Ruto (Suing as legal representative of the Estate of Kibiwott Arap Mwolomet - Deceased) v Maina & another (Environment & Land Case 19 of 2018) [2024] KEELC 4218 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4218 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 19 OF 2018

FO NYAGAKA, J

MAY 14, 2024

BETWEEN

JAPHETH KIBIWOTT RUTO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF KIBIWOTT ARAP MWOLOMET) - DECEASED) ..... PLAINTIFF

AND

VIRGINIA NJERI MAINA ..... 1ST DEFENDANT

VINCENT RONGEI KOTOKOTO ..... 2ND DEFENDANT

RULING

1. The Plaintiff filed the instant Application dated 24/01/2024 the same date. He brought it under Order 61 Rule 3 (proviso) of the *Civil Procedure Rules*. He sought the following prayers:-

    a. ...spent

    b. That there be stay of execution in this suit pending the hearing and determination of Eldoret Court of Appeal No 69 of 2023 between Japheth Kibiwott Ruto (appellant) and 1. Virginia Njeri (respondent) and Vincent Rongei Kotokoto (Respondent).

    c. That the Court do provide for security in its discretion if necessary.

    d. That costs of the application be provided for.

2. The application was not based on any grounds but it was supported by the Affidavit of the Applicant. It was sworn on 25/01/2024. The Applicant deponed that he was served with a notice to show cause why execution should not issue against him. He annexed and marked it as JKR1 a copy of the Notice. Further, the Notice gave him an opportunity to appear in person or through an advocate, and he decided to appear in person. That, Form 23 reserved his right to fair hearing under the *Constitution*. He did not intend to change advocates since his previous ones had left him to his designs. The Advocates

gave him a copy of the Appeal they filed on his behalf. He marked as JKR2 as self-explanatory letter to the effect that he intended to act in person and JKR3 a copy of the Memorandum of Appeal.

3. He deponed that the appeal had high chances of success and raised constitutional issues. That the agreement relied on by the court should not have been taken in as evidence as no stamp duty was paid for it. The title to the suit, copies of which he annexed and marked as JKR 4(a) and (b) were issued in 2010. He annexed to the Affidavit as JKR a copy of a delivery note over the Record of Appeal. He deponed that limitation of Actions only operated where there was valid title issued. That limitation could not have resulted in the failure of his suit. The prosecution of the notice to show cause was an abuse of the process of the court as the costs were supposed to be shared between 2 Respondents. Further, that Section 8 of the *Land Court Act* (sic) was in his favour and his appeal could be rendered nugatory if no stay of execution was granted.

4. The application was opposed through an Affidavit sworn by Virginia Maina, the 1st Respondent on 14/02/2024. She deposed that on 05/08/2021, the court delivered a ruling by which it is struck out with costs to the defendant the Amended Plaint on 19/02/2021 by which decision the instant case was finalized. She referred to the copy of the ruling and deponed further that on 17/08/2021, the plaintiff served her Advocates with a Notice of Appeal but did not take any steps to apply for stay of execution until 05/07/2022, when he filed an application dated 03/07/2022. The application was dismissed on 27/09/2021 for non-attendance. He filed an application dated 03/10/2022 seeking to set aside the orders of 27/09/2022. The respondent opposed the Application through a replying affidavit sworn on 14/10/2022. On 20/06/2023, the court dismissed with costs the application dated 03/10/2022.

5. Upon dismissal of the application dated 03/10/2022, the Court became functus officio. The present Application was therefore *res judicata*. The instant application was scandalous frivolous, vexatious and an abuse of the process of their court. The balance of convenience was in favour of the defendant and not the plaintiff. The plaintiff had failed to demonstrate that he had an arguable appeal or that it would be rendered nugatory, and further that he was able and willing to deposit security.

6. The 2nd defendant filed Grounds of Opposition to the application. They were dated 30/01/2024 and filed on 02/02/2024. He stated that the application was bad in law, defective and should be struck out. It was similar to an application dated 03/07/2022 which was dismissed on 27/09/2022. Further, on 20/06/2023, the court declined to reinstate the same. Further, the firm of Katama Ngeywa & Company Advocates were still on record for the Applicant, hence the applicant herein did not have a locus. The application was made too late in the day and had noticed specified which orders the Plaintiff wanted, hence should be dismissed.

7. The Applicant filed a document he referred to as "Notice of objection to grounds of objection." He stated in it that the grounds were not based on law. No ground of law was stated to support the argument that the application was bad in law to enable him react (sic). No defect had been shown to enable him to react (sic). Applications for stay of execution did not have to wait for execution if it was explicit on record and being pursued or likely to be pursued. The respondent had not denied that an appeal was pending. The grounds were abuse of the process of the court. Regarding latches, the date of the judgement, stay, and the filing of the appeal were pertinent. Grounds of Opposition without a supporting affidavit were inadequate to warrant dismissal of an application. Ground B of the Opposition was stillborn (sic) given the consent between him and the firm of Katama Ngeywa and company advocates. The basis of his filing the application in person was covered in his supporting affidavit and had not been challenged. The interest of justice gave him the right to be heard. The Advocates for the 2nd Defendant had not served the Grounds of Opposition on the 1st Defendant's.

8. The application was disposed of by way of written submissions. The plaintiff, argued that he relied on the content of the Application as it was. Learned counsel for the 1st Defendant opted not to submit, but rather relied on the replying affidavit.

9. Learned counsel for this second defendant argued that the application was against the law since the firm of Katama Ngeywa & Co. Advocates were still on record and the plaintiff did not seek first an order to be permitted to come on record. His indication that he was acting in person or contrary to the record. Further that the instant application was the same as the one he brought on 03/07/2022, which was dismissed.

10. On his part, the plaintiff submitted that he had lost faith in his advocates and decided to act in person. The instant application was different from that of 03/07/2022 which the former advocates did not represent him in. He admitted though that the prayers in the two applications compared were similar. But he did not agree with the submissions that he deposits any sum of money in court since his whereabouts were known and he would not disappear.

11. I have considered the application, the law and the submissions by the parties. Three issues lie before me for determination. One is whether the instant application is properly before court. Two, whether the application is *res judicata*. Three, who to bear costs.

12. Regarding the first issue, the Respondents argue that the Applicant moved the Court before being permitted to come on record to represent himself. The Applicant disputes that and argues that he is properly acting in person.

13. The law regarding either a change of advocates or acting in person by a party who previously engaged an advocate to represent them in a matter in which judgment had been delivered and the same has not been set aside under Order 9 Rule 9 of the *Civil Procedure Rules, 2010*. The provision stipulates that:-

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

14. It means that for a party who intends to represent himself having duly appointed an advocate who represented him to the time of delivery of judgment, he has either to make a formal application to come on record and which application shall be served on all parties including the outgoing advocate and it be heard and the Court gives an order granting it or he files a consent entered into between the outgoing advocate and him and the Court notes it as such. Then in either case he will file a Notice of Change of Advocates and serve it on all parties. It is upon doing that when he will be properly acting in person or his new advocate will be properly on record. Absent of that anything done by the party or new advocate will be against the law of procedure, and anything of that sort is illegal and a nullity.

15. In the instant case, the Applicant was represented by the law firm of Katama Ngeywa & Company Advocates all along up to when judgment was delivered on 05/08/2021. The Plaintiff even filed a notice of appeal on 10/08/2021 through the said law firm and applied to stay the execution of the decree herein through them vide an application dated 03/07/2022.

16. When the Applicant decided to file the instant application he did not follow any of the steps explained in paragraph *14* above. He filed the Application and annexed as JKR2 and JKR5 a document he described as a letter and delivery note at the same time, respectively. Argued that these showed that he was given the consent to proceed after his 'previous' Advocates left him to his own "designs". The undated document was a note stating, "I, Denis Wafula Juma, have been permitted by the firm of Katama Ngeywa & Co. Advocates to hand over a copy of Record of Appeal to Japheth Kibiwott being the client to this firm." The document does not indicate who Denis Juma was in the law firm. It does not disclose the relationship of even the person who purported to witness the document or the purpose of the document.

17. Clearly this was not a consent for the Applicant to either represent himself or come on record. If anything, it means that the instructions remained with the law firm of Katama Ngeywa & Co. Advocates. The content of such a document demonstrates the wisdom of the Rules Committee in providing that an application be made or a consent be granted. In the instant case, it appears to me that when the Applicant got hold of the Record of Appeal from the law firm he vanished into thin air and went to his "designs", of filing the instant application without the knowledge of the Advocates, or perhaps completing his obligations on fees payment. The Court cannot permit such conduct. The application is improperly before the Court.

18. Regarding the second issue, which is whether the application is *res judicata*, Section 7 of the *Civil Procedure Act* is clear on what constitutes *res judicata*. The concept is not a complex doctrine to understand. It simply means that when a court of competent jurisdiction makes findings on merit on issues between same parties litigating under same title, a matter involving one or more parties in a subsequent suit, application or issue before a competent court or the same one will be barred by law from being entertained. It must be declared as determined and dismissed. In *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR the Court of Appeal stated as follows:

> " To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

19. Thus, Section 7 of the *Civil Procedure Act* provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

20. In the instant case, the Defendants/Respondents argued that the application was similar to the one the Plaintiff filed in this matter and was dated 03/07/2022. At first the Applicant denied that the Application was not similar but in response to the submissions of the Respondents, he admitted that indeed the contents were similar. I have looked at the application dated 03/07/2022. In it the Applicant sought an order of stay of execution of the decree herein pending the hearing and determination of the appeal he filed against the judgment herein. The application was dismissed on 27/09/2022. The Applicant has brought the instant application seeking similar orders. Clearly that is a 'repeat of the match' between him and the Respondents but he is not playing away from home (that is to say, in the Court of Appeal where he preferred the appeal to). The instant application can only be nothing but *res judicata*.

21. The upshot is that the Application is *res judicata* and it was improperly before the Court in the first instance. It is hereby dismissed.

22. Since costs follow the event, the third issue is simple in determining: the Applicant shall bear the Respondents' costs of the application.

23. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF MAY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE.