



**Mwatsuma (Suing on his Behalf and on Behalf of 20 others) v Bulkon Builders Limited  
(Environment & Land Case 113 of 2019) [2025] KEELC 631 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 631 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 113 OF 2019  
SM KIBUNJA, J  
FEBRUARY 19, 2025**

**BETWEEN**

**JAPHETH MRAMBA MWATSUMA (SUING ON HIS BEHALF AND ON  
BEHALF OF 20 OTHERS) ..... PLAINTIFF**

**AND**

**BULKON BUILDERS LIMITED ..... DEFENDANT**

**RULING**

**Notices Of Motion Dated 16th August 2024 & 17<sup>th</sup> October 2024**

1. Japhet Mwatsuma, the plaintiff, filed the notice of motion dated the 16<sup>th</sup> August 2024 seeking for inter alia the reviewing, varying and setting aside of the ruling of the trial court pending the hearing and determination of the intended appeal. The application is premised on the four (4) grounds on its face and supported by the affidavit of Japhet Mwatsuma, the plaintiff sworn on the 16<sup>th</sup> August 2024, in which he inter alia deposed that the defendant intends to execute the orders in the ruling of 5<sup>th</sup> June 2024, which will amount to an act of disobedience of the status quo order issued by Naikunu J; that he has filed a notice of appeal dated 19<sup>th</sup> June 2024 and the prayers in his application should be granted.
2. The plaintiff through M/S Bunde Mangaro & Company Advocates also filed the notice of motion dated 17<sup>th</sup> October 2024 seeking for inter alia temporary stay of execution of the ruling issued on the 5<sup>th</sup> June 2024 pending the hearing and determination of the appeal. The application is based on the six (6) grounds on its face and supported by the affidavit of Japheth Mramba Mwatsuma, the plaintiff, sworn on the 17<sup>th</sup> October 2024, deposing inter alia that the eviction orders of 5<sup>th</sup> June 2024 issued against them due to the mistakes of their advocate infringed on their rights; that they have filed an appeal before the Court of Appeal being No. E168 of 2024, which raises serious grounds, and their application should be allowed.



3. The two applications are opposed by the defendant through the replying affidavit of Nilishkumar Bhimji Harji, director, sworn on the 30<sup>th</sup> January 2025, inter alia deposing that the said applications are incompetent, bad in law, gross abuse of the court process, unmeritorious, brought in bad faith and should be dismissed with costs; that the plaintiffs' suit was dismissed on 31<sup>st</sup> January 2024, and their application for review/setting aside dated 7<sup>th</sup> February 2024 was dismissed through the ruling of 5<sup>th</sup> June 2024, and the plaintiff cannot in law seek a similar order from this court; that the order sought to be stayed is the one that dismissed their application for review/setting aside that cannot be stayed as it is not a positive order; that the court gave the plaintiffs 90 days from 5<sup>th</sup> June 2024 to give vacant possession, and the instant application is a delaying tactic and the defendant will continue to be prejudiced; that the plaintiffs had abandoned this suit for sometimes and filed ELC Petition No. E004 of 2024, and served the defendants on 2<sup>nd</sup> February 2024 after the court dismissed this suit on 31<sup>st</sup> January 2024; that the status quo issued in the said petition was ill informed due to the plaintiffs failing to disclose material facts; that no appeal has been lodged against the orders of 5<sup>th</sup> June 2024; that the plaintiffs had filed an application dated 29<sup>th</sup> October 2024 before the Court of Appeal for prayers similar to those in the instant application, without disclosing to the other court, which amounts to forum shopping; that the plaintiffs have not offered security for the due performance of the decree, and should the court consider their application favourably, they should be required to deposit KShs.500,000 as security for costs.
4. The court issued directions on 4<sup>th</sup> November 2024 for inter alia filing and exchanging submissions on the two applications, but when the matter was mentioned on the 13<sup>th</sup> February 2025, none had been filed. Ms Omondi and Mr. Ondego, the learned counsel for the plaintiff and defendant respectively made their oral submissions which the court has considered.
5. The issues for determinations on the two applications are as follows:
  - a. Whether the plaintiff has met the threshold for orders of reviewing, setting aside or varying and or staying of execution of the orders of 5<sup>th</sup> June 2025, to issue.
  - b. Who pays the costs?
6. The court has carefully considered the grounds on the two applications, affidavit evidence, the oral submissions by the learned counsel, the record and come to the following conclusions:
  - a. That I have perused the notice of motion dated the 29<sup>th</sup> October 2024 filed in Mombasa Court of Appeal Civil Appeal No. E168 of 2024, by the plaintiff/appellant and the prayers sought were inter alia temporary stay of execution of the ruling/orders of 5<sup>th</sup> June 2024 in ELC No. 113 of 2019. That is the same prayer sought in the application dated the 17<sup>th</sup> October 2024, that is subject matter of this ruling. In his oral submissions on 13<sup>th</sup> January 2025, Mr. Ondego, counsel for the defendant/respondent disclosed to the court that the Court of Appeal rendered its ruling on 10<sup>th</sup> December 2024 dismissing the stay of execution application. That submission was not countered by the counsel for the plaintiff/appellant, and I have no reason to doubt that the counsel for the defendant told the court the truth. The filing of similar applications before this court and the Court of Appeal by the same party, especially through counsel, who is an officer of the court, is not only unprofessional, irregular but also an abuse of the court process. Now that the Court of Appeal has determined the plaintiff's application dated 29<sup>th</sup> October 2024 for stay of execution, that is in every sense similar to the application dated the 17<sup>th</sup> October 2024, the court finds the said application to be an abuse of the court process and is struck out with costs.



- b. In respect of the application dated the 16<sup>th</sup> August 2024 the court has perused the court record and noted the following:
- i. That the said application seeks for inter alia the reviewing, varying and setting aside of the ruling of the trial court pending the hearing and determination of the intended appeal. That even if the date of the ruling sought to be reviewed, set aside or varied is not disclosed in the prayer, I will take it to be the one delivered on 5<sup>th</sup> June 2024.
  - ii. That this suit was dismissed on the 31<sup>st</sup> January 2024 for non-attendance. The plaintiff then filed the application dated 7<sup>th</sup> February 2024 seeking to review the order of 31<sup>st</sup> January 2024. That application was canvassed together with the defendant's application for eviction dated the 1<sup>st</sup> February 2024. That vide the court ruling of 5<sup>th</sup> June 2024, the plaintiff's application dated 7<sup>th</sup> February 2024 was dismissed with costs while that by the defendant dated 1<sup>st</sup> February 2024 was allowed. The plaintiff was granted ninety days to vacate or be evicted.
  - iii. That there is no evidence that the dismissal of the suit order of 31<sup>st</sup> January 2024 has been successfully appealed against or reviewed or of existence of any pending appeal or application for review.
- c. That Order 45 of the Civil Procedure Rules, 2010 that provides for reviewing of orders/decrees and is specific in Rule 1 that such an application can only arise where no appeal has been filed or no appeal is allowed on the order/decree. The plaintiffs herein have already filed an appeal on the decree/order/ruling of 5<sup>th</sup> June 2024 in Court of Appeal Civil Appeal NO. E168 of 2024, and for the same party to come to this court, being the trial court to seek what they are essentially seeking before the appellate court, is definitely an abuse of the process of the court. It is a shame that the counsel on record for the plaintiff allowed the prosecution of the application while knowing very well, that there was an appeal pending before the Court of Appeal over the same orders/decree. It matters not that the application had been filed by the plaintiff in person, and before he came on record. In view of the pending appeal over the same orders/decree sought to be reviewed, set aside and or varied, and being aware of Order 45 Rule 1 of the Civil Procedure Rules, the application dated 16<sup>th</sup> August 2024 is hereby struck out with costs.
- d. That the plaintiffs having lost in both applications they will in terms of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya pay the defendant's costs.
7. Flowing from the above conclusions on the two notices of motion, the court finds and orders as follows:
- a. That the two notices of motion dated the August 16, 2024 and October 17, 2024 are hereby struck out for being an abuse of the court process.
  - b. The plaintiffs are to pay the defendant's costs in both applications.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19<sup>TH</sup> DAY OF FEBRUARY 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:



Plaintiffs : M/s Katana for Bunde

Defendant : Mr Ondego

Court Assistant – Shitemi.

