



REPUBLIC OF KENYA



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

**Nderu v Nganga (Environment & Land Case 303 of 2019)
[2023] KEELC 81 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 81 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 303 OF 2019
MD MWANGI, J
JANUARY 20, 2023**

BETWEEN

MARGARET WANGUI NDERU PLAINTIFF

AND

ALICE WACHEKE NGANGA DEFENDANT

(In respect of the Notice of Motion Application dated 15th November 2022 brought under the Provisions of order 5 rule (5), (6), rule 2 (7) of the Civil Procedure Rules, 2010 and all enabling provisions of the law)

RULING

Background

1. This is a matter where judgment has already been delivered and a decree issued. The application under consideration is by the defendant/judgment-debtor who prays for orders of stay of execution of the judgment and decree delivered on September 27, 2022 or in the alternative a status quo order, the status quo being that the defendant/applicant is in possession and occupation of the property, the same being all that parcel of land known as Ngong/ngong/5677 and that the defendant/respondent ought not invade, evict and or dispose the same pending the hearing and determination of the intended appeal to the Court of Appeal.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Alice Wacheke Ng'ang'a. The applicant pleads that she has already filed an appeal and an application for stay of the aforesaid orders in the Court of Appeal. The Court of Appeal has already certified the application urgent. The applicant avers that it is in the interest of justice that this court grants a stay of execution of its orders pending the hearing of the application filed by the defendant/applicant in the Court of Appeal.



Response by the Plaintiff/Respondent

3. The response by the plaintiff/respondent was by way of a notice of preliminary objection and grounds of opposition dated November 5, 2022. In the said notice, the plaintiff avers that the defendant's application is incompetent as there is a similar application pending before the Court of Appeal brought under the *Appellate Jurisdiction Act* and rule 5(2) (b) of the *Court of Appeal Rules*.
4. The plaintiff/respondent therefore argues that in view of the fact that the defendant/applicant has moved the Court of Appeal for a similar application, this court is no longer seized of the jurisdiction to deal with the issue.
5. Further the plaintiff/respondent avers that the application is brought after inordinate delay and is an abuse of the process of court. It is the plaintiff's position that the applicant has not shown the substantial loss she would suffer by vacating the plaintiff's property, neither has she provided any security.

Court's Directions.

6. The court's directions were that the application be canvassed by way of written submissions alongside the preliminary objection by the plaintiff. The defendant/applicant filed her submissions dated December 14, 2022. The plaintiff/respondent's submissions on the other hand are dated January 13, 2023.

Submissions Filed

Submissions by the defendant/applicant.

7. In her very brief submissions, the defendant/applicant explains that she is not seeking to review the decree and or orders of this court rather what she seeks is stay of the orders pending the hearing and determination of an application filed in the Court of Appeal in order to protect herself from being evicted before the application in the Court of Appeal is determined.

Submissions by the Plaintiff/Respondent

8. The plaintiff challenges the defendant's application's competence on the basis that it is stated to have been brought under the provisions of order 5 of the *Civil Procedure Rules*. The plaintiff submits that the cited provisions are totally irrelevant since order 5 deals with service of summons to enter appearance.
9. Secondly, the plaintiff submits that order 42 rule 6 of the *Civil Procedure Rules* does not allow an applicant to file an application for stay of execution at the two levels of the courts' hierarchy at the same time. Further that the defendant/applicant's submission contradicts her application.
10. The plaintiff terms the defendant/applicant's application an abuse of the process of court and urges the court to strike it out. She relies on the decisions in the case of *Nancy Musili v Joyce Mbete Katisi* (2018) eKLR and *Muchanga Investments Ltd v Safaricom Unlimited (Africa) Ltd & 2 others* civil appeal No 25 of 2002 (2009) KLR 229

Issues for Determination

11. Having considered the application by the defendant herein, the response by the plaintiff and the respective submissions filed by both parties, the court is of the view that the only issue for determination herein is whether the defendant's application is merited.



Analysis and Determination

12. Order 46 rule 6(1) of the *Civil Procedure Rules* empowers the court which made or issued the decree or ordered appealed from to issue an order for stay of execution of such order or decree where an appeal has been preferred and where sufficient case has been shown.
13. The court to which the appeal is preferred too has the power, on an application, to consider such an application and to grant an order of stay of execution as it may deem just.
14. The court appealed to has an additional power to set aside any stay order granted by the court appealed from on an application by any aggrieved party.
15. My reading of order 42 rule 6(1) of the *Civil Procedure Rules* is that an appellant has an option to either file his/her application for stay either in the court where the decree or order appealed from was made or to file it in the court appealed to, in the first instance.
16. Secondly, where the application is refused by the court appealed from, the appellant has two options: -
 - i. To apply to set aside the order of the court appealed from by the court of appealed to, or
 - ii. To file a fresh application altogether in the court appealed to notwithstanding the dismissal of the 1st application by the court appealed from.
17. I must state that I don't understand the defendant's reference to order 5 of the *Civil Procedure Rules* in her application. It is irrelevant and completely off the curve. I will however, proceed to consider the application on its merit.
18. In this case, the defendant/applicant opted to file the application for stay of execution of the decree of this court in the Court of Appeal in the first instance. In her own words, in the affidavit in support of the application, she states that she has already filed an appeal and an application for stay of execution 'which the Court of Appeal has already certified urgent'. In spite of the pending application before the Court of Appeal, the defendant/applicant still went ahead to file the present application before this court after her application was 'certified urgent but with no orders granted'.
19. The defendant/applicant in her submissions attempts to change tune and states that she only seeks stay of execution pending the hearing and determination of her application before the Court of Appeal.
20. In this court's opinion, based upon the clear reading of the order 42 rule 6 of the *Civil Procedure Rules*, where a party opts to file his/her application before the court appealed to, he cannot thereafter purport to file a similar application before the court appealed from. As I already stated earlier, the party has a choice of forum, but cannot maintain two applications pari pasu. This is deliberately setting the two courts on a collision course. It is an abuse of the process of court; gross abuse of the process of court for that matter.
21. I agree with the holding in the case of *Satya Bhama Gandhi v DPP & 3 others* (2018) eKLR where the court stated that: -

“It is settled law that a litigant has no right to pursue pari pasu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the processes or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a



contest by judicial process where parties place on the table of justice their different positions clearly, plainly and without tricks.”

22. The defendant/applicant having made her choice of forum must live with the consequences of her choice.
23. The attempt by the defendant/applicant in her submissions to ‘clarify’ her prayers is too little too late. She is bound by her pleadings.
24. Consequently, the court finds no merit in the defendant/applicant’s application dated November 15, 2022. Further the court makes a finding that the filing of the application while a similar one was pending determination before the Court of Appeal amounts to a gross abuse of the process of court. The application is hereby dismissed with costs to the plaintiff/respondent.

It is so ordered.

Dated, signed and delivered at Nairobi this 20th day of January 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Prof. Kiama Wangai for the Defendant/Applicant.

Ms. Kithinji h/b for Mr. Mbigi for the Plaintiff/Respondent.

Court Assistant: Joan/Tracy

M.D. MWANGI

JUDGE

<i>ELC 303 OF 2019 RULING</i>	0
-------------------------------	---

