



REPUBLIC OF KENYA



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Muiyoro & 3 others v Mwaura & another (Environment and Land Miscellaneous Application 4 of 2023) [2024] KEELC 1734 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1734 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 4 OF 2023
LC KOMINGOI, J
APRIL 11, 2024

BETWEEN

HANNAH WANJA MUIYORO 1ST APPLICANT
SAMSON KARANJA MWANGI 2ND APPLICANT
EMMNUEL RIAMET NDARASI 3RD APPLICANT
MOHAMED ALY MABRUKY 4TH APPLICANT

AND

ESTHER WANJIKU MWAURA 1ST RESPONDENT
MWAURA OLE MASHUA 2ND RESPONDENT

RULING

1. This is Notice of Motion application dated 6th June 2023, brought under; (Sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act, Order 51 Rule 1, Order 45 Rule 1, Order 22 Rule 22(1) of the Civil Procedure Rules, Articles 40 and 159(2) of the Constitution of Kenya and all other enabling provisions of Law)
2. It seeks Orders;
 - i. Spent
 - ii. Spent
 - iii. That this Hon. Court be pleased to stay execution and/or any further and/or eviction of the Applicants on Land title No. Loitoktok/Rombo A/185 vide the judgement and Decree issued in Kajiado Civil Suit No. 1 of 2017 (OS) Esther Wanjiku Mwaura vs Mwaura Ole Mashua & 2 others.



- iv. Spent
 - v. Spent.
 - vi. Spent
 - vii. That unless this Court Stays Execution and/or reviews and sets aside the judgement dated 16th October 2018 delivered by Hon. Judge R. Nyakundi in Kajiado Civil Suit No. 1 of 2017 (OS) in relation to land title no. Loitoktok/Rombo A/185 the 1st Respondent will proceed to execute the judgement dated 31st May 2023.
 - viii. Spent
 - ix. That this Hon. Court be pleased to stay any further proceedings in Loitoktok ELC case No. E002 of 2023 Esther Wanjiku Mwaura vs Mohammed Aly Mabruki & 2 others slated for mention for directions on 5th July 2023 pending the hearing and determination of this application.
 - x. That this Court be pleased to grant other and or further orders which it may deem fit and just to grant in the interests of justice and fairness and in the circumstances.
 - xi. That the costs of this application be in the cause.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 13.
 4. The Application is supported by the Affidavits of Morine King'e, Counsel for the Applicants and Hannah Wanja Muiyoro the 1st applicant. They aver that when the application dated 14th April 2023 came for determination, the Court was indisposed and no orders were issued. As such, the matter Loitoktok ELC Case No. E001 of 2023 between Esther Wanjiku Mwaura vs Anne Wanja Mburu proceeded for full hearing, parties closed their cases and a judgement was delivered on 31st May 2023 where the 1st Applicant was ordered to vacate the suit premises, demolish the structures thereon and exhume the remains of Stephen Mburu Ngotho among other orders. The applicants aver that having lawfully purchased the suit property in 2001 have lived and developed it since then risk losing it if the orders are executed. Additionally, in the Matrimonial suit filed in 2017 the Respondents indicated that the suit property had been sold off.
 5. The 1st Respondent in her Replying Affidavit deponed that the trial court was right in dismissing the 1st Applicant's counterclaim for lack of letters of administration on her late husband's estate. Since she lacked locus, then the application at hand is also an abuse of the court process. The Respondent also deponed that the applicants had not filed an appeal thus the prayer for stay was unavailable and that this court did not have jurisdiction to review or set aside a judgement delivered by a court of equal jurisdiction adding that the High Court decision had been appealed against and a decision rendered by the Court of Appeal. The application should thus be dismissed with costs.
 6. The 2nd respondent in his Replying Affidavit also objected to this court's jurisdiction to review the Judgement of a court of equal status in High Court Civil Case Number 1 of 2017 (OS) where the judgement was delivered, appealed and Court of Appeal judgement delivered. The Respondent also contested the Affidavit sworn by counsel for the Applicants, the 1st Applicant locus standi to sue and the institution of a suit by way of miscellaneous application.
 7. This application was canvassed by way of written submissions.



The Applicants' Submissions

8. By the time of writing this ruling, counsel for the Applicants' had not filed their submissions.

The 1st Respondent's Submissions

9. Counsel reiterated that this court was not clothed with jurisdiction to determine the application to review/ set aside a decision of a Court of equal status adding that the said decision had been appealed against at the Court of Appeal and a decision rendered. And that the 1st Applicant did not have locus to institute a suit on behalf of her late husband without letters of administration.

Analysis and determination

10. I have considered the Notice of Motion, the Affidavits in support, the response thereto, the submissions and the authorities cited. The issues for determination are:

- i. Whether the application dated 6th June 2023 is merited;
- ii. Who should bear the costs of this application?

11. The Applicants have sought orders stay of execution against the lower court's decision in Loitoktok ELC No. E001 of 2023 delivered on 31st May 2023 as well as an order for review/ and or setting aside of Nyakundi J.'s decision in Kajiado Civil Suit No. 1 of 2017 (OS) delivered on 16th October 2018.

12. The present application, while invoking Sections 1, 1A, 3, and 3A of the *Civil Procedure Act*, raises significant concerns that undermine its legal validity. These errors transcend mere technicalities; they strike at the very heart of the application, casting doubt upon its legitimacy and appropriateness for judicial consideration. Order 42 Rule 6 of the *Civil Procedure Rules* is the guiding principle for grant Stay Pending Appeal. Unfortunately, this miscellaneous application lacks a substantive foundation upon which it is predicated. The applicants have sought stay of execution orders without anchoring their request on any legal basis or substantive grounds. In instances where a stay of execution is contingent upon an appeal, it is incumbent upon the applicants to annex the appeal alongside the application. Regrettably, no such appeal accompanies the present application, thereby leaving it devoid of the requisite legal basis. The Court of Appeal in *New Ocean Transport Limited & another v Anwar Mohamed Bayusuf Limited [2014]* eKLR held: "... Ordinarily an injunction is always issued pending the doing of something or to compel the doing of something. However under rule 5(2)(b), such an application must be anchored on an appeal or intended appeal and nothing else..."

13. Secondly, the Application asks this court to review a decision rendered by a court of equal status. Such a course of action is procedurally irregular, as courts of equal standing lack the legal authority to review decisions made by their counterparts. This was echoed by the Court of Appeal in *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) [2018] KECA 330 (KLR)* where it was stated thus;

" 14. I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has,



moreover, been expressly stated in Article 165(6) of *the Constitution* in these terms;

“The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.”

14. This notwithstanding, that High Court decision the Applicants urge this Court to review and or set aside was appealed against and a judgement rendered.
15. Finally, the legal capacity of the 1st Applicant as a representative of the estate of her late husband without the requisite Grant of Letters of administration has been called to question. No evidence has been tendered to demonstrate compliance with this procedural requirement, which once again goes to the core of the application.
16. I have perused the impugned lower Court’s decision Loitoktok ELC No. E001 of 2023 and I find that the lower court also reinforced the procedural irregularities evident in the application as follows:

“20. ... I have no doubt that Annah Wanja Mburu and Hannah Wanja Muiyoro refer to the Defendant in this matter.

Starting with the issue of the counterclaim, the Defendant Hannah Wanja has presented a sale agreement dated 15/10/2001 between Mwaura Ole Mashua and her husband. So she is bringing the counterclaim in representative capacity for the estate of her late husband.

21. When she filed the counter claim she never had any letters of administration to the deceased estate and till now none have been shown to this court. She definitely did not have any capacity and/or locus standi to file the suit on behalf of the deceased estate. Even assuming she had locus standi, which she doesn’t, how would the defendant seek for orders from this court to compel Mwaura Ole Mashua transfer the land to her yet she has not enjoined the said Mwaura Ole Mashua as a party to this case...
22. I accordingly order the counter claim struck out in its entirety. I award costs to the Plaintiff Esther Wanjiku.
23. On the issue of ownership of Loitoktok/Rombo A/185 this court has been shown the Judgement in High Court in Kajiado Civil Suit No. 1/2017 (OS) as well as a decree from the said suit. From the said judgement and decree, it is evident that Nyakundi J. awarded the suit land to the Plaintiff herein. This court has not been shown any orders issued by a higher court contrary to those orders of Nyakundi. J. I therefore cannot purport to sit and determine the issue of ownership of a property in which the High Court has already made a determination as doing so would be undermining the authority of the superior court and going against the principle of stare decisis.”

17. I also read through the High Court decision in Civil Suit No. 1 of 2017 (OS) delivered on 16th October 2018 by Nyakundi J. and I note that Loitoktok/Rombo A/185 (the suit property herein) was apportioned to the 1st Respondent. It is on record that the 1st respondent herein appealed this decision as Civil Appeal No. 261 of 2019 between Esther Wanjiku Mwaura vs Mwaura Ole Mashua and Anna Njeri Mwaura & John Tombo Mashua (as interested parties) adduced as Affidavit evidence. The Court



of Appeal delivered its judgement dated 24th June 2022 where it held “For all these reasons we find the appeal bereft of merit and dismiss it...”

18. From the foregoing, it is crystal clear that the present application is not only procedurally improper but also legally untenable akin to taking this Court on an academic exercise.
19. The Applicants ably represented by learned counsel should have been advised better. I am alive to the fact that land matters are emotive issues and should be fully canvassed and addressed. Therefore, if the 1st Applicant needs to ventilate any dispute regarding to the suit property against the Respondents, then she should do so properly and procedurally with proper legal capacity.
20. While it is trite that costs follow the event as per Section 27 of the *Civil Procedure Act*, I am alive to the lower Court’s judgement and what it means to the 1st Applicant. As such, I find it proper that parties do bear their own costs of this Application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. Kinge for the 1st – 3rd Applicants.

N/A for the 4th Applicant.

Mr. Maina Makome for the 1st Respondent.

Ms. Kamau for Mr. Wandaka for the 2nd Respondent.

Court Assistant – Mutisya.

