purchased plots on land parcel Ruiru/Ruiru East Block 2/3286 from Wakibui Self Help Group. That they proceeded to erect permanent structures thereon which include their residential homes and enjoyed peaceful, open, continuous and uninterrupted possession of the suit property that in 2016 they moved the Court for a claim of adverse possession which they lost vide the trial Court Judgement annexed as DKN1. That they are aggrieved by the said challenge and in light of impending execution by the Respondent. That unless their Application is allowed they stand to suffer substantial loss yet their appeal has high chances of success and the Respondent stands to suffer no prejudice.
23. The Respondent, Hannah Wambui Wahigi opposed the Application vide her Replying Affidavit on 2/11/2023. She averred that the Application is Res Judicata; that an appeal cannot operate as a stay of execution of a decree as provided under order 42 rule 6 (2) *Civil Procedure Rules* and the Applicants will not suffer any prejudice if the Application is disallowed. That without prejudice, if the Court is persuaded to grant stay of execution the same be conditional upon paying the entire decretal sum of Kshs. 1.7M in a joint interest account.
24. The Application was prosecuted by way of submissions. The Appellants through the firm of E.P & Co. Advocates filed submissions dated 31/10/2023. A singular issue was drawn for determination; whether the Court should exercise its discretion and grant stay of execution.
25. On substantial loss, the Applicants relied on the case of *James Wangalwa & Anor. vs Agnes Naliaka Cheseto* [2012] eKLR and argued that they have been in possession of the suit property since 1998, developed homes and cultivated lands and if demolition takes place, they will be rendered homeless and subsequently their appeal nugatory. It was further submitted that the Application was timely filed after the delivery of the trial Court Ruling. Lastly on the requirement of security for costs, the Appellants stated that the decree herein is not a money decree but if the Court is inclined to order the same, then it considers the principles set out in the Supreme Court decision in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR) wherein the Supreme Court held inter alia as follows;

“ 13. In determining whether it was appropriate to make an order that a party gave security for costs, the court could have regard to the following matters and such other matters as it considered relevant in the peculiar circumstances of each case-



- a. the prospects of success or merits of the proceedings.
 - b. the genuineness of the proceedings.
 - c. the impecuniosity of the plaintiff.
 - d. whether the plaintiff's impecuniosity was attributable to the defendant's conduct.
 - e.
26. The Respondent through Mwamuye, Kimathi & Kimani Advocates filed submissions dated 2/11/2023. She submitted that she is entitled to enjoy the fruits of her Judgement; that the Application is Res Judicata and that the Appellants have not demonstrated any sufficient cause for the Court to grant stay of execution. That the Appellants bear the burden of proving the substantial loss they stand to suffer, if at all. Last but not least, that the Appellants have not proposed security for the due performance of the decree and therefore casting doubt in their commitment to settle the decretal sum.
27. The main issue for determination is whether the Appellants are entitled to an order for stay of execution pending appeal.
28. The relevant law as rightly submitted by both parties on stay of execution is found in order 42 rule 6 (2) Civil Procedure Rules that;
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and
 - (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
29. The guiding principles in considering an Application for stay of execution were set out by the Court of Appeal in the case of Butt v Rent Restriction Tribunal [1979] eKLR (Madan Miller and Porter JJA) thus:-
- a. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.
 - c. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
 - d. The Court in exercising its discretion whether to grant or refuse an Application for say will consider the special circumstances of the case and its unique requirement.
30. The burden of proving that substantial loss would occur unless stay is granted rests upon and must be discharged accordingly by the Applicant. It is not enough to merely state that loss will be suffered, the Applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given. In the persuasive authority of James Wangalwa & another v Agnes Naliaka Cheseto [2012]eKLR the Court held that no doubt, in law, the fact that the process of execution has been put in motion, or



is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, it remains a lawful process.

31. The Appellants have averred that they reside and cultivate on the suit land since 1998 when they purchased the parcels of land. The Respondent concedes that she is entitled to enjoy the fruits of her Judgement as adjudged. The Respondent does not deny the averments on occupation and cultivation of land. Indeed, she deponed that if the Court is inclined to grant stay, then it be conditional to payment of the decretal sum.
32. In *RWW v EKW* (2019) eKLR the Court stated that:

“The purpose of an Application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an Application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
33. The Applicant’s averred that they are amenable to grant of stay of execution on terms as may be set by Court. To that end, I am persuaded that the Application succeeds subject to the Applicants depositing security in Court in the sum of Kshs. 230,000/-
34. The costs of the Application shall be in the cause.
35. Final orders for disposal
 - a. The Preliminary Objection dated the 2/11/2023 is unmerited. It is dismissed with costs.
 - b. The Application dated the 23/10/2023 is allowed on terms; payment of security in the sum of Kshs 230,000/- within a period of 30 days to be deposited in an interest earning joint account of both Counsel and in default the orders shall lapse automatically.
 - c. The costs of the Application shall be in the cause.
36. Orders accordingly

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2024.

J G KEMEI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered online in the presence of;

Onchiri for 1st – 13th Appellants



Oguye HB Kimani for the Respondent

Court Assistants – Phyllis/Oliver

