



**Munyao v Kitheka & 2 others (Environment and Land Miscellaneous Application E007 of 2024) [2025] KEELC 3487 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3487 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITUI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2024**  
**A KANIARU, J**  
**MARCH 27, 2025**

**BETWEEN**

**GIDEON MUNYAO ..... APPLICANT**

**AND**

**JAMES KATHENGE KITHEKA ..... 1<sup>ST</sup> RESPONDENT**

**JOHNSON KITHEKA KATHENGE ..... 2<sup>ND</sup> RESPONDENT**

**EUNICE WAITHERA KUNGU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. I am called upon to make a determination on a motion on notice dated 9.7.2024 filed in court on even date. It is expressed to be brought under Sections 1A, 3A, and 19(1) (*sic*) of Civil Procedure Act, Section 13 of the Environment and Land Court Act, Articles 50(1), 162(2), 165(6) and (7) of the Constitution of Kenya and all other enabling provisions of law. It came with four prayers but two of them – prayers 1 and 2 - are now moot as they were meant for consideration at the *ex parte* stage. The prayers remaining for consideration are also two – prayers 3 and 4 – and they are as follows:

“Prayer 3: That the honourable court be pleased to call for Kitui Chief Magistrate’s Court MC ELC No. 6 of 2015 and bring to the High Court and review the order for the issuance of warrant of arrest made on 23<sup>rd</sup> May 2024 and set the same aside with all consequential orders.

Prayer 4: That the costs of this application be provided for.”

2. The applicant is Gideon Munyao and some three parties – James Kathenge Kitheka, Johnson Kitheka Kathenge and Eunice Waitthera Kungu – are named as respondents. It can be culled both from the grounds on which the application is premised and the supporting affidavit that came with it, that the judgement was delivered on 11.12.2023 in MC ELC No. 6 of 2015 in the lower court and, consequent



- upon that delivery, the legal representative of the 3<sup>rd</sup> respondent filed an application seeking an order for stay of execution. Such order was granted and, despite it being in place, the 1<sup>st</sup> and 2<sup>nd</sup> respondents moved the court to realize their costs. The court then issued warrant of arrest and this is what the applicant is contesting.
3. It is the applicant's belief that this should not happen while the order of stay is still in force. He fears too that he might be forcefully evicted. The action of the lower court is said to be contradictory in terms given that it has granted an order of stay of execution of judgement and at the same time given a green light to execute for costs arising from the same judgement.
  4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents responded via grounds of opposition dated 12.7.2024. According to these two respondents, the application is misconceived, incompetent, bad in law, and improperly before the court. The order of stay was said to have been granted to the 3<sup>rd</sup> respondent and did not therefore apply to the applicant. The order of stay was also said to apply to the issue of eviction, not cost. Further, the applicant was also faulted for not providing this court with the proceedings of the lower court to enable it make an informed decision. The position taken by 1<sup>st</sup> and 2<sup>nd</sup> respondents is that the lower court proceedings were regular. Further still, it was pointed out that the applicant had not exhausted the options available in the lower court before coming to this court.
  5. The application was canvassed by way of written submissions. The applicant's submissions are dated 24.9.2024. According to the applicant, this court should exercise or invoke its supervisory role or powers given by Article 165 (6) of the Constitution and review the lower court's order. The case of Stephen S. Nteere Inoti v M'twaruchiu Nthunguri Kkwinga & Another [2011] eKLR which relied on the case of Mukiri M'Mbui Inoti v Ringera Mukiira & Another was cited for guidance and/or necessary effect.
  6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' submissions were filed on 1.10.2024. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the order of stay was granted in favour of the 3<sup>rd</sup> respondent and didn't therefore apply to the applicant. It also related to eviction and not costs. It was pointed out that the applicant had not contested the judgement. The lower court did not act blindly, it was submitted, as it was made aware that the applicant had not challenged the judgement and the applicant was therefore duty-bound to pay costs.
  7. I have considered the application as filed, the response made, and the rival submissions. I need to point out from the outset that though the superior court has supervisory powers over the lower courts, there is the proper manner or procedure for doing so. This is so particularly where what is being challenged is an order or directive issued in exercise of judicial powers of the lower courts or tribunals. The applicant has come to this court by way of a miscellaneous application clearly styled as a Notice of Motion. The order sought is for all practical and legal purposes one of certiorari by another name. I would for this reason hesitate to exercise supervisory powers other than by way of judicial review. Ordinarily, review as practiced or exercised in our courts can ordinarily come under order 45 of Civil Procedure Rules, 2010, for normal suits or as judicial review (which normally invokes order 53 of Civil Procedure Rules, 2010, and/or Sections 8 and 9 of the Law Reform Act Cap 26) or as a constitutional review matter under the current constitution. The approach taken by the applicant is anomalous and quite clearly unsuitable for challenging an order issued by a court of law in exercise of its judicial powers.
  8. I also note that the applicant has not challenged the judgement either by way of an appeal or review. In law, it is common to grant an order of stay of costs in a suit where the substantive result in the suit is awaited. But seeking such an order following conclusion of proceedings and subsequent issuance of judgement is unusual unless there is an appeal or some other court process being awaited. In this particular matter, stay is not being sought pending the outcome of any other process. In fact, the order



sought is in the nature of final orders and if granted the applicant can easily use it to permanently avoid paying costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

9. It seems to me also that when the impugned warrants of arrest was issued, the applicant filed an application – a Notice of Motion dated 30.5.2024 – in the lower court seeking to set aside the warrants. While that application was still pending, he then came to this court via the application now under consideration seeking a review of the same lower court orders. This borders on abuse of the court process. As pointed out by the respondents in their submissions, the applicant should first have exhausted the options available to him in the lower court. It was wrong for him to come to this court to try invoke it's supervisory powers.
10. I would wish to point out here that it is not the duty of the superior courts to micro-manage the lower courts. In their functions as judicial arbiters, the lower courts enjoy decisional autonomy which the superior courts should not easily trifle with.
11. It is for these reasons that I make a finding that the application before me is both inappropriate and unmeritorious. I hereby dismiss it with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 27<sup>TH</sup> MARCH, 2025.**

In the presence of,

Njoroge for Applicant

M/s Kiama for Kilonzi for 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Court Assistant - Musyoki

**A. KANIARU**

**JUDGE- ENVIRONMENT & LAND COURT, KITUI**

**27/03/2025**

