



REPUBLIC OF KENYA



**Bwire & another v Siwa (Environment and Land Appeal E015 of 2024)
[2024] KEELC 13355 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E015 OF 2024**

**EO OBAGA, J
NOVEMBER 22, 2024**

BETWEEN

MARY NABWIRE BWIRE 1ST APPELLANT

JAMES WAFULA WANGIRA 2ND APPELLANT

AND

MARTIN CHEMONGES SIWA RESPONDENT

RULING

1. This ruling is with respect of a Notice of motion dated 16.10.2024 in which the Appellants/Applicants seek the following orders: -
 - i. Spent
 - ii. Spent
 - iii. That the honourable court be pleased to review and/or set aside its ruling and orders issued on 15th October, 2024 and in its place there be an order maintaining the status quo pending hearing and determination of the appeal herein.
 - iv. That the costs hereof be costs in the Appeal.
2. The Applicants had filed a Notice of motion dated 18.4.2024 in which they sought stay of execution and/or further execution of the decree in Eldoret CMCC land case No. 73 of 2020 pending the hearing and determination of the appeal. The application was dismissed with costs on 15.10.2024. It is this ruling which the Applicants are now seeking to review.
3. The Applicants had sold 28 acres out of their land known as Uasin Gishu /Moiben/3 to the Respondent. The Applicants did not transfer the said 28 acres forcing the Respondent to file a suit



- before the lower court in which they among others sought to compel the Applicants to transfer the 28 acres to them and stopping the Applicants from utilizing the said 28 acres.
4. The case in the lower court proceeded without the Applicants being heard. The Applicants filed an application seeking to set aside the judgement but their application was dismissed in a ruling delivered on 11.4.2024. The Applicants then filed an appeal against the ruling of 11.4.2024.
 5. The Applicants contend that there is an error apparent on the face of the record in that this court ruled on the basis of the judgement of the lower court when their issue was on the dismissed application. They also argued that there were materials which the court did not consider and that if the same had been placed before the court, the court would have ruled otherwise.
 6. The Applicants contend that their appeal has high chances of success and that no prejudice will be occasioned to the Respondent if status quo is maintained pending the appeal.
 7. The Applicants' application was opposed based on a replying affidavit sworn on 23.10.2024. The Respondent contends that the Applicants' application is an abuse of the process of the court. He states that as this court dismissed the Applicants' application for stay he was at liberty to execute the decree. He contends that the Applicants are seeking to have a second bite by substituting the dismissed application with status quo and that even if this court were to grant an order of maintenance of status quo, the status quo will mean that as he has a decree in his favour, that will remain the position.
 8. The Respondent further states that the applicants' application is only meant to prevent him from executing the decree yet the Applicants are not willing to offer any security.
 9. The Application was argued orally. The Respondent relied on the case of *Makali Shaban Gakera v Mwanaidi Gusbu & 3 others* (2022) eKLR which defines the meaning of maintenance of status quo. The Respondent further submitted that there was no order to be reviewed which was annexed to the Applicants' application. He relied on the case of *Hosea Nyandika Mosawe & 2 others v The County Government of Nyamira* (2022) eKLR.
 10. I have carefully gone through the Applicants' application, the opposition thereof as well as the oral submissions and the authorities relied on. The issue which emerges for determination is whether the Applicants have met the threshold for grant of review.
 11. As I have stated hereinabove, the Applicant is seeking to have the ruling of this court delivered on 15.10.2024 reviewed. The applicants argue that there is an error apparent on the face of the record. The counsel for the applicants argued that the error apparent on the record was that the court proceeded on the premises that it was dealing with the stay of judgement of the lower court, when their claim was on the dismissed application for setting aside. The ruling of the court clearly stated that what was in consideration was an appeal against the ruling of the lower court delivered on 11.4.2024. There was therefore no error apparent on the face of the record and even if that were to be the case which is not, then that would have been an erroneous finding which will not be a ground for review.
 12. The Applicants also argued that there were materials which the court failed to consider as the same were not placed before the court. There were no materials which the court failed to consider. The court was dealing with a matter involving an appeal from a dismissed application which did not require consideration of any evidence and in any case, the alleged materials were not availed and therefore this ground is baseless.
 13. The court has however considered the application in light of what the applicants are seeking. The applicants were not heard in their defence. When they applied to set aside the judgement, their application was dismissed. It is the dismissal of their application that they want the court to consider



in this appeal. The right to be heard is a valued right. It is important for this court to interrogate the reasons why the applicants were not given an opportunity to be heard. For this reason, I find that the Applicant have established that there is sufficient cause to have the application reviewed. I accordingly review the ruling dated 15.10.2024 to the extent that there shall be stay of execution of the decree of the lower court pending the hearing and determination of the Appeal herein on condition that the Applicants deposit security for costs in court in the sum of Kshs 100,000/= within 30 days failing which the stay shall lapse.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 22ND DAY OF NOVEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Karanja for Mr. Rabala for 1st Appellant/Applicant.

Mr. Oguttu for M/s Luseria for Respondent.

M/s Khayo for 2nd Appellant/Applicant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

22ND NOVEMBER, 2024

