



**Anand & another v Mwaluma & 2 others (Environment & Land Case 70 of 2015 & Environmental and Land Originating Summons 252 of 2012 (Consolidated)) [2024] KEELC 13258 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13258 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 70 OF 2015 & ENVIRONMENTAL AND  
LAND ORIGINATING SUMMONS 252 OF 2012 (CONSOLIDATED)**

**SM KIBUNJA, J**

**NOVEMBER 20, 2024**

**BETWEEN**

**ASHOK KUMAR ANAND ..... PLAINTIFF**

**AND**

**PATREMY MWAKWEKA MWALUMA ..... DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 252 OF 2012**

**BETWEEN**

**PATREMY MWAKWEKA MWALUMA ..... APPLICANT**

**AND**

**DAVIS MACHARIA KANGE'THE ..... 1<sup>ST</sup> RESPONDENT**

**ASHOK KUMAR ANAND ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Notice of Motion Dated 30th November 2021**

1. Patremy Mwakweka Mwaluma, the defendant in ELC No. 70 of 2015 and plaintiff in ELC No. 252 of 2021, hereinafter referred to as the defendant, moved the court vide a notice of motion dated 30th November 2021 seeking for orders that pending the hearing and determination of appeal before the Court of Appeal, there be stay of proceedings, and an order for judgement creditor to give security of Kshs.15 million, being the approximate value of the plot and structures he demolished in execution of



the court judgement. The application is based on eleven (11) grounds marked (a) to (k) and supported by the affidavit of Patremy Mwakweka Mwaluma, sworn on the 30<sup>th</sup> November 2021, inter alia deposing that the defendant had filed an appeal through the notice of appeal; that his applications for stay of execution and objection to taxation plus the plaintiff's application for release of Kshs.1,250,000 are pending; that the plaintiff has partially executed the judgement by evicting him from the suit premises on 1<sup>st</sup> November 2021, demolishing his premises and commencing his development thereon despite the pending appeal; that he has filed an application for injunction and stay before the court of appeal, but has been advised to file the instant application so that it does not proceed with the hearing of the applications before it, but wait for the hearing and determinations of the applications and appeal before the Court of Appeal.

2. The application is opposed by the plaintiff through the grounds of opposition dated 16<sup>th</sup> February 2024 and replying affidavit sworn on 19<sup>th</sup> February 2024 in which he inter alia deposed that he is the registered owner of L.R 1956/337 and that the instant application is set to delay enjoyment of his fruits of judgment; that he evicted the plaintiff because he had not complied with the orders dated 15<sup>th</sup> October 2020 which are what the court took judicial notice of above; that the court refunded him the security of Kshs. 1,250,000 through the order given on 11<sup>th</sup> November 2022 and that the defendant did not settle the taxed costs; that the Court of Appeal has delivered a ruling dated 20<sup>th</sup> January 2023 staying execution of taxed costs pending appeal. The plaintiff also complained of not being served with the memorandum of appeal and that the defendant has not shown his readiness and willingness to prosecute it.
3. The defendant filed an affidavit of Samuel Odhiambo Eleakim advocate sworn on 4<sup>th</sup> March 2024, supporting his application by inter alia confirming the Court of Appeal has issued a stay of execution on costs pending appeal.
4. The learned counsel for the defendant and the plaintiff filed their submissions dated the 11<sup>th</sup> November 2023 and 20<sup>th</sup> February 2024 respectively. The counsel for the defendant filed further submissions dated 4<sup>th</sup> March 2024. The court has considered all the said submissions.
5. The issues for determinations by the court are as follows:
  - a. Whether the defendant has met the threshold for the orders sought to be issued.
  - b. Who bears the costs?
6. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, the record and come to the following findings:
  - a. That judgement in these suits was delivered on the 10<sup>th</sup> March 2020 in favour of the plaintiff. The record shows that the defendant filed an application dated 28<sup>th</sup> April 2020 for stay of execution pending appeal. Conditional interim stay of execution order was granted on 29<sup>th</sup> April 2020, and directions on service and inter parties hearing were issued. The court heard the application and allowed it in its ruling delivered on the 15<sup>th</sup> October 2020, on condition the defendant deposits Kshs.1,250,000 in joint interest earning account in the parties counsel names in 30 days, and the taxed costs to be deposited in the said account in 30 days after taxation.
  - b. The record further confirms that the plaintiff filed a party and party bill of costs dated the 18<sup>th</sup> March 2021 that was taxed on 5<sup>th</sup> August 2021 at Kshs.1,138,071. Then the defendant filed the application dated the 26<sup>th</sup> October 2021, that sought for "pending the hearing and determination of the reference filed in the Court of Appeal, the honourable court be pleased



to grant an order of stay of execution of the court's ruling for failure to deposit the sum of Kshs.1,138,071." The plaintiff on his part filed the application dated 15<sup>th</sup> November 2021, seeking for orders that the sum of Kshs.1,250,000 deposited in the joint account be released to him. The two applications were canvassed together and determined through the ruling delivered on 11<sup>th</sup> November 2022, dismissing the defendant's application and allowing that of the plaintiff.

- c. The record further shows that the defendant moved to the Court of Appeal and filed the application dated 5<sup>th</sup> November 2021 in *Civil Application No. E082 of 2021*. The Court of Appeal heard the application and vide its ruling of 20<sup>th</sup> January 2023 granted an order of stay of execution of taxed costs pending the hearing and determination of intended appeal.
- d. The instant notice of motion dated 30<sup>th</sup> November 2021 seeks for orders that pending the hearing and determination of appeal before the Court of Appeal, there be stay of proceedings, and an order for judgement creditor to give security of Kshs.15 million, being the approximate value of the plot and structures he demolished in execution of the court judgement. This prayer has two limbs of:
  - i. Stay of proceeding pending hearing and determination of the appeal.
  - ii. An order for judgement creditor to give security of Kshs.15 million, being the approximate value of the plot and structures he demolished in execution of the court judgement, pending the hearing and determination of the appeal.

The court has perused the record and noted that there is no pending application in this suit by either of the parties, other than the instant one and an order for stay of proceedings would be of no effect. On the second limb of an order for the plaintiff to deposit Kshs.15 million as security, pending the hearing and determination of the appeal, this court has already rendered its decision in respect of application for stay of execution pending appeal as can be seen in (a) above. The court is therefore of the view that it is now functus officio in this suit and the forum for the parties should be before the Court of Appeal that is seized of this matter.

- e. Under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for good cause the court orders otherwise. In this instance, I find no reason to deviate from that general principle on costs.

7. Having come to the foregoing determinations, the court finds and orders as follows:

- a. That the defendant's notice of motion dated the 30<sup>th</sup> November 2021 is without merit and is dismissed.
- b. The defendant to pay the plaintiff's costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 20<sup>TH</sup> DAY OF NOVEMBER 2024.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

In the Presence of:

Plaintiff : No Appearance

Defendant : Mr. Odhiambo



Leakey – Court Assistant.

**S. M. Kibunja, J.**

**ELC MOMBASA.**

