



REPUBLIC OF KENYA



**Katunga & 8 others v Matee (Environment and Land Appeal
4 of 2020) [2024] KEELC 1046 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 4 OF 2020
TW MURIGI, J
FEBRUARY 21, 2024**

BETWEEN

MAWEU KATUNGA 1ST APPELLANT
ROSE MWANZU 2ND APPELLANT
MUTWEWA KENYAI 3RD APPELLANT
KATUA MARTIN 4TH APPELLANT
MATEE MUKOTO 5TH APPELLANT
KYALO MUSYOKA 6TH APPELLANT

AND

NZIVO DAUDI 1ST APPLICANT
MUTINDA KATUA 2ND APPLICANT

AND

JANET MUTIA APPELLANT

AND

SAMUEL MATEE RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 25th January, 2023 brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 21 Rule 12 and Order 51 Rule 1 of the *Civil Procedure Rules* in which the Appellants/Applicants seek the following orders: -

1) Spent.



- 2) That this Honourable Court be pleased to stay execution of the judgment delivered on 10/07/2018 and the subsequent decree pending final determination of the appeal.
 - 3) That the Honourable Court be pleased to stay any demolition of the Applicants property or arrest of the Applicants pending hearing and determination of this suit.
 - 4) Costs of this application.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Maweu Katunga sworn on 26/1/2023.

The Applicants Case

3. The Applicant averred that being aggrieved with the judgment delivered on 10/7/2018 by Hon. J.O. Magori SPM in Makindu PMCC No 48 of 2009 they lodged an Appeal to this Court which is pending for hearing and determination.
4. He argued that the Applicants will suffer irreparable loss if stay of execution is not granted since the Respondent has taken out execution proceedings and intends to demolish their property in addition to causing their arrest. He stated that they are willing to abide with any conditions which the court may impose as a condition for stay.
5. He urged the Court to allow the application as prayed.

The Respondents Case

6. The Respondent filed a replying affidavit dated 2/3/2023 in opposition to the application. He argued that the application is an abuse of the court's process since the Applicants had previously filed a similar application dated 10/8/2020 which they never bothered to prosecute and was even fixed for dismissal for want of prosecution. He argued that the instant application is an attempt by the Applicants to deny him the fruits of his judgment.
7. According to the Respondent, the Applicants have not demonstrated the prejudice or damage that they are likely to suffer if the orders sought are not granted. He averred that the Applicants' actions of trespass have deprived him from enjoying the fruits of his judgment. He urged the court to dismiss the application with costs.
8. The application was canvassed by way of written submissions.

The Applicants Submissions

9. The Applicants' submissions were filed on 14th April, 2023. On their behalf, Counsel submitted that the Applicants have satisfied the conditions set out in Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) for the grant of stay. Counsel argued that the Applicants will suffer substantial loss if the order of stay is not granted since they would not only lose their property but would also be arrested.
10. Counsel argued that the application herein has been made without unreasonable delay. Counsel submitted that after the trial Court dismissed the Applicants' application vide the ruling delivered on 28/4/2020, they immediately filed the memorandum of appeal on 27/5/2020 while also filing the Record of Appeal.
11. Concluding his submissions, Counsel submitted that the Appellants have an arguable appeal with high chances of success. Counsel argued that the trial court ought to have allowed the Applicants application dated 25/10/2019 which had sought to set aside the judgment and orders of the trial court while also



seeking leave to file a defence out of time since it was not opposed. Counsel urged the court to allow the application as prayed.

The Respondent's Submissions

12. The Respondent's submissions were filed on 25th April, 2023. On his behalf, Counsel submitted that the instant application is an abuse of the court's process since the Applicants had filed a similar application dated 10/08/2020 which has never been prosecuted. Counsel contended that the Applicants have not demonstrated any loss which they may suffer that cannot be compensated by way of damages. Lastly, Counsel submitted that litigation must come to an end and that the Respondent must be allowed to enjoy the fruits of his judgment.

ANalysis and Determination

13. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the instant application ought to be struck out for being an abuse of the court process.
14. The *Black's Law Dictionary* defines abuse as:-

“Everything which is contrary to good order established by usage that is a complete departure from reasonable use”. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.
15. Discussing what constitutes abuse of the court process, the Court of Appeal in the case of *Muchanga Investment Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002 (2009) eKLR stated that;

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and frivolous, vexatious or oppressive.”
16. In the Nigerian case of *Amaefule & other v The State* 3 PLR/1988/12 (SC) Oputa J.S.C (as he then was) defined abuse of court process as follows:-

“A term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process”.
17. The Respondent argued that the instant application is an abuse of the Court process as the Applicants had previously sought similar orders in the application dated 10/08/2020 which is yet to be heard and determined. In this regard, the Respondent annexed to his replying affidavit a copy of the application dated 10/08/2020(Exhibit SKM2).
18. The record shows that the Applicants filed the application dated 10th August 2020 seeking the following orders:-
 - a. That this Honourable Court be pleased to stay execution of the judgment/decree pending hearing and determination of this application.



- b. That this Honourable Court be pleased to stay execution of the judgment/decree pending hearing and determination of the Appeal.
 - c. Costs be provided for.
19. The Applicants having failed to prosecute the said application, the court issued a Notice to Show Cause why the application should not be dismissed for want of prosecution.
20. Instead of prosecuting the application dated 10th August 2020, the Applicants filed the instant application in which they are seeking for similar orders. I have not come across a notice of withdrawal of the said application. The said application has to date never been prosecuted and there is no evidence that a notice of withdrawal of the said application was filed. It is crystal clear that the application dated 10/08/2020 is still pending before this Court for hearing and determination.
21. I am alive to the fact that striking out of pleadings is a draconian measure which should be exercised sparingly and in the clearest of cases. Having filed an earlier application which is identical to the present application, it is the finding of this court that the filing of the application dated 25th of January 2023 is an abuse of the court process and the court cannot allow the same.
22. The upshot of the foregoing is that the application dated 25th January, 2023 is an abuse of the court's process and is hereby struck out with costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 21ST DAY OF FEBRUARY, 2024.

In The Presence Of:

Court assistant Kwemboi

In the absence of both parties.

