



**Lelekoitien & another v Loiporkera (Miscellaneous Civil Application E004 of 2022) [2023] KEELC 16406 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16406 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
MISCELLANEOUS CIVIL APPLICATION E004 OF 2022**

**AK BOR, J**

**MARCH 2, 2023**

**BETWEEN**

**RAKITA LELEKOITIEN ..... 1<sup>ST</sup> APPLICANT**

**JOSEPH KIPKOECH TUITOEK ..... 2<sup>ND</sup> APPLICANT**

**AND**

**WILLIAM LOIPORKERA ..... RESPONDENT**

**RULING**

1. The Applicant brought the application dated 7/9/2022 seeking to have an order staying execution of the decree issued on 14/12/2022 (sic) in Nanyuki Chief Magistrates Court Civil Suit No. 17 of 2018 by way of deregistration or cancellation of the registration entries in respect of the 2<sup>nd</sup> appellant or his forceful eviction from the suit land. He also sought to have the Magistrate's court file brought to this court by the Executive Officer or Court Administrator for purpose of perusal. Further, he sought an order to the effect that the trial court's ex parte proceedings, judgment, decree and the subsequent proceedings on execution were a mistrial, null and of no legal effect and that they should be set aside and the case heard *de novo* before a different trial Magistrate.
2. The application was made on the grounds that there was no service of the hearing notice for the hearing which was scheduled for 3/8/2021 and 14/9/2021 and that the trial court failed to scrutinize the affidavit of service. Further, that the court did not give notice of the date for the delivery of judgment and that the Applicants were therefore condemned unheard. The Applicants contended that they would be deprived of ownership of the suit land or be evicted when execution commenced.
3. The application was supported by affidavit of Joel Kipkorir Sigilai sworn on 7/9/2022 in which he deponed that he was the advocate having conduct of the matter for the Applicants who were defendants in the suit before the trial court. He gave a chronology of the events that took place after the suit was filed resting with the notice dated 28/9/2020 for pre-trial conference which he claimed they



- received in December 2020. He went further to give details regarding how the 1<sup>st</sup> and 2<sup>nd</sup> Applicants were allocated and came to be in possession of the land known as Laikipia/Uwaso Narok/782 and how they got to be registered as its owners.
4. He averred that he was surprised when on 29/8/2022 the 2<sup>nd</sup> Applicant went to his office with a copy of the decree dated 14/1/2022 which was served on him by the Assistant Chief of Uwaso Narok sub location who summoned the 2<sup>nd</sup> Applicant on 1/9/2022 to give vacant position of the suit land to the Respondent. He annexed a copy of the letter in response to the Assistant Chief and maintained that they were not notified of the judgment date or any processes that took place after 2021. He emphasised that the Applicants were condemned unheard. He annexed copies of the correspondence together with the supporting affidavit of the 2<sup>nd</sup> Applicant who exhibited the title deed issued to him over the suit property in 2014.
  5. He also attached a copy of the draft memorandum of appeal which basically challenges the mode of service of the hearing notices and the failure to serve a notice of delivery of judgment.
  6. The Respondent swore the replying affidavit on 15/9/2022 in opposition to that application. He maintained that the Applicants advocates were properly served with the notices and annexed copies of the affidavits of service and the hearing notices. He averred that the application had been overtaken by events since a title deed over the suit land had been issued to him on 17/8/2022. He argued that the Applicants had neither sought to set aside the decree of the court nor had they sought review or appealed against the decree issued on 14/1/2022. He maintained that the hearing notices were sent to the Applicants advocates through the email address given in their letterhead.
  7. The Applicants were granted leave to file a supplementary affidavit which they filed on 3/10/2022. John K. Sigilai, the Applicants' advocate deponed in the affidavit that the Respondent's advocate failed to confirm whether the email address jksigila@yahoo.com given in his letter written in 2015 was still working after the *Civil Procedure Rules* of 2020 were promulgated five years later allowing service through email. He reiterated the attack on the mode of service that was used and produced an abstract of title confirming that the suit property was transferred to Amos Saitoti Loiborkera on 22/8/2022.
  8. The court directed the parties to file submissions. The Applicants submitted that land in Kenya was a very sensitive and emotive matter which is why Article 40 of the *Constitution* prohibits the deprivation of property without a hearing in accordance with Article 50 of the *Constitution*. They submitted that they were condemned unheard and that substantive justice enshrined in Article 50 of the *Constitution* was not served. They urged that the judgment of the Learned Magistrate and the decree were irregular and ought to be set aside as a matter of right so that the hearing can start afresh.
  9. Further, they argued that electronic service must be accompanied by an affidavit of service together with the document served, a receipt and proof of delivery of what was served. They added that such documents must be filed in court and stamped. They also pointed out that the decree was not preceded by a draft decree approved by the Applicants which is contrary to Order 21 Rule 8 of the *Civil Procedure Rules*. They implored the court to set aside the ex parte judgment and decree. They relied on *David Bundi v Timothy Mwenda* [2022] eKLR and Nyahururu HC Miscellaneous Application No. 18 of 2017 – *Boniface Nyutu Mbogo v James Kariuki Gachara*.
  10. The Respondent relied on Article 165 of the Constitution and Section 78 of the *Civil Procedure Act* regarding the appellate jurisdiction of the court. He submitted that the Applicants had not preferred an appeal in this court yet they are seeking substantive orders for stay of execution and quashing of the proceedings and decree of the Magistrate's court. He relied on Order 42 which provides that an appeal should be in the form of a memorandum of appeal and pointed out that the orders which



the Applicants seeks in this application would in effect determine the matter without affording the Respondent an opportunity to canvass the appeal. The Respondent relied on *Abraham Lenauia Lenkeu v Charles Kotekeyo Nkaru* [2016] eKLR.

11. The Applicant was granted leave to file further submissions where it addressed the issue of the appellate jurisdiction of this court while pointing out that the Magistrates court became *functus officio* upon delivery of the judgment and that it did not have power to set aside or overturn the judgment it had entered. They pointed out that there was need to seek the leave of the court to appeal out of time and extend the time for appeal while seeking conservatory orders to preserve the status quo on the ground for the ends of substantive justice to be met.
12. The issue for determination is whether the court should grant the orders sought in the application. The orders which the Applicants seek for this court to direct the Executive Officer to avail the Magistrates court file is not merited at this point because looking at the draft memorandum of appeal it is the very issue of service which will be the subject matter of the appeal. It is only when the appeal is filed that the court will call for the Magistrate's court file for purposes of hearing the appeal.
13. The other prayer sought is stay of execution of the decree. At this juncture it is apparent that the decree was already executed and a title issued to the Respondent way back in August 2022. The copy of the green card which the Applicants exhibited confirms that the title over the suit property has already been transferred to a third party. It will not serve any useful purpose to grant the prayer staying execution at this stage in light of that fact.
14. What is left is the issue of eviction of the 2<sup>nd</sup> Applicant from the suit land. From the documents filed in court, it would appear as if the 2<sup>nd</sup> Applicant has not been evicted from the suit land.
15. Without the benefit of the perusal of the Magistrate's court file regarding the issue of service, this court cannot pronounce itself on the propriety or otherwise of the service which was effected by the Respondent's advocate. That is the remit of the appeal.
16. The order that commends itself for this court to make at this point is one allowing the Applicants leave to lodge an appeal against the decision of the Learned Magistrate within 21 days of the date of this ruling.
17. If the 2<sup>nd</sup> Applicant has not been evicted from the suit land then he is to remain there until further orders are issued by the court.

Each party shall bear its own costs.

**DELIVERED VIRTUALLY AT NANYUKI THIS 2<sup>ND</sup> DAY OF MARCH 2023.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Joel Sigilai for the Applicants

Ms. N. Wachira holding brief for Mr. A. Chweya for the Respondent

Ms. Stella Gakii - Court Assistant

