



Njeru Nyaga & Company Advocates LLP v Registered Trustees of Ruiru Sports Club; National Land Commission (Garnishee) (Environment and Land Miscellaneous Application E083 of 2022) [2025] KEELC 695 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 695 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E083 OF 2022
CG MBOGO, J
FEBRUARY 20, 2025
IN THE MATTER OF NATIONAL LAND COMMISSION TRIBUNAL
REVIEW OF GRANTS AND DISPOSITION OF TITLES LR NOS 122/4 &
7 KIAMBU COUNTY
AND
IN THE MATTER OF NATIONAL LAND COMMISSION TRIBUNAL
REVIEW FOR VALUATION AND COMPENSATION OF 15 ACRES
ACQUIRED FROM L.R. NOS 122/4 KIAMBU COUNTY.

BETWEEN
NJERU NYAGA & COMPANY ADVOCATES LLP ADVOCATE
AND
REGISTERED TRUSTEES OF RUIRU SPORTS CLUB CLIENT
AND
NATIONAL LAND COMMISSION GARNISHEE

RULING

1. Before this court is a Notice of Motion Application dated 11th December 2024 and filed by the Client/ Respondent pursuant to Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 42 Rule 6 and Order 50 Rule 2 of the Civil Procedure Rules. The Respondent has sought the following orders:
 - a. Spent.
 - b. Spent.



- c. Pending the hearing and determination of Civil Appeal No. E463 of 2023: The Registered Trustees of Ruiru Sports Club v Njeru Nyaga & Company Advocates LLP, there be a stay of execution of the orders of 2nd November 2023.
 - d. The costs of this application be borne by the Advocates/Applicant herein.
2. This application is predicated on the grounds on its face in the supporting affidavit sworn by Gabriel Muthwale, a trustee of Ruiru Sports Club. Gabriel Muthwale deponed that by a ruling dated 31st May, 2023, this court entered inter alia judgement in the sum of Kshs. 41,289,401.80/- against the Respondent being the agreed costs in favour of the Applicant. Pursuant to the ruling, a decree was extracted and thereafter a further order was issued on 2nd November, 2023 to the effect that all money held by the Garnishee be attached to answer and/or satisfy the ruling given on 31st May, 2023. The club consequently filed an appeal against the decree on the basis of the said Garnishee proceedings in Civil Appeal No. E463 of 2023: The Registered Trustees of Ruiru Sport Club v Njeru Nyaga & Company Advocates LLP.
 3. The deponent asserted that within the said appeal, the Respondent filed an application for stay of execution of the said decree pending hearing and determination of the appeal. He stated that on 13th December, 2023, the Applicant and the Respondent compromised the application for stay by recording a consent whereby parties agreed that the garnishee should deposit the decretal amount in an escrow account to be opened by advocates for both parties within 30 days as a condition for the stay of execution. The Garnishee however failed to deposit the said decretal sum within 30 days, thereby necessitating the Club to file an application seeking extension of time to deposit the decretal sum.
 4. Mr. Muthwale asserted that the application for extension of time was certified urgent and directions were given for the parties to file responses and written submissions. The Client/Respondent duly complied with the directions by filing further affidavit dated 9th October, 2024, Written Submissions dated 8th October, 2024 and a List of Authorities dated 8th October, 2024. The Advocate/Applicant, they contend, has not complied with the said directions as it only filed a replying affidavit.
 5. Mr. Muthwale states that the further affidavit dated 9th October, 2024 was filed by the Club to bring to the attention of the Court of Appeal that the delay in depositing the decretal sum in the escrow amount was not in bad faith. They annexed a statement of account of the escrow account to demonstrate that the Garnishee had finally deposited the decretal amount in good faith hence the more reason the Court of Appeal should enlarge time as prayed in the application.
 6. He stated that in the meantime, the Advocates/Applicant filed an application in this suit seeking to cite the officials of the Garnishee for alleged contempt of court. By a ruling delivered on 22nd October, 2024, this court dismissed the Applicant's application on the basis that the application for contempt was riddled with several contradictions; that the application referred to non-existent court orders; that the application was inviting this honourable court to usurp the jurisdiction of the Court of Appeal and that this court lacked jurisdiction to cite the officials of the Garnishee for contempt of court of an order issued by the Court of Appeal.
 7. He asserts that regrettably, based on a misinterpretation of the ruling dated 22nd October, 2024, the Advocates/ Applicant wrote an email to the bank where the amount is held in an escrow account on 22nd October, 2024, demanding to transfer the amount from the escrow account to its own sole account . The Advocates indicated to the Bank that should they fail to transfer the amount, the Applicant would commence contempt proceedings against the Bank. The Applicant had already agreed for the said amount to be deposited in the escrow account after the lapse of the 30 days as it furnished the Garnishee with its details of the escrow account for the purposes of the said deposit.



8. Mr. Muthwale stated that it was on this basis that the Respondent through its advocates wrote to the Bank on 24th October, 2024 informing the Bank not to comply with the said demands as the ruling of 22nd October, 2024 did not grant any positive orders that can be used to transfer the said amount as demanded by the Applicant and that the previous application for contempt was dismissed.
9. According to the deponent, the main objective of the Court of Appeal order was to deposit the decretal amount in the escrow account. He asserts that the direction that payment be paid within thirty days does not affect the validity of depositing it after the set period; that the time limit was to hold the parties' hands from applying for the execution of the order before its expiration; that the High Court has no jurisdiction to entertain any application relating to the said order made by the Court of Appeal and the intention of the current contempt application is to coerce the trustees of the Club to release the amount deposited in the escrow account to the Applicant's sole account.
10. He avers that if the application for contempt is allowed, the Club will suffer grave prejudice and irreparable loss because the entire appeal will be rendered nugatory; that if the appeal succeeds and the decretal sum has already been deposited in the sole account, the Club will not be in a position to recover the said amount as the Applicant will have utilized it and lastly, the Applicant has not demonstrated its capability of refunding the said decretal sum in the event the same is deposited in its sole account and utilized it and the appeal succeeds. They contend that in these circumstances, it is in the interests of justice that this application be allowed with costs.
11. The Advocate/Applicant responded to this application through Grounds of Opposition dated 23rd December, 2024. The Advocates articulated three grounds of opposition. First is that the application is res judicata as the Honourable Court dismissed the Client's application for stay of execution dated 16th September, 2023 on 2nd November, 2023 with costs of Kshs. 30,000/- which has not been paid to date.
12. The Second ground is that the application is incompetent as the Client was by consent granted orders by the Court of Appeal in Nairobi COA Civil Appeal Application No. E463 of 2023 on 13th December, 2023 on condition that the Garnishee deposits the principal sum in a joint escrow account within 30 days, which orders lapsed for non-compliance.
13. The Third ground of opposition is that this application lacks merit, is an abuse of the court process and an affront to the authority of this Honourable Court and a mischievous attempt by the Applicant to invite this Honourable Court to ratify the acts of contempt by the Applicant and the Garnishee.
14. This application was canvassed through written submissions.
15. Counsel for the Client/ Respondent filed written submissions dated 30th January, 2025. Counsel submitted three grounds in support of the Respondent's Application: that the application is not res judicata, that the application is not incompetent and that the Respondent has met the threshold of grant of stay.
16. On the first issue, of whether the application is res judicata, Counsel submits that that the application is not res judicata as there are new facts which were not before this honorable court earlier, which after the exercise of due diligence, which facts merit a rehearing of the application and possible departure from the previous ruling given on 2nd November, 2023. These facts are that at the hearing of the earlier application, the decretal amount had not been deposited in the escrow account. However, the said amount has since been deposited in the escrow account, hence the Club deserves a stay pending the hearing and determination of the said appeal. Counsel relied on the principle laid down in Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR, which principles were further reiterated in Mohamud Sheikh Hussein v Gulf African Bank Limited [2019] eKLR.



17. On the second issue that the application is not incompetent, Counsel argued that Order 42 Rule 6 of the Civil Procedure Rules permits the Applicant to apply for an order of stay of execution in the court which issued the decree or order pending the hearing of the appeal of that decree or order. They asserted that Civil Appeal No. E463 of 2023 is yet to be determined and that the application for stay in the Court of Appeal was compromised whereby the Garnishee was ordered on 13th December, 2023 to deposit the decretal amount in an escrow account and that the decretal amount has been deposited out of time.
18. Counsel asserted that the Club filed another application before the Court of Appeal seeking to enlarge time within which to deposit the said amount, and also sought the Court of Appeal to stay execution of the contempt proceedings herein. They assert that during the hearing on 23rd January, 2025, the prayer for extension of time was withdrawn because it was supposed to be before a one-judge bench and not a three-judge bench. The three-judge bench all the same held that the late disposal of the decretal amount did not occasion the stay order of 13th December, 2023 to lapse. The Court of Appeal was of the view that the conditional stay order of 13th December, 2023 is still in force so long as the decretal amount has been deposited. The said application is scheduled for ruling on 9th May, 2025. The court of Appeal however failed to grant status quo orders pending the hearing and determination of the appeal or pending the delivery of the ruling on 9th May, 2025.
19. Counsel's submission was that the Club/ Respondent has met the threshold for grant of stay of execution set out in Order 42 Rule 6(2) of the Civil Procedure Rules 2010, which is that the application has been made without unreasonable delay; that the Respondent shall suffer substantial loss unless the order of stay of execution is granted and that the Respondent has furnished such security as the court may order for due performance of such decree or order.
20. Counsel contends that this application has been made without unreasonable delay, as it was filed on 11th December, 2024, and was triggered by the Applicant's contempt application filed on 21st November, 2024. They assert that this application was filed less than a month after the application for contempt of court was filed. They relied on the case of *Jospeh Simiyu Mukenya v Agnes Naliaka Cheseto* [2012] eKLR.
21. It was Counsel's further submission that the Club has furnished security in an escrow account held by the advocates of both parties. They state that the said security was being held by the National Land Commission who are the Garnishee in this matter. The said security was a condition precedent for granting of stay by the Court of Appeal on 13th December, 2023.
22. Moreover, Counsel stated that the Respondent will suffer substantial loss if a stay of execution is not granted because the decretal sum had already been deposited in an escrow account as security, and the amount of Kshs. 41,289,401.80 is substantial. They submit that the substantial loss is not quantitative and is not dependent on whether the decretal amount is great or small, rather, substantial loss is a qualitative concept which refers to any loss, great or small with real value or worth. Counsel relied on the case of *Tropical Commodities Suppliers & Others v International Credit Bank Limited* (2004) 2 EA 331 as cited in *Ann Wanjiru Waigwa & Another v Jospeh Kiragu Kibarua* [2009] eKLR.
23. Counsel's final submission was that the Respondent/Club will suffer grave prejudice if stay is not granted because the trustees of the Club are now facing contempt of court proceedings and may be committed to civil jail if the application for contempt is allowed. They relied on the cases of *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another* [2006] eKLR and *Abyssinia Iron & Steel Ltd v Kenya Engineering Workers Union & another* [2015] eKLR.



24. Counsel for the Advocate/Applicant filed written submissions dated 7th February, 2025. Counsel submitted that this application is an application for stay of execution but Counsel has attempted to create confusion by submitting an application for injunction, which the application is not. They submitted that once an application for stay of execution has been dismissed under Order 42 Rule 6(1) of the Civil Procedure Rules as happened on 2nd November, 2024, a similar application can only be made to the court which the appeal has been preferred. They state that the client indeed filed such an application to the Court of Appeal and entered into a consent with the Advocate, but the consent orders lapsed in January 2024.
25. Counsel urged this court to hold its officers to the highest standards possible and to thwart the attempts to abuse the court process by Counsel who try to subvert the course of justice by filing multiple applications to vex and frustrate other parties. They implored this court to dismiss the application with costs on the higher scale and ignore the Client/ Respondent's attempt to confuse applications to enforce court orders with an application for stay of execution which can only be made to the court to which the appeal is preferred.
26. Counsel submitted that the situation is more incredulous as the client has never agreed on the Advocate's Bills of Costs and as a result, they are yet to obtain the decree and proceedings to the judgement dated 31st May, 2023, amounting to unconscionable delay. Further, the Advocate's application to strike out the purported appeal is due for ruling on 9th May, 2025 before the Court of Appeal as the Appellant has never filed a Record of Appeal.
27. Upon consideration of the application, grounds of opposition and the respective submissions filed, the following issues are for the determination of this court:
 - a. Whether this application is res judicata
 - b. Whether this application is competent
 - c. Whether this court should issue orders of stay.
28. The facts of this case are that by a ruling dated 31st May, 2023, this court awarded the Advocate/Applicant with costs in the sum of Kshs. 41,289,401.80/- which sum was to be paid by the Respondent. Thereafter, through an application dated 9th August, 2023, the Advocate/Applicant sought that all the monies held by the garnishee be attached to answer and/or satisfy the ruling given by this court on 31st May, 2023 and the balance thereof be paid to the Client/ Respondent. Through a ruling dated 2nd November, 2023, the Honourable Justice Oguttu Mboya allowed the relief of attachment sought, as he found that the monies held by the garnishee are attachable for purposes of satisfaction of the decree in favour of the Applicant.
29. In the same ruling dated 2nd November, 2023, the Honorable Justice Oguttu Mboya considered an application for status quo orders and stay of execution where the Client/Respondent sought orders of stay or proceedings of this court, pending determination of an application for stay of proceedings and stay of execution of the decree arising from the ruling of this court, filed at the Court of Appeal. The court dismissed the Client/ Respondent's application as it held that it did not have the jurisdiction to determine the application, and further stated that the said application amounts to an abuse of the due process of the court.
30. Being aggrieved by the ruling dated 2nd November, 2023, the Client/ Respondent filed Civil Appeal (application) No. E463 of 2023 before the Court of Appeal. At the Court of Appeal, the Client/ Respondent filed an application for stay of execution of the decree pending hearing and determination of the appeal. A consent order was recorded on 13th December, 2023 between the Advocate/Applicant



and the Client/Respondent. The terms of the consent were that the Garnishee should deposit the decretal amount in an escrow account to be opened by advocates of both parties within 30 days as a condition for the stay of execution. The Garnishee however failed to deposit the sum within the indicated thirty days.

31. The Advocate/Applicant then filed an application before this court dated 6th June, 2024 seeking to cite the National Land Commission through its commissioners for failing to obey the court orders issued by the Court of Appeal on 13th October, 2023. Through a ruling dated 22nd October, 2024, Justice Oguttu Mboya found this application to be incompetent as the Environment and Land Court is not seized of the requisite jurisdiction to punish for contempt of orders issued by the Court of Appeal.
32. Meanwhile, at the Court of Appeal, on 24th September, 2024, the Client/Respondent filed a Notice of Motion application seeking that the Court extend time by a further thirty days for the decretal sum to be deposited as ordered on 13th December, 2023. They also sought that pending the hearing and determination of the application and the appeal, the orders given by Justice Oguttu Mboya on 2nd November, 2023, attaching all money held by the Garnishee to answer and/or satisfy the ruling given on 31st May, 2023 be stayed. The application was certified as urgent on 26th September, 2024 and the Court of Appeal declined to issue the interim orders of stay sought in the application. The said application is scheduled for ruling on 9th May, 2025.
33. It is in this context that the Client/ Respondent has sought orders of stay of execution of the orders of 2nd November, 2023, pending hearing and determination of Civil Appeal No. E463 of 2023.
34. The Advocate/ Applicant has opposed this application on the grounds that this application is res judicata, incompetent and an abuse of court process. The doctrine of res judicata is set out in Section 7 of the [Civil Procedure Act](#) as follows:-

quote

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.

35. The Supreme Court in the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR succinctly set out the five essential elements to be satisfied in a claim of res judicata: -

“The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”



36. In this case, it is not disputed that the Client/ Respondent indeed filed a similar application to the one before this court dated 16th September, 2023. In that application, the Client/ Respondent sought an order of stay of proceedings, pending the Hearing and determination of the Notice of Motion Application dated the 3rd July, 2023 in Civil Appeal No. E463 of 2023; the Registered Trustees of Ruiru sports club vs Njeru Nyaga & Co Advocates. As noted above, the said application was dismissed as the court found that it lacked the jurisdiction to determine the application, seeing as the Client/ Respondent had filed a similar application before the Court of Appeal.
37. In the application currently before this case, the Client/ Respondent is seeking orders for stay of execution pending the determination of Civil Appeal No. E463 of 2023. While these orders are distinct and may accordingly not be res judicata, the actions of the Client/Respondent of shuttling between this court and the Court of Appeal are an abuse of court process.
38. In its ruling of 2nd November, 2023, this court found that it was bereft of the jurisdiction to consider an application for stay of execution, as a similar application dated 3rd July, 2023 was pending before the Court of Appeal. The outcome of the process at the Court of Appeal was the consent order dated 13th December, 2023, whose terms the garnishee failed to fulfill. At this time, the Client/ Respondent have approached the Court of Appeal through the application dated 24th September, 2024 seeking extension of time to deposit the decretal sum as well as orders of stay against the decree of this court. The Court of Appeal however declined to issue interim stay orders pending their ruling, scheduled for May 2025. The Client/ Respondent has therefore filed this application as a ‘Hail Mary’ attempt to procure orders to tide them over until May 2025.
39. This court must however find that it lacks the jurisdiction to determine this application. As stated by Justice Oguttu Mboya in his ruling of 2nd November, 2023 *Njeru Nyaga & Co Advocates LLP v Registered Trustees of Ruiru Sports Club; National Land Commission (Garnishee) [2023] KEELC 21420 (KLR)*:

“In my humble, albeit considered view, the moment the Respondent herein ventured forward and approached the Court of Appeal for purposes of procuring and obtaining an order of stay of proceedings and/or an order of stay of execution, the Respondent ceases to have the right to revert back to the Environment and Land court.

44. Premised on the foregoing exposition of the law, it is my humble albeit considered view that the invocation of the Jurisdiction of the Court of Appeal for purposes of granting an order of stay, automatically divests the Superior Court, whose decision is being appealed from, of the Jurisdiction to entertain a similar Application, like the one pending before the Court of Appeal.

45. Secondly, it is also important to point out that where a Party has approached and invoked the Jurisdiction of a particular court, in this case the Court of Appeal, it behooves that particular litigant to exhaust the Jurisdiction of that particular court before commencing further proceedings of a like manner, elsewhere, subject of course to whether such a cause is legally permissible.”

40. This court finds that this application is incompetent and an abuse of court process. This application is dismissed and its costs shall be borne by the Client/ Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

HON. MBOGO C.G.



JUDGE

20/02/2025

In the presence of:

Mr. B. Agunga – court assistant

Mr. Njeru for the Advocate/Applicant

No appearance for the client/Respondent

No appearance for the Garnishee

