



REPUBLIC OF KENYA



National Police Service Commission & 2 others v Elicon Holdings Limited (Environment and Land Appeal E101 of 2024) [2025] KEELC 592 (KLR) (17 February 2025) (Judgment)

Neutral citation: [2025] KEELC 592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E101 OF 2024**

JA MOGENI, J

FEBRUARY 17, 2025

BETWEEN

NATIONAL POLICE SERVICE COMMISSION 1ST APPELLANT

INSPECTOR GENERAL OF POLICE 2ND APPELLANT

ATTORNEY GENERAL 3RD APPELLANT

AND

ELICONA HOLDINGS LIMITED RESPONDENT

(Being an appeal against the Ruling of Honourable A.M Obura (Mrs), Chief Magistrate in Milimani 6/08/2021)

JUDGMENT

1. The Appellants filed this appeal from the Ruling of Honourable A.M Obura (Mrs) Chief Magistrate in Milimani Civil Application No. E 1270 of 2021 delivered on 06/08/2021.
2. The Applicant/Respondent had filed an Originating Summons Application dated 19/02/2021 seeking orders that the 1st and 2nd Appellants by themselves, tenant/servants and or agents or any other occupants give vacant possession forthwith of the suit premises described as LR No. 12251/13 IR No. 58071. The Respondent further sought mesne profits of Kshs. 750,000/= monthly as at December 2018 till the date of Judgment.
3. The Applicant/Respondent contended that it is the registered owner of the suit premises having acquired it from Housing Finance Company Limited at a public auction on 10/07/2018. It allegedly pays its rates and rent to the County and National Government.
4. The said Application was opposed by the 1st Appellant/Respondent. The gist of the 1st Appellant's position is that after due diligence and following the procurement procedures. That the 1st Appellant



executed a Lease Agreement with the Swara Safari Limited on 18/12/2018 and that they took possession but were surprised when on 23rd and 24th November 2020 they were served with a demand letter demanding that they vacate the suit property.

5. The 1st Appellant/Respondent also filed the Chamber Summons Application dated 26/03/2021 seeking to enjoin Swara Safari Hotel Limited as a Third Party contending that the proposed third party has occasioned the present claim for illegal occupation and distress for rent and they seek indemnity from Swara Safari Hotel.
6. The Chamber Summons was however opposed by the Applicant/Respondent contending that the issue before Court is about trespass to property and not ownership thus the presence of a third party is unnecessary and they sought the dismissal of the Application of joining the third party.
7. The Subordinate Court considered the said Applications and dismissed them with costs. Further the Court directed that the 1st and 2nd Appellants/Respondents shall pay the Applicant/Respondent mesne profits of Kshs. 750,000/- monthly with effect from 18/12/2018.
8. The Appellants were dissatisfied with the said decision and filed the present appeal on the following grounds:-
 1. The Learned Magistrate erred in law and fact by holding that the 1st and 2nd Appellants shall pay the Respondent mesne profits of Kshs. 750,000/- monthly with effect from 18th December 2018 until vacant possession is granted.
 2. The Learned Magistrate erred in law and fact by failing to consider the issues raised in the Application made by the 1st Appellant enjoining Swara Safari Hotel Limited.
 3. The Learned Magistrate erred in law and fact by awarding costs to the Respondent.
9. For those reasons, the Appellants prayed that this Court:
 - a. Part of the Judgment and Decree of the Honourable Magistrate A.M. Obura issued on 6th August 2021 be set aside.
 - b. That a stay order of the Ruling issued on 6th August 2021 be granted.
 - c. The costs of this appeal as well as those of the Chief Magistrate's Court be awarded to the Appellant/be set aside.
10. The appeal was canvassed by way of written submissions which were duly filed by both parties. The 1st Appellants filed their submissions dated 9/01/2025 through the firm of Diro Advocates LLP while the Respondent's submissions are dated 5/02/2025 and filed through the firm of Wairuiru, Karuku and Mwangale Advocates.
11. In their submissions both parties identified three issues for determination which touched on whether the Application for joinder of third party, Swara Safari Hotel Limited should have been allowed, whether the trial Court erred in awarding mesne profits to the Respondent and whether the award of costs should be reconsidered.
12. I have perused and considered the Record of Appeal, the Grounds of Appeal and the submissions by the parties. This being a first appeal, I am conscious of the Court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned Magistrate were justified on the basis of the evidence presented and the law.



13. At the same time, this Court is obliged to abide by the provisions of Section 78 of the *Civil Procedure Act* to evaluate and examine the lower Court record and the evidence before it and arrive at its own conclusion. This principle of law was settled in the case of *Selle Vs. Associated Motors Boat Co Ltd* (1968) EA 123 where Sir Clement De Lestang stated that:

“This Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard, the witnesses and should make due allowances in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif Vs. Ali Mohamed Sholan* (1955), 22 EACA 279).”

14. I am aware that there was no viva voce evidence but that the trial proceeded by way of documents and Affidavit evidence. My perusal of the Record of Appeal and the typed proceedings support this fact.

Analysis and Determination

15. The issues for determination as I can deduce from the Grounds of Appeal are whether the trial Magistrate erred in law and fact when she Decreed that the Appellants have to pay mesne profits, whether in her decision to fail to allow joinder she exercised that discretion rightly and who should bear the costs?
16. A brief history of the dispute is that the 1st Appellant had leased the suit property LR No. 12251/13 situated in Karen Nairobi from Swara Safari Limited vide a Lease Agreement dated 18/12/2018 which was registered with the Ministry of Land.
17. On their part the Respondent contends that they acquired the suit property from Housing Finance Company Limited at a public auction on 10/07/2018. Meaning that by the time the Appellants were entering into a Lease Agreement with Swara Safari Limited on 18/12/2018 the suit property did not belong to Swara Safari Limited.
18. The Appellants however continued to pay rent to Swara Safari Hotel Limited and were surprised to be served with a demand letter from the Respondent’s Advocates demanding that they vacate the suit property.
19. On the issue as to whether the Respondent is entitled to mesne profits, Courts have held in many cases that mesne profit is a special damage which must be specifically pleaded and specifically proved. The Respondent from my reading of the Record of Appeal did specifically plead for mesne profits and also prove that the 1st Appellant was paying rent for the premises. My perusal of the trial Court records has the agreement between the 1st Appellant and the Respondent for handing over of the suit premises and spells out the issue of costs. I am therefore persuaded with the finding of the trial Magistrate in computing mesne profit since there is corresponding documentary evidence.
20. Further in the case of *Micheal J C K Kapsot Vs. Kotut arap Too* [2020] eKLR the Court held that a claim for mesne profits is a special damage which must be specifically pleaded and proved. I find that the Respondent did specifically plead mesne profits and did also lead any evidence to prove the same. This limb succeeds except it shall run from the date when the Respondent issued a demand letter to the Appellants until the vacant hand over of the suit premises.
21. On whether by failing to consider the Application of joinder the Honourable Magistrate erred.



22. Order 7 rule 9 of the Civil Procedure Rules states that;
- “Where any such person as is mentioned in rule 8 is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence, which shall be served in accordance with the rules for regulating service of summons.”
23. The Court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit.
24. Therefore, joinder of parties is permitted by law and can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the parties being joined, is necessary: or will just occasion unnecessary delay or costs on the parties in the suit.
25. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that common question of fact or law would arise between the existing and the intended parties. This is the test applied by Justice F. Gikonyo in the case of Lucy Nungari Ngigi and 128 Others Vs. National Bank of Kenya Limited and Another (2015) eKLR.
26. The threshold of joinder was set out in the case of Francis Kariuki Muruatetu & Another Vs. Republic & 5 Others Petition 15 as Consolidated with 16 of 2013 (2016) eKLR and where the Court held that the Applicant must: One must move the Court by way of a formal Application. Enjoinment is not as of right, but is at discretion of the Court: hence, sufficient ground must be laid before the Court, on the basis of the following elements:
- a. The personal interest or stake that the party has in the matter must be set out in the Application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - b. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
 - c. Lastly, a party must, in its Application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.
27. I have perused and studied the Chamber Summons Application made for joinder on 26/03/2021 and the three principles on joinder are clearly missing. It is not clear what prejudice the third party would suffer. The issue of indemnity if need be can be pursued in a different law suit especially due to the fact that the third party did not have a good title to pass on by the time the 1st Appellant and the proposed third party entered into a contract. Further, the claim before the trial Court was for vacant possession for a proprietor of a suit property which was well grounded.
28. In the case of Francis Kariuki Muruatetu as stated above the Court held that the Applicant must demonstrate the personal interest that it has in the matter by laying sufficient grounds before the Court; the prejudice it would suffer if it is not joined as interested party; set out the case that it intends to make before the Court and demonstrate the relevance of the evidence being proffered to the Court in determining the issue in controversy.



29. In all the above cases the Court is clear that the interested party must demonstrate: interest or stake in the suit, that he will be affected by the outcome of the suit; his presence is necessary to enable the effectual and complete adjudication of the suit and that finally that the party's interest will only be articulated if allowed to in the proceeding.
30. From the record, it is clear that the proposed third party knew of the existence of the suit in March 2021 but made no Application for joinder themselves. It seems they knew that they had a bone to pick with the 1st Appellant and instead of doing so chose to go on a "wild goose chase" or reporting the Directorate of Criminal Investigations that the Respondent was fraudulently claiming to be owners of the suit property. Annexure 'JVO10' is a copy of the said letter. Further the Court found that the suit property was transferred to the Respondents before the Appellant and proposed third party signed the Lease Agreement.
31. I therefore do find that the learned trial Magistrate correctly analyzed the Appellant's Application and I find no basis to interfere with this part of the Ruling. In my view, the learned trial Magistrate exercised her discretion correctly in dismissing the Appellant's Application on joinder.
32. This Application has been brought under Order 42 seeking stay of the Honourable Magistrate's decision rendered on 6/08/2021. Now on matters of stay Order 42 Rule 6 (2) of the Civil Procedure Rules which is the applicable law provides as follows;
- "No order for stay of execution shall be made under sub-rule (1) unless;-
- a. The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay, and
 - b. Such security as the Court orders for the due performance of such Decree or order as may ultimately be binding on him has been given by the Applicant."
33. The law sets out three conditions a Court must be satisfied before granting an order for stay pending appeal. First, an Application for stay must be made without unreasonable delay. Unreasonable delay depends on the circumstance of each case. In this case, the impugned Ruling was delivered by the trial Court on 6/08/2021 and this Application for stay was filed on 13/08/2021. There was therefore no inordinate delay.
34. The second ground is whether the Applicants will suffer substantial loss unless the Application is granted. This is the cornerstone for an Application for stay pending appeal. Substantial loss has been defined by the Superior Courts in numerous decisions to mean an action done to the subject matter of an appeal such that it would not be reversed by the appellate Court should the Appellant ultimately succeed. That action does not include execution of a Judgment/Decree which is a lawful process, unless the Applicant in case of a liquidated Decree can demonstrate that the Decree Holder is a man of straw and therefore unlikely to refund the decretal sum or in the case of unliquidated Decree, that the Decree Holder is likely to dispose/alienate the same. The 1st Appellant in this appeal has not demonstrated how they would suffer substantial loss if the Application is not allowed. In the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* (2012) eKLR Gikonyo J held as follows:-

"No doubt in law the fact that the process of execution has been put in motion or is likely to be put in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is not to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the



Civil Procedure Rules. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni* (2002) 1 KLR 867. the issue of substantial loss is what has to be prevented by preserving the status-quo because such loss would render the appeal nugatory.”

35. The third condition is provision of security by the Appellants. On whether the Appellant has provided security for the due performance of the Decree as provided by Order 42 Rule 6(2)(b) of the Civil Procedure Rules which provides:-

“(2) No order for stay of execution shall be made under subrule (1) unless—
(b) such security as the Court orders for the due performance of such Decree or order as may ultimately be binding on him has been given by the Applicant.”

36. The Court finds that the Appellant has not at all offered any security for the due performance of the Decree. The above requirement is mandatory and since the Appellant has failed to offer such security, the Court finds that they have not met the conditions for grant of stay of execution. See the case of *Equity Bank Ltd Vs. Taiga Adams Co. Ltd*, where the Court held that:-

“.... of even greater impact is the fact that an Applicant has not offered security at all and this is one of the mandatory tenets under which the Application is brought..... let me conclude by stressing that all the four, and not one or some, must be met before this Court can grant an order of stay”

37. In applying for stay of execution it is important that the Applicant must establish sufficient cause for grant of the orders of stay of execution, it is evident that the Respondent herein is the successful litigant and they should enjoy the fruits of the Ruling. However, stay of such Ruling can be allowed if the Appellant is able to establish sufficient cause to deprive such successful litigant the fruits of the Ruling. In the instant case, the 1st Appellant has not alleged that if the Respondent is allowed to execute the order of the trial Court, then the Appeal filed will be an exercise in futility or an academic exercise. However, it is evident that the suit property was long sold by the Bank through Public Auction and the property is owned by the Respondent. In fact from perusing the trial Court’s record I noted that the 1st and 2nd Appellants already entered into an agreement with the Respondent to hand over the suit property on 27/09/2021. At the same time the parties were already in discussions about the value addition of the 1st Appellant made to the suit property and the agreement took this into consideration.

Who shall bear costs of the Application?

38. Although costs of an action or proceeding are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons Vs. Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The Court finds no good reason why the successful party should not be awarded costs of the Application. Accordingly, the Respondent shall be awarded costs of the appeal to be borne by the 1st and 2nd Appellants.



39. The upshot of the foregoing is that the Court finds that the appeal is partly merited. The Court makes the following orders for its disposal:-

- a. The trial Court's mesne profit award shall apply from 23/11/2020 to the time the Appellants give (or gave) vacant possession of the suit property to the Respondent.
- b. The prayer for stay of execution and or setting aside of the Honourable Chief Magistrate's Decree is hereby dismissed.
- c. Costs of the Appeal are awarded to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 17TH DAY OF FEBRUARY, 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:-

Mr. Moriasi holding brief for Mr. Diro for 1st Appellant

Ms. Kyalo holding brief for Mr. Wachira for the Respondent

No appearance for the 2nd Appellant

Mr Melita - Court Assistant

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MOGENI J

JUDGE

