



Githu & 5 others v Mugwe (Suing as the legal representative of the Estate of Githinji Mugwe (Deceased) & another (Environment & Land Case E001 of 2021) [2023] KEELC 16518 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E001 OF 2021
LN GACHERU, J
MARCH 23, 2023**

BETWEEN

**PETER KIIRU GITHU 1ST APPLICANT
PHARISON MWANGI GITACHU 2ND APPLICANT
HENRY MACHARIA GITHINJI 3RD APPLICANT
JOHN GACAGUA GITHINJI 4TH APPLICANT
MUTHARI GITHINJI 5TH APPLICANT
JESSE MUTHIGA ALBERT 6TH APPLICANT**

AND

**MARGARET MUTHONI MUGWE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GITHINJI MUGWE (DECEASED)) 1ST RESPONDENT
KAMAU GITHINJI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GITHINJI MUGWE (DECEASED)) 2ND RESPONDENT**

RULING

1. By a Notice of Motion Application dated 9th January 2023, the 1st Respondent/Applicant sought for the following orders:
 1. That pending the hearing and determination of this application inter parties, this Honourable Court be pleased to grant an order of stay of execution of the judgement/decree or any other resultant orders made by honourable Lady Justice L. Gacheru on 20th December 2022;



2. That pending the hearing and determination of the Applicant's intended appeal this honourable Court be pleased to grant stay of execution of the judgement/decree or any other resultant orders made by honourable Lady Justice L. Gacheru on 20th December 2022;
 3. That the honourable Court be pleased to grant the Applicant such orders and further orders it deems fit to grant to meet the ends of justice;
 4. That the O.C.S. Commanding Kahuro Police Station be and is hereby authorized to supervise and ensure compliance of the Court orders and maintenance of law and order; and
 5. That the costs of this application be provided for.
2. The application is premised on the grounds stated thereon and supporting affidavit of Margaret Muthoni Mugwe, sworn on 9th January 2023. She deponed that this Court delivered a Judgement on 20th December 2022, in favour of the Applicants/Respondents, entitling them to land measuring 58 meters long and 6 meters wide on land parcel no. Loc 8/Kaganda/43 (the suit property). That the 1st Respondent/Applicant orally sought for a stay of execution which application was denied for lack of counsel for the Applicants/Respondents herein. The 1st Respondent/Applicant averred that being dissatisfied with the said Judgement, she lodged an appeal through a Notice of Appeal dated 5th January 2023. The 1st Respondent/Applicant further averred that on 6th January 2023, the Applicants/Respondents entered into the suit property, committed acts of waste, and destroyed crops. Further that if this application is denied, her appeal stands to be prejudiced and rendered nugatory. Lastly, that the Applicants/Respondents have attempted to execute the Judgement without Court orders, and that he said appeal is arguable with a high chance of success.
3. The Applicants/Respondent filed their Grounds of Opposition dated 18th January 2023, and stated as follows:
1. The application is devoid of merit and is simply calculated to deny the Applicants the fruits of their judgement;
 2. The application is grounded on the false assumption that the Court awarded the Applicants a portion of land on the suit property, when the Court only recognized and declared that the Applicants are entitled to and have acquired an easement over the suit property. In the judgement the Court only recognized the situation that existed on the ground;
 3. The 1st Respondent/Applicant (Margaret Muthoni Mugwe) will not suffer any irreparable damage if stay is not granted since the parties will continue with their life as it was long before and immediately before the judgement; in any case irreparable loss or damage has not been pleased.
 4. The Applicants/Respondents are only enjoying an easement and the question of eviction of the 1st Applicant does not arise;
 5. The Applicants/Respondents did not destroy any property as alleged, but they cleared the road of weed and smoothed the rough surfaces because the road had deteriorated over the period the 1st Respondent/Applicant had unreasonable and unlawfully closed it; and
 6. At no time was there a threat of violence at the time the Applicants re-opened the road otherwise reports would have been made at Kahuro Police Station which is quite near any other government office.



4. The 5th Applicant/Respondent with the authority of his fellow Applicants/Respondents, filed a Replying Affidavit dated 25th January 2023. He averred that on 2nd January 2023, together with a group of people, he went to clear the road that passes over the suit property, which had been closed by the 1st Respondent/Applicant. He further averred that the said road was graded by the County Council of Muranga in 1982, and that the Applicants/Respondents did not go beyond the limits of the road, as they cleared the access road only. Lastly, the 5th Applicant/Respondent averred that there were no crops or trees growing on the land parcel as none could grow within a period of two years on the grounds which had previously been levelled by a tractor.
5. He further averred that in the Judgement of the Court, it was held that an easement existed over the suit property for the benefit of their respective land parcels, but not that they were entitled to a portion of the suit property as the 1st Respondent/Applicant seems to believe. He stated that the Court Orders, do not require execution and therefore there is nothing to stay.
6. He also averred that his understanding of the judgement is that the Easement existed before the judgement was delivered, and therefore the *status quo* was that they should continue using the easement pending the appeal. He prays that the instant application for stay be denied, and that the balance of convenience in this case is for the road to remain open during the pendency of the appeal.
7. The 1st Respondent/Applicant filed a Supplementary Affidavit dated 30th January 2023, in which she avers that the Applicants/Respondents Replying Affidavit is full of falsehoods. She avers that unless stay of execution is granted, she will suffer irreparable loss and that she has established proper grounds for granting of the said orders. She further avers that her late husband graded the path, and not the Government as claimed by the Applicants/Respondents. Lastly, that the status quo was that there never existed a public path across the suit property since the Respondents parcels are not land locked and therefore there should be a stay of execution pending the intended appeal to halt blatant destruction of her property.
8. This application was canvassed by way of written submissions. The 1st Respondent/Applicant through L. M. Kinuthia & Associates, filed her written submissions in support of the application on 30th January 2023. The 1st Respondent/Applicant identified four key issues for determination.
9. On the first issue as to whether the 1st Respondent/Applicant had filed a Notice of Appeal and served the Applicants/Respondents, she submitted that she had already filed a Notice of Appeal on 5th January 2023 in the Environment and Land Court at Murang'a.
10. On the second issue of whether the 1st Respondent/Applicant would suffer irreparable loss and damage if the stay orders were not granted, she submitted that she had provided proof of acts of waste requiring the area Chief to visit to quell the chaos.
11. Regarding the third issue as to whether the court judgement dated 20th December 2022, required execution, the 1st Respondent/Applicant submitted that Court orders are mandatory. Further, that no order for destruction of property was issued.
12. On the fourth issue as to whether to grant the orders sought, the 1st Respondent/Applicant submitted that no court orders have been issued and that stay of execution should be granted expeditiously to give the intended appeal a chance.
13. The 1st Respondent/Applicant anchored her submissions on the case of [RWW Vs. EKW \(2019\)](#) eKLR, where the Court held as follows:



14. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that rights of the Appellant are safeguarded.”
15. The Applicants/Respondent filed their written submissions dated 31st January 2023, opposing the instant application.
16. On the issue of the grounds required for granting of stay of execution, the Applicants/Respondents relied on the case of *Carlius Mwai Auomo and Another Vs. Godfrey Oinyi Nyagindi (2008)* eKLR, wherein the Court held as follows:
17. It is trite law that an applicant for stay of execution pending appeal under Order XLI Rule 4(1) and (2) has to establish:
 - i. Sufficient cause for the grant of the order;
 - ii. Substantial loss that he is likely to suffer unless the order sought is granted;
 - iii. That the application has been made without undue delay; and
 - iv. Such security as the court may order for the due performance of the decree order given.”
18. The Applicants/Respondents further relied on the case of Makueni High Court Misc Civil App No E030 of 2021 – *James Musyoka Kasimu Vs. Cornelius Musyoka Kasimu (2022)* eKLR, wherein the Court held as follows:

I now turn to the request of stay of execution. The considerations to be taken by a court in determining whether an application for stay of execution of decree are codified under Order 42 Rule 6 of the Rules. The said provisions of the Rules have been the subject of consideration in many decided court cases. In my view, it will suffice if I cite the case of John Mwangi Nderitu v. Joseph Ndiritu Wamathai (2016) eKLR relied upon by counsel for the Respondent herein, in which the Court stated as follows: It is clear from the wording of Order 42 Rule 6(1) of the Rules for an Applicant to succeed in an application of this nature, he must satisfy the following conditions, namely: a) substantial loss may result to the Applicant unless the order is made, b) the application has been made without unreasonable delay, c) such security as to costs has been given by the Applicant.”
19. It was the Applicants/Respondents further submissions that the provisions as set out above were not proven.
20. On the issue of substantial loss, the Applicants/Respondents submitted that they had used the graded road since 1982, and footpath since 1994, and that the 1st Respondent/Applicant stands to lose nothing if the status quo is continued.
21. On the issue of sufficient cause, they submitted that the 1st Respondent/Applicant merely talked of chaos, and a hostile environment and failed to provide any proof of the allegations.
22. Lastly on the issue of security, the Applicants/Respondents submitted that in this particular case, it would be difficult to offer Security since the Decree does not really order performance of any act and that no amount of security would secure the Decree holders.
23. Having considered the instant Application and the Reply thereto, the respective written submissions, and the cited authorities, this Court finds that the key issue for determination is whether the application meets the threshold for grant a stay of execution?



24. The 1st Respondent/Applicant moved the Court through the instant application seeking for stay of execution pending appeal on the grounds that she intends to appeal against the Judgement dated 20th December 2022, as evinced through his annexed Notice of Appeal dated 5th January 2023.
25. The application is opposed by Applicants/Respondents vide their grounds of opposition dated 18th January 2023, stating that the application lacks merit; that the application is grounded on the false assumption that the Court awarded the Applicants a portion of land on the suit property. They averred that the Court only recognized and declared that the Applicants/Respondents are entitled to and have acquired an easement over the suit property.
26. It is trite that no appeal can operate as stay, and hence an application for stay shall be made to court by desiring parties. The provisions for stay of execution pending appeal are provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) which states:
- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”
27. In *Halai & Another v Thornton & Turpin (1963) Ltd [1990]* eKLR, the Court of Appeal held as follows concerning an application for stays of execution pending appeal under the old Order XLI Rule 4 (the equivalent of Order 42 Rule 6 of the present [Civil Procedure Rules](#)):
28. The application before the superior court was made under Order XLI rule 4. In sub-rule (1) the order provides that the court appealed from may for sufficient cause (emphasis is ours) order stay of execution of a decree or order made or passed by it. Before the superior court can exercise its discretion in favour of an applicant for a stay of execution, the applicant must first establish a sufficient cause. Subrule (2) of the same rule reads:
- (2) No order for stay of execution shall be made under sub-rule 1 unless:
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

And

 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”



29. The Supreme Court in *Application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014]* eKLR when determining an issue of stay held:

Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

- (iii) That it is in the public interest that the order of stay be granted.

30. Considering the above holding of the Supreme Court, the 1st Respondent/Applicant must therefore demonstrate that the application herein has been made without unreasonable delay; that she will suffer substantial loss; that the appeal is not frivolous and finally that the appeal will be rendered nugatory, if orders are not granted.

31. The impugned Judgement was delivered on 20th December 2022, while the present application was filed on 9th January 2023. Notably, the 1st Respondent/Applicant filed a Notice of Appeal on 5th January 2023, while the Respondents/Applicants cleared the access road on 6th January 2023.

32. Once a court issues orders, there is always an existing uncertainty as to what time execution can issue as a result therefore an aggrieved party is required to take immediate action to avoid execution by staying the orders of Court. The 1st Respondent/Applicant herein filed the instant application within a period of less than a month. This court finds that there has been no delay in the filing of the application for stay of execution.

33. The next issue for consideration is whether the 1st Respondent/Applicant stands to suffer irreparable substantial loss. There is no definite definition of what amounts to substantial loss, but various Courts have come up with what constitutes a substantial loss. The High Court of Uganda in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* (2004) 2 E.A. 335 held;

Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

34. In Miscellaneous Application 42 of 2011 *James Wangalwa & Another V Agnes Naliaka Cheseto [2012]*eKLR, the Court held as follows in relation to substantial loss:

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.”

35. In the Judgement delivered on 20th December 2022, the Court found that an access road measuring 58 metres long and 6 meters wide, across indeed passed through the suit property as evidenced through the production of Maps presented to the Court. That the said access road was in use for a period of 39 years before it was closed off by the 1st Respondent/Applicant herein. The Respondent/Applicant



cannot now state that she stands to suffer loss and damage of her property through eviction. The Court having found that the access road existed on various maps, and had been used by the public for over 20 years, the 1st Respondent/Applicant simply wants to deny the Applicants/Respondents the fruits of their Judgment. In any event, if the appeal will be found merited, the access road will simply be closed.

36. This Court concurs with the Applicants/Respondents herein and finds that there is no evidence that the 1st Respondent/Applicant will stand to suffer substantial loss at all, as the land on which the access road lies is a pre-existing access road to which access is granted for public use as had been the case for more than 20 years.
37. Lastly, the 1st Respondent/Applicant has not submitted any grounds of appeal for this court to peruse and aid it in determining whether the appeal is not frivolous, and is arguable as stated in the *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*, or whether the appeal is merely an attempt to frustrate the Applicants/Respondents following the delivery of judgement in their favour, so that they do not enjoy the fruits of their Judgment.
38. Having carefully considered the instant application and the rival written submissions and the relevant provisions of law, the Court finds and holds that the said application is not Merited.
39. Consequently, the Court proceeds to wholly dismiss the instant application dated 9th January 2023, with costs to the Applicants/Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF MARCH, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of;

Lily Mwende - Court Assistant

1st – 6th Applicants/Respondents- Absent

Mr Kinuthia for the 1st Respondent/Applicant

2nd Respondent - Absent

L. GACHERU

JUDGE

23/3/2023

