



REPUBLIC OF KENYA



KENYA LAW
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**Wanjohi & another v Jege (Environment & Land Case 74 of 2014)
[2023] KEELC 16072 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 74 OF 2014
EC CHERONO, J
FEBRUARY 28, 2023**

BETWEEN

PENINA MUTHONI WANJOHI 1ST PLAINTIFF

PAUL WACHIRA NJEGE 2ND PLAINTIFF

AND

GRACE MUTHONI JEGE DEFENDANT

RULING

1. This Honourable Court has been called upon to determine 3 applications which were all instituted by way of Notices of Motions dated 10/1/2022, 4/2/2022 and 15/3/2022 respectively.
2. The Notice of Motion dated 10/1/2022 was filed by the Defendant who seeks orders that: -
 - a. The Honourable Court to order the plaintiffs – Penina Muthoni Wanjua and Paul Wachira Njege – to remove the building and/or structure from title numbers Kabare/Nyangati/4800 and Kabare/Nyangati/4802 forthwith and in default the honourable court order that the plaintiffs, their servants be evicted from by M/S Providence Auctioneers from title numbers Kabare/Nyangati/4800 and Kabare/Nyangati/4802.
 - b. The officer in charge- Wang’uru Police Station do provide security during the exercise.
 - c. That the costs of this application be provided for.
3. The said application was opposed by the 1st Plaintiff by way of a replying affidavit sworn on 4th February, 2022.
4. The application dated 4/2/2022 was filed by the 1st Plaintiff who seeks the following orders: -
 - a. That there be a stay of execution of the orders issued on 22nd October, 2021 pending the hearing and determination of Kerugoya ELC No 2 of 2022.



- b. There be no orders as to costs.
5. The Defendant opposed the said application by way of a replying affidavit sworn on 24th February, 2022.
6. The 2nd Plaintiff filed the application dated 15th March, 2022 whereby he seeks orders that: -
 - a. That there be a stay of execution of the orders issued on 22nd October, 2021 pending the hearing and determination of Kerugoya ELC No E13 of 2022.
 - b. There be no orders as to costs.
7. The said application was opposed by way of a Replying Affidavit sworn on 16th May, 2022.
8. When the matter came up for hearing on 16th March, 2022, the parties through their advocates on record agreed that the three applications be heard contemporaneously by way of written submissions.
9. The Defendant filed submissions on 25th February, 2022 while the 1st plaintiff filed Her submissions on 16th March, 2022.

Defendant/applicant's Case And Submissions: -

10. The Defendants case is that they were the plaintiffs in the counterclaim and judgment was entered in their favor on 22nd October, 2021 as per the counterclaim.
11. They stated that the Respondents never appealed the Judgment and that the said Judgment/Decree has not been discharged and/or set aside and that they should to be allowed to enjoy the fruits of the judgment by way of removal of the building and/or structure on Land parcel No Kabare/Nyangati/4800 and 4802.
12. With respect to the applications by the Plaintiffs dated 4/2/2022 and 15th March, 2022, their case is that a Decree was issued in Senior Resident Magistrate Court Arbitration case No 8 of 2008 to the effect that the suit land be awarded to the Plaintiff. The same position was upheld in Wanguru Principal Magistrate Court Misc. Application No 8 of 2009 whereby the District Land Registrar Kirinyaga was compelled to register the suit lands in the names of the plaintiff.
13. They stated that the plaintiffs were not condemned unheard as they were represented by M/S S. G. Wachira Advocate who made an application to review the said orders which was dismissed. According to them, the plaintiffs are economical with the truth by stating that they came to know of the suits during the hearing.
14. They stated that pursuant to the said orders, the plaintiff was registered as proprietor of the suit lands and later sold land parcel No Kabare/Nyangati/4800 at a consideration of Kshs. 900,000/-, and thus the same was acquired procedurally and lawfully.
15. They further stated that they had been advised by their Advocates on record which advise they believe to be true that the applications by the plaintiffs are bad in law and an abuse of the court process as they have not satisfied the requirements of section 6 of the Civil Procedure Act with regard to stay of suits and that the issues of fraud raised by the Plaintiffs were heard and determined before it was delivered on 22nd October, 2022.
16. They also stated that if the Plaintiffs were aggrieved by the resultant Decree issued on 7th May 2009, they ought to have moved to the superior court for orders of *Certiorari* within 6 months from the issuance thereof as required under Order 53 of the Civil Procedure Rules, 2010.



17. It is their case that as the registered owners of the suit lands, they should be allowed to enjoy all the privileges that arise out of a lawful registration and therefore prayed that their application dated 10th January, 2022 be allowed as prayed and the applications dated 4/2/2022 and 15th March, 2022 be dismissed with costs.
18. In their final submissions, they relied in the following cases; *Viktar Maina Ngunjiri & 4 others v Attorney General Genral & 6 others* (2018) eKLR, *Kenya Wildlife Service v James Mutembei* (2019) eKLR, *Joyce Nancy Kabiru v Faulu Micro-Finance Bank Limited and 2 others* ELC Case No 178 of 2016 amongst others.

Plaintiffs' Case And Submissions: -

19. The Plaintiff's case is that the Defendant's application seeking eviction is premature, and that even though it is true that there is judgment that was delivered on 22nd October, 2021, they had been advised by their advocate on record to file another suit seeking different prayers. This is because they strongly believe that the procedure that was used to acquire the suit lands was irregular.
20. They stated that the Defendant's case ought to be put in abeyance pending further directions as they have no other place they can call home and if the orders of eviction are allowed, they will lead to them being thrown to the road side.
21. They pray that *status quo* be maintained to allow them ventilate their claims in their new suits being ELC No 2 of 2022 and ELC E13 of 2022 which they believed have prima facie case with high chances of success.
22. In their submissions, they urged this Honourable Court not to be used to perpetuate an illegality.
23. They submitted that though the Respondents had submitted that their cases are res udicata, this court cannot act suo moto without any objection in regard to the competence and legality of their fresh cases.
24. They submitted that though the Land Disputes Tribunal Act which established the Land Disputes Tribunal was repealed, the awards issued therefrom are still challengeable and that the Attorney General as the Chief Government Legal Advisor will have an opportunity to defend the acts or omissions of the two bodies. They relied in Kerugoya ELC No 136 of 2017 *Alex Muriithi Kangangi v Eunice Wanjiru Ngatu* and Article 165 (6) of the *Constitution*.
25. They further submitted that their fresh suits have not been caught up by sections 6 and 7 of the *Civil Procedure Act* as section 6 concerns itself with a situation where there are two pending suits. Further that the prayers which were sought in this suit are different from the prayers sought in the fresh suit and that the defendants and the cause of action is totally different.
26. They submitted that the issue for determination in the fresh suit is that they were not served and will seek to determine why Wang'uru court with judicial powers never directed that the 2 Respondents be served. They further submitted that there is nothing on record to show that the Defendant herein never informed them of the Decree and/or Order within 6 months from the date of issue.
27. They also submitted that there was collusion between the Defendant and Beth Wamuyu Mukinyukia as they obtained a back dated letter of consent which was 15 days prior to entering the sale agreement. They remained adamant that since the land was sold during the pendency of this suit, the purchaser is bound by the doctrine of lis pendens.



28. They submitted that they have no other place to go and that under section 3A of the *Civil Procedure Act* and Article 159 (d), this Court has inherent jurisdiction to ensure that the plaintiffs have access to justice under Article 48 of the *Constitution* of Kenya.
29. They submitted that the defendant's application is incompetent for failure to comply with Order 51 Rule 4 and Order 19 rule 5 of the *Civil Procedure Rules* and that even though the same is competent, the defendant is seeking to sanitize an illegal process.
30. They urged this Honourable Court to allow their applications and to dismiss or put in abeyance the application dated 10th January, 2022.

Analysis: -

31. I have considered the three applications dated 10/01/2022, 14/2/2022 and 15/3/2022 rival Affidavits and submissions as well as the applicable law.
32. In the first application dated 10/01/2022, the defendant is seeking to enforce the judgment delivered by this Honourable Court on 22nd October, 2021.
33. On the other two applications dated 14/02/2022 and 15/03/2022, the plaintiffs are seeking stay of execution of the said judgment delivered on 22nd pending hearing and determination of Kerugoya ELC Case No 2 of 2022 and ELC Case No E13 of 2022 (herein after referred to as fresh suits).
34. I have noted that in the said fresh suits, the Plaintiffs' are challenging the orders issued by Wang'uru Court in Arbitration Case No 8 of 2008 and Misc Application No 88 of 2009 on grounds that the same were irregular, null and void ab initio.
35. The said fresh suits were filed after their claim in this suit was dismissed on 22nd October, 2021 and the Defendant's counterclaim was allowed which ordered the Plaintiffs to be evicted.
36. At paragraph 3 of the Replying Affidavit sworn on 4th February 2022, the 1st plaintiff stated that this court was right in its judgment. In my view, this goes to say that the Plaintiffs are not faulting the judgment of this Honourable court delivered on 22nd October, 2021. This explains why they have not filed an appeal against the said judgment.
37. The Plaintiffs also allege that they became aware after filing the suit and when the parties were testifying that the suit lands were transferred pursuant to Orders issued by the Wang'uru Court. Nothing could be further from the truth as at Paragraph 5 of the Defendants' Defence and Counterclaim in this matter dated 4th September 2014, the defendant explained how the land was transferred to her through the said orders. It therefore cannot be true that the plaintiffs learnt of the existence of the orders while testifying.
38. Even assuming they learnt of the same during that time, it is evident that the plaintiffs slept on their rights. Since the Plaintiffs were represented by an advocate, they have not explained why they failed to file their declaratory suits during that time or even amend their pleadings to include the claims raised in the fresh suits.
39. The Plaintiffs waited until the suit was concluded to file the fresh suits. It is trite that equity aids the vigilant and not the indolent. The Plaintiffs have submitted that they have a right to access justice through the fresh suits filed. That cannot be correct as litigation must come to an end and the defendants who are successful



parties in this suit have a right to enjoy the fruits of their judgment which was delivered by this Honourable Court on 22nd October, 2021.

40. The Plaintiffs are not saying that they were dissatisfied with the judgment by this Honourable court delivered on 22/10/2021 but they want the same stayed. My view is that the application by the plaintiffs for stay are an attempt to not only to delay justice but to also defeat justice.
41. I have noted that the parties have submitted at length concerning the legality of the Orders by Wang'uru Court and the issue of res judicata and subjudice. I find that those issues are neither here nor there as they ought to have been raised before this suit was determined.

Conclusion: -

42. In view of the foregoing, I am satisfied that the application dated 10/1/2022 is merited and the same is hereby allowed with Costs. However, I find the other two Notice of Motion applications dated 4/2/2022 and 15/3/2022 without merit and the same are hereby dismissed with costs.
43. Orders accordingly

READ, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 28TH FEBRUARY, 2023
HON. E.C CHERONO ELC JUDGE

In the presence of;

Mr Ngigi Gichoya for the Defendant

Mr. Maina Kagio for the Plaintiffs

Joy C/A

