



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwasi & others v Mbaruk (Environment and Land Appeal
30 of 2018) [2024] KEELC 6887 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6887 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 30 OF 2018
SM KIBUNJA, J
OCTOBER 23, 2024**

BETWEEN

ANGELINA KALAMBA MWASI & OTHERS APPELLANT

AND

MBARUK AYUB ALI MBARUK RESPONDENT

RULING

1. The respondent filed the notice of motion dated the 24th April 2024 seeking for inter alia an order of stay of execution of the ruling delivered on 20th September 2023 by Hon. J. Nyariki, pending the hearing and determination of Mombasa CACA No. E006 of 2020: Mbaruk Ayub Ali Mbaruk v Angelina Kalamba Mwasi & 6 Others. The application is based on the seven (7) grounds on its face, and supported by the affidavit of Mbaruk Ayub Ali Mbaruk, respondent, sworn on the 24th April 2024. It is the respondent's case that on 20th September 2023, the taxing master taxed the appellants bill of costs at Kshs.326,992.40, and he was on 16th April 2024 served with a notice of proclamation by the auctioneer, intimating the intention to auction his properties if Kshs.378,432 was not paid. That he is apprehensive that the appellant will carry out the execution while his appeal on the ruling of 24th September 2020 is pending before the Court of Appeal. That the Court of Appeal had on 6th May 2022 ordered the status quo to be maintained pending the hearing and determination of the appeal. That if execution is carried out, the appeal will be rendered nugatory, and he will suffer irreparably as the appellants are men of straw. That the court has a duty to preserve the substratum of the pending appeal and the prayers sought should be granted.
2. The application is opposed by the appellants through seven (7) grounds of opposition dated 13th May 2024, stating inter alia that the court is functus officio and no party can have lawful audience as the Court of Appeal is seized of the matter; that if the respondent is aggrieved by the decision of the taxing master, then he has not moved the court properly.



3. The learned counsel for the respondent filed two sets of submissions dated the 1st June 2024 and 1st July 2024, which the court has considered. Though the learned counsel for the appellants informed the court on the 8th July 2024 that they had filed submissions, I have perused both the physical file and the CTS and no such submissions have been seen.
4. The issues for determinations by the court are as follows:
 - a. Whether the respondent has met the threshold for an order of stay of execution to issue as prayed to issue.
 - b. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by the learned counsel for the respondent, and come to the following conclusions:
 - a. The heading of the notice of motion dated the 24th April 2024 shows clearly that it is brought under sections 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 42 Rule 6 of the Civil Procedure Rules. Sections 1A, 1B & 3A of the said Act provides the objective of the Act, duty and inherent powers of the court, while Order 42 Rule 6 provides for stay in case of appeal.
 - b. That it is apparent that this application was prompted by the execution process undertaken by the appellants after the taxing officer delivered his ruling on taxation on the 20th September 2023. That by that date, the parties had a pending appeal before the Court of Appeal, being Mombasa CACA No. E006 of 2020, in which a ruling had been delivered on the 6th May 2022, on the application dated 8th October 2020, for conservatory order and injunction in respect of the suit property. In the said ruling, the Court of Appeal directed the parties to maintain status quo obtaining at the date of that ruling. The pending appeal and the ruling delivered on 6th May 2022, has nothing to do with the taxing officer's ruling of 20th September 2023.
 - c. That it is also apparent that the instant application does not amount to an appeal or reference over the taxing officer's ruling of 20th September 2023. All the application seeks is for a stay of execution of the ruling of 20th September 2023, pending the hearing and determination of Mombasa CACA No. E006 of 2020. As already pointed out above, that appeal is not over the ruling sought to be stayed, and further, there is no reference or appeal filed in respect of that ruling. The application is therefore a non-starter and is not properly grounded in law.
 - d. That as the respondent has failed in the application, then under section 27 of the Civil Procedure Rules, he should pay the appellants costs.
6. In view of the foregoing conclusions, the court finds and orders as follows:
 - a. That the respondent's notice of motion dated the 24th April 2024 is without merit and is dismissed.
 - b. The respondent to pay the appellant' costs.Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23RD DAY OF OCTOBER 2024.

S. M. Kibunja, J.

ELC MOMBASA.



In The Presence Of:

Appellants: M/s Kinuva

Respondent: Mr Mwanzia

Leakey – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

