



**Mulei v Njagi (Environment & Land Case 372 of 1994)  
[2023] KEELC 16574 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16574 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 372 OF 1994  
A NYUKURI, J  
MARCH 15, 2023**

**BETWEEN**

**GRACE JOHN MULEI ..... PLAINTIFF**

**AND**

**GABRIEL MBUGUA NJAGI ..... DEFENDANT**

**RULING**

1. Before court is a Notice of Motion dated June 15, 2022 filed by the Defendant seeking the following orders;
  - a. Spent.
  - b. That leave be granted to the firm of Fred K Musyimi & Associates Advocates to come on record in place of Wilfred K Babu & Co Advocates for the Defendant/Applicant after the delivery of judgment dated May 4, 2022.
  - c. Spent.
  - d. That this Honourable Court be pleased to grant a stay of execution of the judgment and decree delivered on May 4, 2022 and all consequential orders thereto pending the hearing and determination of the appeal.
  - e. That the costs of this application do abide the outcome of the intended appeal.
2. The application was premised on the grounds on its face as well as the affidavit of Grace John Mulei, the Defendant herein. The Applicant's case is that she is aggrieved with the judgment of this court made against her on May 4, 2022 and intends to file appeal in the Court of Appeal as she has already filed a Notice of Appeal. That the Plaintiffs have extracted the decree and are keen to execute and recover costs.



3. The Applicant further deponed that if the judgment is executed, she stands to suffer substantial loss in satisfying the costs and that unless the stay is granted, her intended appeal will be rendered nugatory. She further stated that no prejudice will be suffered by the Plaintiff and that she was ready to furnish security as the court may direct. She maintained that she has valid grounds with chances of success to challenge the judgement.
4. The application is opposed. Benard Nganga Njoroge, the 1<sup>st</sup> Plaintiff/Respondent filed a replying affidavit sworn on July 7, 2022. It was his case that the Applicant did not disclose the implications that would occur if the decree is executed and that no material has been placed before this court by the Applicant to warrant grant of the orders sought. He also stated that he was not served with the Notice of Appeal within the statutory 7 days period.
5. The application was disposed by way of written submissions. On record are the Defendant's submissions dated October 19, 2022 and the Plaintiffs' submissions dated November 9, 2022, all of which the court has considered.

### **Analysis and determination**

6. I have carefully considered the application, the response and the submissions. The issues that arise for determination are:
  - a. Whether the firm of Fred K Musyimi & Associates Advocates should be granted leave to come on record in the place of Wilfred K Babu & Co Advocates for the Defendant.
  - b. Whether the Defendant/Applicant is deserving of the orders of stay of execution pending appeal.
7. Order 9 Rule 9 of the [Civil Procedure Rules, 2010](#) requires that where a party had formerly been represented by an Advocate in a matter where judgement was entered, for such party to change their advocate, they need leave of court. In this matter, the firm of Wilfred K Babu & Company Advocates were representing the Defendant up to after the entry of judgment herein. Having considered the response, this prayer was not opposed. A party has a Constitutional right to be represented by counsel of their choice and can change their advocates whenever they consider it necessary. In the premises, the prayer for leave to the firm of Fred K Musyimi & Associates Advocates to replace the firm of Wilfred K Babu & Company Advocates is merited and therefore allowed.
8. I therefore turn to the question of stay of execution pending appeal. Order 42 Rule 6 of the [Civil Procedure Rules](#) provided for stay of execution pending appeal as follows;
  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, or 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.
9. Essentially, a court whose decree has been appealed against has power to grant stay of execution where the Applicant demonstrates sufficient cause; that substantial loss may result unless stay is granted; that the application is made without unreasonable delay and security for the due performance of the decree is given by the Applicant.
10. As to what constitutes substantial loss, the court observed in the case of *James Wangalwa & Another v Agnes Naliaka Cheset* [2012] eKLR as follows;
- No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. 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 .... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
11. In the instant case, the Applicant's prayer for stay is premised on the allegation that the Plaintiff has extracted the decree and is keen to execute and recover costs and that substantial loss will be suffered by the Applicant in satisfying the costs.
12. I have considered the judgment delivered herein on May 4, 2022, which is also attached to the Defendant's application herein. In that judgment, the court ordered that each party shall bear their own costs. Therefore, the Defendant's allegations that the Plaintiffs will execute for the costs are not founded on any factual basis. The Applicant has therefore failed to place any relevant material before this court to demonstrate that unless stay of execution is granted, she stands to suffer irreparable loss.
13. In the premises, I find no merit in the prayer for stay pending appeal and that prayer is declined.
14. The upshot is that the application dated June 15, 2022 partly succeeds to the extent that this court hereby grants leave to the firm of Fred K Musyimi & Associates Advocates to come on record for the Defendant in the place of Wilfred K Babu & Company Advocates.
15. The prayer for stay of execution pending hearing and determination of the appeal is dismissed, and the costs of the application are awarded to the Plaintiffs/Respondents.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 15<sup>TH</sup> DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of:**

Ms Mutua for Respondents/Plaintiffs

Mr. Musau for Defendant/Applicant



Court Assistant – Josephine

