



REPUBLIC OF KENYA



KENYA LAW
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**Wanjau v Bett (Environment & Land Case 957 of 2012)
[2023] KEELC 15812 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 957 OF 2012
JM ONYANGO, J
FEBRUARY 27, 2023**

BETWEEN

JOSEPH WANJAU PLAINTIFF

AND

CALEB KIPKOROIR BETT DEFENDANT

RULING

1. What is before me is the Defendant's application dated July 27, 2022 in which he seeks an order of stay of execution and that he be allowed to pay the decretal sum of Kshs.234,954 by installments of Kshs.5,000 per month.
2. The application is anchored on the Applicant's Supporting Affidavit sworn on the July 27, 2022 in which he explains the difficulty he has in paying the decretal sum at once.
3. The application is opposed by the Plaintiff through the Grounds of Opposition dated September 20, 2022 in which he states that the application is devoid of merit and amounts to an abuse of the court process. He also states that the proposal to liquidate the costs by installments of Kshs.5,000 per month is unreasonable since it would take the Applicant 26 years to pay the outstanding amount.
4. He also states that the application has been made after inordinate delay.
5. The application was canvassed by way of written submissions.

Applicant's Submissions

6. Although the Applicant's counsel indicated that he had filed his submissions, the same were not on record at the time of writing this ruling.



Respondent's submissions

7. Learned counsel for the Respondent submitted that the entire application was incompetent, devoid of merit abuse of the process of the court. He submitted that the plaintiff filed suit against the defendant on September 25, 2012 seeking that the structures erected by the defendant on the plaintiff's land be demolished and an order of permanent injunction be issued restraining the defendant from interfering with the plaintiff's property. Judgment was entered in favour of the plaintiff and his costs were taxed in the sum of Kshs.258,954.
8. Counsel submitted that the Applicant applied for a stay of execution vide an application dated February 12, 2021 but the same was dismissed. As the Applicant has been unable to settle the plaintiff's costs, he has filed this application seeking a stay of execution and that he be allowed to pay the costs by installments. It was his submission that the application for stay of execution was res judicata and it ought to be dismissed. He relied on the case of *Henderson v Henderson* [1843-60] ALL ER378.
9. With regard to proposal by the Applicant to be allowed to pay the costs by installments, counsel relied on the case of *Keshvaji Jethabbai & Bros Limited v Saleh Abdulla* [1959] E A 260 where the court laid down the principles that should guide the court while exercising its discretion in an application for payment by installments. It was his contention that the Applicant's proposal to pay the costs by installments of Kshs.5,000 per month was unreasonable as it would take him 4years, 4 months to pay the amount and this would frustrate the decree-holder. He proposed that the amount be liquidated in 2 installments of Khs. 129,477/= .

Issues for Determination

10. The application only raised two issues for determination:
 - i. Whether the application is res judicata
 - ii. Whether the proposal to pay the costs by installments is tenable.

Analysis and Determination

11. The first question I have to determine is whether the application is res judicata.

The doctrine of res judicata is contained in section 7 of the *Civil Procedure Act* which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

12. In the case of *Henderson v Henderson* [1843-60] ALL ER 378 the court held that:

“where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the a matter which might have been brought forward as part of the subject in contest but was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea



of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

13. In the instant case, the Applicant filed an application dated February 12, 2020 for stay of execution under Order 42 Rule 6. The court delivered a ruling on 21.7.2021 dismissing the said application.
14. The Applicant has brought a similar application seeking a stay of execution but he has now added a prayer for payment by installments. The issue of stay of execution having been determined by a court of competent jurisdiction, it is my finding that the same is res judicata.
15. I will now move on to consider the proposal by the Applicant to pay the costs by installments.

Order 21 rule 12 of the [Civil Procedure Rules](#) provides as follows:

“After passing any such decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by installments on such terms as to payment of interest, the attachment of property of the judgment debtor or the taking of security from him, or otherwise as it thinks fit.”

16. In the case of *Keshvaji Jethabhai & Bros Limited v Saleh Abdulla* (1959) E A 260 the court laid down the following principles which should guide the court in exercising its discretion in applications under Order 21 rule 12:
 - a) “Whilst creditors rights must be considered, each case must be considered on its own merits and discretion exercised accordingly.
 - b) The mere inability of a debtor to pay in full at once is not sufficient reason for exercise of discretion
 - c) The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion.
 - d) Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.”

17. In the instant case, the Applicant has explained his inability to pay the full amount and proposed to pay the costs of Kshs. 258,954/= by installments of Kshs. 5,000. The judgment debtor is opposed to this as it would take a period of 4 years, 4 months to pay the full amount. I also note that even though the bill of costs was taxed in January 2022, the Applicant has not made any effort to pay any amount towards offsetting the costs. In the circumstances, I am unable to exercise my discretion in his favour in the manner proposed. However, considering the Applicant’s financial status and in the interest of Justice, I direct that the Applicant pays a lump sum of Kshs. 129, 477/= within 7 days from the date of this ruling and the balance by 4 equal monthly installments failing which Decree Holder may apply for execution.

18. The costs of the application shall be borne by the Applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM AT ELDORET
THIS 27TH DAY OF FEBRUARY 2023.**

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J.M ONYANGO

JUDGE.

In the Presence of;

1. Mr. Kipngeno for Mr. Chege for the Defendant/Applicant

2. No appearance for the Plaintiff/Respondent

Court Assistant: Antony Oniala

