



**Mogeni v Koskei & another (Environment and Land Appeal
E033 of 2023) [2024] KEELC 7032 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7032 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E033 OF 2023
LC KOMINGOI, J
OCTOBER 24, 2024**

BETWEEN

PETER NYAMARI MOGENI APPLICANT

AND

DAVID KOSKEI 1ST RESPONDENT

KAJIADO COUNTY GOVERNMENT 2ND RESPONDENT

RULING

1. The Notice of Motion dated 28th February 2023 is brought under; (Order 42 Rule 6(1)(2) and order 51(1) of the Civil Procedure Rules; Article 53 of *the Constitution* of Kenya; Section 1A, 3A of the *Civil Procedure Act* and all other enabling provisions) seeks that:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. The Hon. Court be pleased to order temporary stay of execution of the judgement and / or decree issued in Ngong Principal Magistrate Case No. ELC 16 of 2018 and all consequential orders arising therefrom pending inter parties hearing and determination of this Appeal.
2. This application supported by the Appellant's Affidavit is premised on the grounds that the if the orders issued in the Ruling delivered on 30th November 2023 in Ngong PM ELC Case No. 16 of 2023 are not stayed, the Respondent is likely to apply for execution of the decree which would occasion the Appellant loss and damage which would be prejudicial to the Appellant. The Appellant also avers that he is ready to offer security of costs.



3. The 1st Respondent in his Replying Affidavit deponed that he is the owner of the suit property. He claimed that the suit was originally filed in the year 2012 by the Applicant and orders of status quo granted. However, in the 11 years of this suit and the Applicant enjoying status quo orders he showed no interest in prosecuting it. It was the 1st respondent who ensured that the matter was fixed for mentions and hearing.
4. On 20th July 2023 the suit at the trial Court was dismissed with costs. On 25th August 2023, the Applicant filed an application to reopen the suit and on 30th November 2023 the application was dismissed. Noteworthy, the Applicant never served the 1st respondent with the said application and his advocates only learnt about it by luck.
5. The 1st Respondent then sought to execute the judgement dated 20th July 2023 and sought costs of the suit from the Applicant. It was at this point that the Applicant contesting the execution, annexed the Memorandum of Appeal which the 1st Respondent was unaware of its existence. And then filed this Application.
6. The 1st Respondent thus claims that the Applicant is a perennial litigant and this application is an abuse of the court process. He also indicated that there was no order to be stayed in the Judgement delivered on 20th July 2023 because it only declared him the lawful owner of the suit property. Therefore, the Applicant would suffer no loss or damage. Additionally, the said judgement and ruling were not availed by the Applicant in his application and that the orders sought were to stay a judgement delivered seven months prior to its filing. The Applicant had therefore not met the threshold for grant of such orders and should be dismissed with costs.
7. And should the court grant the orders, then the Applicant should be ordered to deposit security of Kshs. 300,000.
8. This application was canvassed by way of written submissions.

The Appellant's submissions

9. Counsel submitted that both the Applicant and the 1st respondent claimed ownership of plot No. 404 Business, Ole Kasasi Trading Centre and if the Applicant's right to be heard under Article 50(i) of *the Constitution* is not upheld, he would suffer irreparable harm. Counsel submitted that the matter at the lower court proceeded in absence of the Applicant because the Respondent did not serve him with the hearing notice. As such, the Application met the threshold set in *Giella vs Cassman Brown (1973) EA 358*, *Nguruman Ltd vs Jan Bonde Nielsen & 2 others (2014) eKLR* and *Mrao Ltd vs First American bank of Kenya Ltd (2003) eKLR*.

The Respondents' submissions

10. While pointing out that the Applicant had not filed the impugned judgement or ruling in court, counsel submitted on the following two issues for determination.
11. On whether the trial court's judgement delivered on 20th July 2023 and the Ruling delivered on 30th November 2023 could be stayed, counsel submitted that the Applicant had not met the stipulated threshold as per Order 42 Rule 6 of the Civil Procedure Rules because at the Lower Court he admitted that his parcel was plot No. 404 Business OleKasasi Trading Centre while the Respondent's was plot No. 1020 Residential Olekasasi Trading Centre which were two distinct parcels of land. Adding that the Applicant had appealed against the Ruling and not the Judgment that declared the Respondent the rightful owner of the property. There was therefore, no substantial loss that would be incurred by the Applicant. Counsel added that there being no appeal against the judgement, then the execution process



towards recovery of costs awarded was not capable of being stayed because this Appeal was against the ruling that dismissed the Applicant's application to reopen his case at the lower court. Reference was made to the following cases which held that it was absurd to stay a judgement where no appeal had been lodged: Sang (suing as the Legal Representative of the Estate of Kipsang Miso Deceased) & 2 others vs Bengat [2024] KEELC 3835 (KLR) and Bernard Njoroge Kibaki t/a Njowa Njemu Enterprises vs Equity bank Ltd & another [2020] eKLR.

12. On whether the Applicant had met the threshold for grant of status quo orders, counsel submitted that to warrant issuance of status quo orders, the Applicant ought to have demonstrated the imminent loss. He did not since he was neither in possession of the property nor did he lay valid claim on it. Counsel made reference to Nyambura & another vs Mwangi [2023] KEELC 22456 (KLR) which held that status quo was to maintain substratum of the dispute. Counsel added that should the Appeal succeed, the Respondent was in a position to refund the Kshs. 100,500 awarded as costs and should the court be inclined to grant the orders sought, then the Applicant should deposit Kshs. 300,000 as security for costs.
13. Counsel also pointed out that the Applicant had not filed the impugned judgement or ruling.

Analysis and Determination

14. I have considered the Notice of Motion, the affidavit in support and the response thereto, the rival submissions and the authorities cited. I find that the issues for determination are:
 - i. Whether this application is properly before court;
 - ii. Whether the Application is merited;
 - iii. Who should bear costs of the application?
15. This court will first determine whether the current application is properly before the court. This question is not only procedural but also fundamental to the court's jurisdiction, as it directly concerns the legal validity of the application itself.
16. The Appellant/Applicant filed the Memorandum of Appeal dated 21st December 2023 on 22nd December 2023 against the Ruling delivered on 30th November 2023. From the Court file, I take cognisance that no further step was taken until 21st February 2024 when this application was filed as a matter of urgency seeking the stay of execution of judgement in Ngong PM ELC Case No. 16 of 2018 pending determination of this Appeal, among others.
17. The Applicant neither filed the Record of Appeal, nor the said Judgement and or ruling being appealed from. An issue that was also raised by the Respondent in his Replying Affidavit as well as the submissions. But the Applicant did not deem it fit to avail those important documents nor give an explanation of their absence.
18. Order 42 Rule 2 of the Civil Procedure Rules provide that: "Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible....."
19. Order 42 Rule 13(4) of the Civil Procedure Rules goes on to provide that:
 - "(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:



- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal...”

20. Without the Record of Appeal this court has nothing to assess or scrutinise to determine the substantive issues raised by the Appellant/Applicant and whether the reasoning of the lower court is sound or not. He is therefore asking this court to make orders without furnishing court with all the relevant documents to aid in the dispensation of justice. This is a technicality that goes to the root of the suit.

21. In a similar case where parties sought leave to amend the pleadings without furnishing court with the draft pleadings, Onyango Otieno J.A. in *Musamarini Limited & 6 others v A.D.M. Limited & 5 others* [2011] eKLR stated:

“... The effect is that, I would not be in a position to know amendment for which leave is being sought and that makes it difficult for me to exercise my discretion on the matter. I did raise this omission with the applicants’ learned counsel during the hearing of the notice of motion but he suggested that I can allow the application and thereafter, he would serve the respondents with the document. I do not think that would be proper. I think the rule is to enable the Court to know what new thing it is being asked to give leave to introduce and consider whether indeed the amendment for which leave is sought would be within the requirements of the law or whether for instance it would introduce a completely new matter into the case and thus would be irrelevant. To do what Mr. Munyiya suggests would be tantamount to acting in the dark. A court of law must be aware of its actions and the effects thereof... In my mind this omission is fatal and cannot be cured by the application of the provisions of section 3A and 3B of the *Appellate Jurisdiction Act*...”

22. Guided by the above, it would be improper for this court to purport to grant orders or make a determination on issues not placed before the court.

23. As such, I decline to grant orders sought by the Appellant/Applicant and hereby dismiss this application with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF OCTOBER 2024.

L. KOMINGOI

JUDGE

In The Presence Of:

Mr. Mbeche for the Appellant.



Mr. Awuor for the Respondent.

Court Assistant - Mutisya

