



**Kihara (Suing as a legal representative of Pricilla Wambui Kihara) v Mbagu & another  
(Environment & Land Case 1265 of 2016) [2024] KEELC 3559 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3559 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1265 OF 2016**

**LN MBUGUA, J  
APRIL 11, 2024**

**BETWEEN**

**PAULINE WANGUI KIHARA (SUING AS A LEGAL REPRESENTATIVE OF  
PRICILLA WAMBUI KIHARA) ..... PLAINTIFF**

**AND**

**BEATRICE MUKERI MBAGU ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH KAMAU MBAGU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendants' application dated 29.11.2023 is for determination, where they seek my recusal from hearing any application in the matter as well as orders that the file be placed before the Presiding Judge of the ELC Court and be allocated a different judge or a bench of judges for urgent determination. The Defendants also seek stay of this court's orders of 30.9.2022 and 21.11.2023.
2. The application is based on grounds on its face and on the 2<sup>nd</sup> Defendant's supporting affidavit sworn on 29.11. 2023. He faults this court's judgment issued on 30.9.2019 and its subsequent ruling of 21.11.2023 on the basis that the said orders contradict the *Constitution* and the *Limitation of Actions Act*. They seek orders of stay to enable them to lodge an appeal against the ruling of this court dated 21.11.2023.
3. The application is opposed by the Plaintiff vide grounds of opposition dated 12.1.2024 where it is argued that the Defendants' application is not merited because there are no grounds advanced for my recusal which is sought after judgement was issued in the matter.
4. The Plaintiff also avers that the Defendants have not adduced any reasons or grounds to support their prayer for stay of the orders of this Court issued on 21.11.2023 and that they did not demonstrate to the court that substantial loss may result unless an order of stay is granted.



5. In response to the Plaintiffs' grounds of opposition, the Defendants filed a replying affidavit sworn by the 2<sup>nd</sup> Defendant on 6.2.2024 where he avers that the substance of their application is failure on my part to acknowledge my lack of accountability to the law and review the judgement of 30.9.2022 because it was illegal and *ultra-vires* to the [Constitution](#), an issue that was communicated to the Judicial Service Commission vide the letter dated 21.12.2023, addressed by the Defendants' Advocates.
6. He also avers that there is a Memorandum of Appeal filed against the ruling delivered on 21.11.2023, thus the judge ought to cease from further action in the matter.
7. The application was canvassed by way of written submissions. The Defendants' submissions are dated 2.2.2024 where they argue that the judgement issued herein on 30.9.2022 is ultra- vires to Article 40 of the [Constitution](#) and that it is on the basis of the said illegality that the Defendants filed the application dated 11.10.2023 seeking to arrest execution of the said judgment but the court proceeded to issue further orders to enable execution of the ultra-vires orders. To buttress their arguments, the Defendants rely on the case of [Okiya Omtatah Okiiti v Principal Secretary for Health, Board of Directors & 3 others](#) [2022] eKLR.
8. On her part, the Plaintiff filed submissions dated 12.1.2024 arguing that the Defendants failed to adduce any ground for recusal as stipulated in the [Judicial Service \(Code of Conduct and Ethics\) Regulations](#) 2020.
9. The court is urged to be guided by the decision in [Republic v Independent Electoral & Boundaries Commission & Another ex parte Coalition for Reforms and Democracy \(CORD\)](#) [2017] eKLR as well as the case of [Philip K. Tunoi & Another v Judicial Service Commission & Another](#) CA Civil Application NAI No. 6 of 2016 [2016] eKLR.
10. The Plaintiff also argues that the Defendants have not met the conditions for grant of stay as provided under Order 42 Rule 6 (2) (a) of the [Civil Procedure Rules](#) which are; establishment of a sufficient cause, satisfaction of substantial loss and furnishing of security.
11. It is pointed out to the court that the application for stay is filed after inordinate delay, judgment having been entered on 30.9.2022.
12. It is also submitted that the Defendants have not attempted to present any security to the court which is a demonstration of their unwillingness to comply with this court's orders. To this end, the case of [Visbram Ravji Halai v Thorton & Turpin](#) Civil Application No. Nairobi 15 of 1990 [1990] KLR 365 is cited.
13. I have considered all the arguments raised herein. The issues falling for consideration are;
  - a. Whether the Defendants have established grounds for my recusal from this matter.
  - b. Whether the defendants have satisfied the conditions for grant of stay pending appeal.
14. On recusal, Defendants herein seek my recusal from this matter. As pointed out by the Plaintiff, the grounds upon which the order is sought are not discernable, since the defendants simply state that the judgment was ultra-vires the [Constitution](#) and contravened the provisions of the [Limitation of Actions Act](#). Those are however issues in the realm of judicial pronouncements and not misconduct. The Defendants did not advance any ground/allege any misconduct/bias on my part.



15. In the case of *Prayosha Ventures Limited v NIC Bank Ltd & another; Beatrice Jeruto Kipketer & Another (Interested Parties)* [2020] eKLR, the court stated that;

“If Judicial Officers formed the habit of easily recusing themselves based on unproven allegations which are not reasonably capable of being plausible, then no matter would ever make headway in the courts, as the nature of our decisions is such that there will always be a loser.”

16. Needless to say that having delivered the judgment on 30.9.2022, and having declined a review of the said judgment vide the ruling of 21.11.2023, this court is now functus officio in so far as matters relating to the merits of the dispute are concerned. It follows that the issue of placing the file before a different judge cannot arise. The court’s mandate is limited to the process of implementation of the aforementioned judgment and nothing more.

17. In any event, the judgment was delivered way back on 30.9.2022 and for the next one or so year, the defendants never challenged the competency of this court to handle the matter.

18. On the issue of stay, the principles guiding grant of stay of execution pending appeal are provided for under Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* and reiterated in the case of *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR as follows;

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another v Thornton & Turpin Ltd* where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that; “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, Substantial loss would ensue from a refusal to grant a stay. The Applicant must furnish security; the application must be made without unreasonable delay.”

19. The Defendants seek a stay a year after judgement was entered herein on 30.9.2022. There is inordinate delay which was not explained.

20. Further, the Defendants did not demonstrate that they would suffer loss if stay is not granted and they also failed to furnish security.

21. In the circumstances, the Defendants’ Notice of Motion dated 29.11.2023 is found to have no merits, the same is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Mwaura for Plaintiff

Mary Muigai for Defendants

Court assistant: Eddel

