



**Mwagiru v Gachuhi (Environment & Land Case E934 of 2013)
[2024] KEELC 754 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E934 OF 2013
EK WABWOTO, J
FEBRUARY 15, 2024**

BETWEEN

HUMPHREY NJAU MWAGIRU PLAINTIFF

AND

MWANGI GILBERT GACHUHI DEFENDANT

RULING

1. The background of the suit is quite extensive stemming from the initial suit filed in Thika under CMCC No 761 of 2008 after which it was transferred to the Environment and Land Court. On 18th February 2022, the plaintiff's suit was dismissed for non-attendance and the Court proceeded to hear and determine the defendant's counterclaim.
2. This ruling is in respect to two applications dated 28th March 2023 and 23rd June 2023. In the Notice of Motion application dated 28th March 2023, the Defendant seeks orders of eviction, orders of assistance in enforcement by the OCS Gatong'ora Police Station and costs of the application
3. On the other hand, the Plaintiff filed a Notice of motion application dated 23rd June 2023 seeking:
 - i. That the Plaintiff herein be substituted with Miriam Wambui Mwagiru.
 - ii. ...Spent....
 - iii. This Honourable Court be pleased to issue an order of stay of execution of judgement delivered on 7th July 2022 and all other orders.
 - iv. That this Honourable Court be pleased to set aside/review its orders dated 18th January 2022 dismissing the Plaintiff's suit for want of prosecution.
 - v. That the Honourable Court be pleased to set aside its judgement delivered on 7th July 2022 and all orders.



- vi. That the Plaintiff's case be reinstated and the Plaintiff be granted leave to defend the counterclaim.
 - vii. The costs of this application be in the cause.
4. Having considered the two applications, rival submissions, supporting documents and evidence adduced, it is clear that the issues for determination before this court are as follows:
- i. Whether the Plaintiff's application dated 23rd June 2023 is merited.
 - ii. Whether the Defendants is entitled to the prayers sought in his application dated 28th March 2023.
5. On the issue of granting stay of execution, the Court is guided by Order 42 rule 6 of the [Civil Procedure Rules, 2010](#) which provide as follows;

“...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 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.

No order of stay shall be made under sub rule (1) unless-

- a) The court is satisfied that substantial loss may result to the applicant unless the order is made and 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.
6. This Court is well aware of the delicate balance of the right to fair hearing vis a vis the right to enjoy the fruits of the Judgement. This Plaintiff's application is hinged on the averment that Plaintiff was seriously ill and suffered an incurable mental illness that barred him from participating in the suit.
7. In the case of *Carter & Sons Ltd v Deposit Protection Fund Board & 2 others* Civil Appeal No 291 of 1997:

“... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”[Emphasis Mine]

8. I have considered that prior to the Court's orders for dismissal in 2022, the suit had been dismissed for want of prosecution twice the first time being on 18th March 2019 and 16th March 2021. Furthermore, I note that the Plaintiff did not appear nor participate until 5th June 2023 after filing the post-judgement application. Having perused the medical report dated 31st May 2023 and the orders issued in Petition No E026 of 2023, this court is convinced that the Plaintiff's absence from the proceedings is excusable.



9. With regards to re-opening of the parties respective cases, the Court of Appeal in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others* [2016] eKLR highlighted that the Court exercises discretionary powers when determining to re-open a case. In *Samuel Kiti Lewa v Housing Finance Company & another* [2015] eKLR, it was held that the Court would not grant the plea if it is intended to fill gaps in the evidence. Lastly, the plea cannot be granted if there is inordinate and unexplained delay on part of the Applicant. Having arrived at the conclusion that the Plaintiff's inactivity is excusable, I equally believe the delay is attributed to the deteriorating mental health of the Plaintiff that persisted and was untreated for approximately 5 years.
10. In view of foregoing, the Notice of Motion applications dated 28th March 2023 and 23rd June 2023 are dispensed with in the following terms:
- a. An order of substitution is hereby granted to Miriam Wambui Mwangi, as Plaintiff replacing Humphrey Njau Mwangi.
 - b. A stay of execution is hereby issued against the judgement delivered by Hon. Wabwoto J. on 7th July 2022
 - c. Orders of the Court issued in 18th January 2022 are hereby vacated.
 - d. The Plaintiff's suit is hereby reinstated and to be heard de novo.
 - e. The Defendant's Notice of Motion application dated 28th March 2023 is dismissed.
 - f. Costs will abide the final determination of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kimotho for the Plaintiff.

Mr. Wambua for the Defendant.

Court Assistant; Caroline Nafuna

