



**Sum (Suing as the Administrator of the Estate of Ernest Sum - Deceased) v Samoei (Environment & Land Case E057 of 2022) [2024] KEELC 14054 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14054 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E057 OF 2022  
JM ONYANGO, J  
DECEMBER 17, 2024**

**BETWEEN**

**VERONICA SUM ..... PLAINTIFF  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF ERNEST SUM -  
DECEASED**

**AND**

**JOEL SAMOEI ..... DEFENDANT**

**RULING**

1. The Defendant/Applicant in his Notice of Motion dated 18<sup>th</sup> June, 2024 brought under Certificate of Urgency seeks the following orders:-
  - a. Spent
  - b. Spent
  - c. That the Honourable Court be pleased to stay the order made on 12/6/2024 holding the defendant/applicant in contempt of court pending the hearing and determination of the intended appeal herein.
  - d. That costs be provided for.
2. The Application is premised on the grounds presented on the face of it and in the Defendant's Supporting Affidavit of even date. The Defendant's case is that on 28<sup>th</sup> May, 2024 the court found him in contempt of its orders and on 12<sup>th</sup> June, 2024 fined him KShs.300,000/- for the said contempt. Being aggrieved with those findings of the court, he has since lodged a Notice of Appeal against the Ruling. He therefore sought an order of stay of execution of the ruling dated 28<sup>th</sup> May, 2024 and the order made on 12<sup>th</sup> June, 2024 ordering him to pay a KShs.300,000/- fine. He deponed that no prejudice



would be suffered by Edel Chepkorir if the order of stay is granted, and he accused her of obtaining a Grant Ad Litem to represent Veronica Sum as a guardian yet Veronica is fit as a fiddle.

3. The Application is opposed vide the Replying Affidavit sworn by Edel Chepkorir Sum who deponed that she has been granted guardian ad-litem rights by the court over her mother's affairs. She deponed that the Plaintiff had expressly admitted to being on L.R. No. 2226 (the suit property) illegally, and remains on the land to the Plaintiff's detriment, yet he has not demonstrated to this court why he is unable to pay the fine imposed by the court. She asked the court to uphold the rule of law and have the Defendant purge his contempt by paying the fine. She also deponed that the Defendant knows his actions are wrong and in contempt, and that the allegation that she was hiding behind her mother is an outright lie as the court assessed her and the medical reports were presented in court. She added that the Defendant should not present himself as a medical professional or expert in matters of health concerning her mother.
4. Aside from the Motion, the Defendant/Applicant also lodged a Notice of Preliminary Objection dated 21<sup>st</sup> June, 2024 on the following grounds:-
  - a. This court lacks jurisdiction to hear and determine this suit as there is nothing to determine on ownership the same having been determined in H.C. ELC No. 418 of 2012 - Celine George vs Jonah Chiroch and Veronica Sum and judgement delivered on 20<sup>th</sup> November, 2017.
  - b. This is a succession matter given that Celine George Poland is a purchase (sic) of 100 acres from the estate of Ernest Sum and it will only be determined in the Succession Cause No. 23 of 1985 whether Celine George Poland will be entitled to her share of the Estate or not.
  - c. In Eldoret H.C. P&A No. 23 of 1985, the Plaintiff herein Veronica Chepsat Sum distributed the estate and the share of Celine George Poland was not distributed at all during the distribution and this court cannot therefore interfere with a Succession matter. There is nothing touching on ownership for the court to determine.
  - d. The defendant herein Joel Samoei is not the owner of 100 Acres for him to be sued and punished for no wrong done or committed.

### **Submissions**

5. The court directed that the Application and the PO be canvassed by way of written submissions. The parties complied, with the Defendant filing his submissions dated 23<sup>rd</sup> October, 2024 and the Plaintiff filing two sets of submissions dated 22<sup>nd</sup> August, 2024 and 14<sup>th</sup> October, 2024.

### **Defendant/Applicant's Submissions**

6. On the Application for stay of execution, Counsel for the Defendant submitted that the Defendant resides on the suit land as a manager of the farm since 1982 to date. Counsel explained that even when the orders were made, the Defendant was on the land utilizing it as usual, thus he commits no offence in utilizing the land belonging to Celine George Poland. Counsel also submitted that the Defendant has a good case on appeal with high chances of success, thus he will suffer loss if the stay is denied. Counsel submitted that the discretion to grant or not grant stay should be exercised judiciously and in this event in favour of the Defendant. Counsel added that this court has no jurisdiction to handle succession matters.
7. On the Preliminary Objection, Counsel submitted that the issue of ownership was determined in H.C. ELC No. 418 of 2012 and a judgment delivered on the same. Further that there is an appeal pending which was instituted vide a Notice of Appeal dated 23<sup>rd</sup> November, 2017 therefore, this court has no



jurisdiction to hear and determine this suit. Counsel also argued that this is a succession matter which can only be determined in Succession Cause No. 23 of 1985 in the Estate of Ernest Kimng'etich Sum, thus this court has no jurisdiction over the suit. Counsel for the Defendant included in his submissions in support of the PO an extract of a letter dated 26<sup>th</sup> July, 1982. Counsel urged that the Defendant is not the owner of the 100 Acres and he has been sued and punished for the wrong reasons. He prayed that the court allow the Application dated 18<sup>th</sup> June, 2024 as well as the Preliminary Objection dated 21<sup>st</sup> June, 2024.

### **Plaintiff/Respondent's Submissions**

8. Opposing the Application, Counsel for the Plaintiff submitted that based on the blatant disregard, contempt and rebellious and repeated acts of disobeying court orders, the Defendant has failed to justify why this Court should stay the order issued on 12<sup>th</sup> June, 2024. He relied on Kenya Wildlife Service vs James Mutembei (2019) eKLR and Global Tours & Traves Limited; Nbi HC Winding Up Cause No. 43 of 2000 among numerous other cases. Counsel cited Order 42 Rule 6 as the statutory basis for stay of execution, which lists the conditions to be satisfied before an order of stay can be granted. Counsel submitted that the Defendant had not demonstrated that he stands to suffer substantial loss if the orders are granted, he relied on James Wangalwa & Another vs Agnes Naliaka Cheseto (2013) eKLR. He submitted that the Defendant needed to demonstrate that the application for stay was made at the earliest possible moment (M'Ndaka Mbiuki vs James Mbaaba Mugwira (2010) eKLR). Counsel also argued that the Defendant had not demonstrated his willingness to put up any security for the due performance of the decree. Counsel further submitted that the Defendant is not entitled to the reliefs sought on account of his conduct. Further, that litigation must come to an end, and that it would be just, fair and prudent that the instant application be dismissed.
9. On the PO, the Plaintiff submitted that a PO should be on legal points and does not concern itself with points of facts. Counsel relied on inter alia the cases of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 and Peter Mungia vs Joseph Ngaba Kuria & Another; Leah Njeri Ndichu (Interested Party) (2022) eKLR. Counsel pointed out that the Defendant's PO clearly delves into disputes of facts, some of which are subject to strict proof. That no provision of law was ever cited and neither was a point of law made. Counsel submitted that the current PO is sub-judice and/or res judicata citing Eldoret ELC No. 418 of 2012 and Eldoret HC No. 38 of 2018, as well as the ruling of this court in this suit delivered on 28<sup>th</sup> May, 2024. Counsel concluded that the PO is woefully ineffective for, in addition to the above reasons, seeking to re-litigate matters that had already been determined. Counsel for the Plaintiff urged that should the court grant the orders sought, it would be making a mockery of its previous findings. Counsel prayed that the PO be dismissed with costs.

### **Analysis and Determination**

10. I have carefully considered the Application alongside its Supporting Affidavit, the Respondent's Replying Affidavit and the Preliminary Objection as well as the submissions by Counsel. The issues for determination are:-
  - i. Whether the Preliminary Objection is merited;
  - ii. Whether the Defendant has met the conditions necessary for grant of an order of stay of execution pending appeal;



### a. Whether the Preliminary Objection is merited

11. The Defendant lodged a Notice of Preliminary Objection (PO) on the grounds set out above. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable. The case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696* is clear on the issue of what constitutes a preliminary objection, where the Court of Appeal observed that:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

12. In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

13. What this court gathers from ground 1 of the Preliminary Objection is that the suit herein is *res judicata* owing to an earlier case being HC ELC No. 418 of 2012, *Celine George vs Jonah Chiroch and Veronica Sum*, the Plaintiff herein. The Defendant alleges that the said suit was determined by the judgment delivered on 20<sup>th</sup> November, 2017. The plea of *res judicata* can in fact determine a suit preliminarily if proved, however it ought not be raised in a PO. This is because one must adduce evidence of the existing case. The court is then required to look at the decision claimed to have determined the issues raised in the subsequent suit to confirm whether it is indeed *res judicata*. True enough, the Defendant could not include evidence of the previous suit, owing to the very nature of a PO which is that it ought not require evidence to prove the point of law raised.

14. The Defendant tried to overcome this hurdle by including in his submission an extract of a letter by the Plaintiff dated 26<sup>th</sup> July, 1982 and addressed to the District Commissioner. This is an attempt to adduce evidence through submissions, which practice is against the rules of procedure. Submissions are not a mode of receiving evidence as set out under Order 18 rule 2 of the Civil Procedure Rules, 2010. Furthermore, it is trite that a court’s decision cannot be based on written submissions and that such a decision would be a nullity. There are numerous judicial pronouncements on the place of written submissions in legal proceedings such as these ones. See the decision by the Court of Appeal in the case of *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another (2014) eKLR*, where it was held that:-

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is



the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

15. Further, the said introducing evidence to support a PO defeats the very purpose and intent of a preliminary objection, which by its very nature is only meant to raise pure points of law. In *Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party)* (2022) eKLR, it was held that:-

“20. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

16. In attempting to adduce evidence, the Defendant introduced factual matters into the objection, thus taking it out of the ambit of a PO. Additionally, since the court would as explained above require to delve into evidence to ascertain these facts, then it goes without saying that the first ground of the PO is unsustainable and it thus fails.

17. The remaining grounds in the Defendant’s Preliminary Objection (PO) can be summarised into two issues, the first being on jurisdiction of this court to hear and determine the main suit, and the second one being the locus standi of the Defendant to defend the suit. On the question of jurisdiction, in the celebrated case of *The Owners of Motor vessel Lillian ‘S’ vs Caltex Kenya Limited*. [1989] KLR 1, the Court held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. It is common knowledge that a Court’s jurisdiction flows from either *the Constitution* or legislation or both. Consequently, a court of law can only exercise the jurisdiction conferred to it by *the Constitution* or other written law, as the case may be, and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

19. The Jurisdiction of the ELC as established under Article 162 (2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act* is to “determine disputes relating to the environment and the use and occupation of, and title to, land”. It is clear from the Plaintiff that the Plaintiff seeks a permanent injunction against the Defendant barring him from trespassing, encroaching or developing the suit property. She also sought an order directing the Defendant to demolish and/or remove all illegal structures erected on the suit property. The suit as contained in the Plaintiff does not raise matters of succession as the prayers sought in the main suit relate to the use and occupation of land. There is no allegation or prayer relating to the distribution of the property of the estate of the late Ernest Sum, which would lead one to conclude that the suit belongs in the succession court. The objection that the suit is a succession dispute filed in the Environment and Land Court is therefore without merit.

20. On the issue of locus standi, the Defendant’s objection is that he is not the owner of 100 acres for him to be sued and punished over the land. I have looked at the Plaintiff herein and note that the Defendant was not sued as an owner of the 100 Acres but instead as an encroacher onto the suit property. The



facts on how he came into possession and use of the land can only be explained during the hearing hereof. For this reason, that objection is also unfounded and baseless.

21. It is worth noting that the Appeal against the decision in Eld HC ELC No. 418 of 2012 was instituted vide a Notice of Appeal dated 23<sup>rd</sup> November, 2017. It is now 7 years since then with no indication from the Defendant whether the said Appeal was prosecuted or that the same was determined and in whose favour. In the absence of such information, the judgement that still stands is that delivered in Eld HC ELC No. 418 of 2012, where the court clearly dismissed both the Plaintiff and the counterclaim. The said Celine George Poland was not declared owner of the suit land herein. The Defendant's claim that he is on the suit land as a manager of Celine George Poland is thus also misleading. In addition, the submission that pending the determination of the Appeal, the interests of Celine George Poland remain intact is, for lack of a better word, an outright lie as the court never made any determination that she held any interest over the land. As a consequence, the Notice of Preliminary Objection raised by the Defendant fails.

**b. Whether the Defendant has met the conditions necessary for grant of an order of stay of execution pending Appeal**

22. The law governing the granting of orders for stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules which stipulates as follows: -

“6. Stay in case of appeal [Order 42, rule 6]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) 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.”

23. The above provision requires a Party seeking orders for stay of execution to establish that they have sufficient cause for seeking the orders, that they stand to suffer substantial loss if the orders are not granted and lastly, that they are willing to furnish security for the due performance of the decree. In



addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.

24. As to whether the Application has been filed without undue delay, the impugned ruling was delivered on 28<sup>th</sup> May, 2024 and the fine imposed on 12<sup>th</sup> June, 2024. The memorandum of appeal was filed on 19<sup>th</sup> June, 2024, simultaneously with this application, all of which were done in less than one month. This court thus finds that this application for stay of execution has been filed without undue delay.

25. On substantial loss, Platt Ag JA in *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another 1986*) eKLR, held that:-

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

26. In this case, the Defendant has only stated that he will suffer substantial loss if the order if stay is not granted. He however has not presented any evidence of any such loss neither has explained his difficulty in paying the fine imposed. Accordingly, I am not persuaded that substantial loss has been proved.

27. Turning to the last requirement under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of *Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others (2014)* eKLR held that:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.

Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

28. This Court is entitled to take into account the fact that no such security has been offered in deciding an application herein. The Defendant has not offered any security either in his Application or submissions as required. There was no expression either that he was even willing to offer such security or to abide by any order or condition of the court regarding the same.

29. The three (3) conditions for granting stay of execution pending appeal must be met simultaneously, as they are conjunctive and not disjunctive. It is my finding that the Defendant herein, though he brought this Application without undue delay, has not adequately demonstrated the substantial loss that he would suffer. He has equally failed to furnish security as stipulated by sub-rule 2b or express his willingness to abide by any conditions this court may impose on security.

30. Consequently, the Defendant has failed to demonstrate that he has met all the prerequisites for the grant of an order of stay of execution pending Appeal. He has also failed to demonstrate that the Preliminary objection is merited. As a result both the Notice of Motion dated 18<sup>th</sup> June, 2024 and the



Notice of Preliminary Objection dated 21<sup>st</sup> June, 2024 are without merit and are dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> DAY OF DECEMBER 2024.**

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**J.M ONYANGO**

**JUDGE**

In the presence of;

1. Miss Otuma for Momanyi Gichana for the Plaintiff/Respndent
2. No appearance for the Defendant/Applicant

Court Assistant: Brian

