



REPUBLIC OF KENYA



**Wanjohi & another v City Council of Nairobi & another (Environment & Land Case E089 of 2021) [2023] KEELC 835 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 835 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E089 OF 2021**

**J OMANGE, J**

**FEBRUARY 16, 2023**

**BETWEEN**

**JOSEPH MWANGI WANJOHI ..... 1<sup>ST</sup> APPELLANT**

**NANCY NYAMBURA MWANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CITY COUNCIL OF NAIROBI ..... 1<sup>ST</sup> RESPONDENT**

**PAUL JOHN KIMANI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement of the chief magistrate court at Nairobi, Hon. L.L. Gicheha (MS) dated 30th July 2021 in Milimani Civil Suit No. 9266 of 2001)*

**RULING**

1. The subject matter of this appeal is the Judgment and Decree of Hon LL. Gicheha of 30 July 2021 over the Property known as Nairobi/ Umoja Block 83/14/438.
2. By a Notice of Motion Application dated 21<sup>st</sup> July 2022, the Appellants seek the following reliefs:
  - a. Spent
  - b. Spent
  - c. Pending the inter partes hearing and determination of the instant appeal application, this Honourable Court be pleased to issue an order of status quo maintaining the prevailing status of the suit property.
  - d. Costs of this Application be in the Cause.
3. The Application is based on the grounds set out in the face of the Application and the 2<sup>nd</sup> Appellant's Supporting Affidavit sworn on 21<sup>st</sup> July 2022, that upon making an application dated 12<sup>th</sup> November



- 2021, this Honourable Court delivered a Ruling on 5<sup>th</sup> May 2022 granting the Appellants leave to appeal against the decision of the Chief Magistrate out of time, however the Court did not stay execution of the Judgment appealed from and that subsequently, the 2<sup>nd</sup> Respondent had threatened to evict them from the suit property.
4. The Applicant deponed that if the 2<sup>nd</sup> Respondent's threat is actualized, it will dispossess the Appellant of the suit property at the risk of transfer or in any other way dealing with the suit property inconsistent with true ownership by the 2<sup>nd</sup> Respondent thus render this Appeal a mere academic exercise.
  5. The Appellants therefore contend that the orders which they seek are meant to preserve the subject matter of the Appeal and to ensure that the Honourable Court would enter Judgement capable of execution.
  6. The Application is opposed by the 2<sup>nd</sup> Respondent. Vide the Replying Affidavit of the 2<sup>nd</sup> Respondent sworn on 5<sup>th</sup> August 2022.
  7. The 1<sup>st</sup> Respondent contended that that the proceedings were stolen in order to justify an appeal out of time and therefore the appeal should not be allowed in hindsight, but instead, the DCI should be involved to investigate the allegation of theft of Court documents.
  8. By a letter dated 20<sup>th</sup> May 2022 addressed to the Appellants' Counsel on record, the 2<sup>nd</sup> Respondent informed that following the dismissal of their "frivolous application for a stay of execution" from his land, the Appellants have been illegally occupying the suit property from 6<sup>th</sup> May 2022 in defiance of a Court order, and out of the criminal trespass, the Appellants owed him the sum of Kshs 20,000 daily for criminal trespass, and if the 1<sup>st</sup> Respondent involves Auctioneers and Police to eject the Appellants from the property, then the Appellants will be liable for the costs incurred.
  9. Parties filed submissions, the Appellants' dated 8<sup>th</sup> January 2023 and the 2<sup>nd</sup> Respondent's 9<sup>th</sup> dated January 2023.
  10. The Appellants submitted that the central dispute between the parties herein was the ownership of the suit property which the Appellants are in occupation of, and that the application was necessitated by the 2<sup>nd</sup> Respondent's threat to evict them. The Appellants submitted that the 2<sup>nd</sup> Respondent's Affidavit does not address the demerits of the Application and on this issue alone, the Application should be allowed as prayed.
  11. The Appellants relied on the cases of *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR, *Rhoda Mukuma v. John Abuoga* (1988) eKLR, as cited *Elgon Kenya Limited v Peter Musyoka Kamuya* [2017] eKLR and *Monica Mukubi Kbirrecu & another v Caleb Omboga Moturi* [2021] eKLR on the importance of a status quo order to preserve the suit or appeal.
  12. The Appellant contended that since there is an appeal that is yet to be determined, there is a legal necessity to preserve the substratum of the appeal to avert substantial loss that would render the Appeal nugatory.
  13. On the other hand, the 2<sup>nd</sup> Respondent submitted reiterating the that the Court ought not to have allowed the Appellants to appeal out of time in the first place as proceedings were stolen to justify the filing of appeal out of time. He took issue with the Appellants' back- dating of documents, and that the appeal does not stop criminal action.
  14. The 2<sup>nd</sup> Respondent submits that as at the date of this Ruling, the Appellants owe him Kshs 5,740,000 being Kshs 20,000 per day from 5<sup>th</sup> May 2022 for their criminal action, and a total of Kshs 19,000,000 from the year 2001.



15. I have considered all the pleadings, affidavits, exhibits and submissions filed in this Court. I have also taken note of the Appellant’s Memorandum of Appeal dated 16<sup>th</sup> May 2022.
16. In the Memorandum of Appeal, the Appellants seek to set aside the Judgment and decree of the Hon Chief Magistrate.
17. In the Judgment and Decree, the Chief Magistrate had entered Judgment in favour of the 2<sup>nd</sup> Respondent herein against the Appellants, giving the Appellants 60 days to vacate the suit property failure of which, eviction orders would issue.
18. The only issue for determination before me is whether a status quo order should be granted pending the hearing and determination of the Appeal.
19. I note that the Appellants’ Application is made under the inherent powers of Court under Sections 1A,1B,3A of the Civil Procedure Rules, Order 9 Rule 9 and Order 51 Rule 1 of the Rules. Though the rules are relatable, Order 9 Rule 9 relates to Post- Judgment change of Advocates. I do not believe this is relevant to the instant Application.
20. Be so as it may, first I wish to dispel a notion that Applications are to be allowed solely on the basis of lack of opposition. The Judicial system in Kenya is a meritocracy. Applications and appeals would still be heard and determined on their merits even if there is no opposition. However, in this case, I find that the Application is opposed based on allegations of criminal activity, and the fact that by the Ruling of 5<sup>th</sup> May 2022, the Court had declined to grant stay of execution.
21. The court in refusing to grant stay of execution held that the requirements of Order 42 Rule 6 had not been met.
22. Even though the current application has been framed so as to invoke the courts inherent powers, the court would still need to exercise these powers judicially and not arbitrarily. The Court of Appeal had occasion to give guidance on the exercise of this power in the case of Kenya Power and Lighting Company versus Benzene Holdings t/a as Wyco Holdings in which the court recounted “The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury’s Laws of England, 4<sup>th</sup> Edn. Vol. 37 Para. 14 as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.” See also Meshallum Waweru Wanguku (supra).



23. The court summed it up thus “This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.
24. The question is whether this is such a case. The applicant in this case is alleged to have been involved in criminality which they have benefitted from as leave to appeal out of time was given. The applicants have not demonstrated the efforts they have made to fast track the hearing of the appeal. Furthermore, they had filed an earlier application for stay which was not successful and now approaching the court through another door. In view of the foregoing I find that the application has no merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**JUDY OMANGE**

**JUDGE**

**In the presence of: -**

Mr. Hans for Appellant

Mr. Kagongo holding brief for Mr. Saleh 1<sup>st</sup> Respondent

Mr. Kimani the 2<sup>nd</sup> Respondent

Steve - Court Assistant

