



**Khalambukha & another v Lidovolo (Civil Appeal (Application)  
E084 of 2021) [2021] KECA 181 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 181 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) E084 OF 2021  
PO KIAGE, K M'INOTI & M NGUGI, JJA  
NOVEMBER 19, 2021**

**BETWEEN**

**ACTION MUSII KHALAMBUKHA ..... 1<sup>ST</sup> APPLICANT**

**SABETI KHALAMBUKHA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PATRICK MALONGO LIDOVOLO ..... RESPONDENT**

**RULING**

1. By the motion dated 17th June, 2021 brought under Rule 5(2)(b) of this Court's Rules, the applicants seek an order of injunction and stay of execution of the judgment and decree issued against them by the Environment & Land Court at Kakamega pending the hearing and determination of their appeal against the same. By that decision the applicants were ordered to vacate the suit land parcel No. Tiriki/Shamakhokho/1442 within 90 days from the date of the judgment and in default be evicted. The applicants were also ordered to exhume the bodies of their deceased relatives from the suit parcel of land.
2. The application is founded on grounds that; the applicants lodged a notice of appeal against the impugned judgment on 3rd May 2021 and an appeal on 18th May 2021; on 15th December 2020, the Environment & Land Court allowed the respondent's application to have the applicants forcefully evicted from the suit property; the applicants are faced with a real danger of being forcefully evicted from the suit property and their deceased relatives exhumed thus exposing them to unbearable public shame and a deplorable destitute state as they depend on the suit property for their livelihood, and should the application not be granted, the filed appeal will be rendered nugatory.
3. The application is further supported by an affidavit sworn on 17th June, 2021 by the 1st applicant on his behalf and that of his mother, the second applicant. The affidavit principally reiterates the grounds of the application.



4. The respondent opposed the application through a replying affidavit sworn on 21st July 2021, wherein he deposes that the application is res judicata as the applicants had previously filed a similar application dated 3rd December 2020 which was determined by this Court vide a ruling delivered on 19th March 2021 dismissing the application. Further, after dismissal of the aforesaid application for orders of injunction and/or stay, on 11th July 2021, the O.C.S Serem Police station executed the Environment & Land Court decree and the applicants, their relatives and agents were evicted from the suit property and bodies of the deceased relatives exhumed and taken to Mbale County Referral Hospital Mortuary. The respondent affirms that upon eviction of the applicants, their relatives and agents, he took vacant possession of the suit land and continues to exercise exclusive possession over it. In the circumstances, contends the respondent, the application has been overtaken by events since the impugned judgment has already been fully executed.
- 5 The respondent questions the applicants' failure to participate in proceedings in the court below, and contends that by not attempting to set aside the ex parte proceedings and the resultant judgment, the applicants accepted the judgment. The respondent asserts that the applicants have their own parcels of land where they live hence they will not be prejudiced by denial of this application.
- 6 Parties lodged written submissions, rehashing the averments in their affidavits, each party imploring this Court to make a finding in their favour.
- 7 We have given due consideration to the application, the rival affidavits, the contending submissions and the law. It is averred by the respondent that execution of the impugned decree has already been effected, an averment that is not rebutted by the applicants. It would appear then, and we so hold, that the horse has bolted, and there is nothing to stay. The Court cannot act in futility.
- 8 The motion is therefore devoid of merit and accordingly fails.

It is dismissed with costs to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

