



**Nairenke v Tina & 9 others (Environment & Land Petition  
1 of 2021) [2023] KEELC 17061 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17061 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND PETITION 1 OF 2021**

**EM WASHE, J**

**APRIL 25, 2023**

**BETWEEN**

**DENIS KINYAMAL NAIRENKE ..... APPLICANT**

**AND**

**SAMSON OLE TINA ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .... 2<sup>ND</sup>  
RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**TRANSMARA ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**SIMON LETEIPA NAIRENKE ..... 6<sup>TH</sup> RESPONDENT**

**JOSEPHINE NASIEKU KIMANI ..... 7<sup>TH</sup> RESPONDENT**

**SIMON R.ILE MASI ..... 8<sup>TH</sup> RESPONDENT**

**MOSES TALALA SIALO ..... 9<sup>TH</sup> RESPONDENT**

**DOMINIC KIONGA LOMANAT ..... 10<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The 5<sup>th</sup> Respondent (hereinafter referred to as “the Applicant”) filed a Notice of Motion Application dated 18<sup>th</sup> November 2022 (hereinafter referred to as “the present application”) seeking for the following Orders; -

i. The Application herein be certified urgent and same be heard ex-parte in the first instance.



- ii. Pending the hearing and determination of this application, the Honourable Court be pleased to grant interim orders of stay of execution of the judgement/Decree dated 30<sup>th</sup> day of September 2022, stopping the implementation and/or enforcement of the Court's judgement/Decree issued by the Honourable Court.
  - iii. The Honourable Court be pleased to grant an order of stay of execution and/or enforcement of the judgement/Decree issued on the 30<sup>th</sup> of September 2022, pending the hearing and determination of the intended Appeal to the Court of Appeal commenced vide the Notice of Appeal dated 4<sup>th</sup> October 2022.
  - iv. Costs of this Application be provided for.
  - v. Such other and further orders as this Honourable Court may deem just and expedient be granted.
2. The Grounds contained in the present Application in support of the prayers hereinabove are as follows;
- a. The Trial Court delivered its judgement/Decree dated on the 30<sup>th</sup> of September 2022 inter-alia revoking the properties known as L.R.No.transmara/Ololchani/163,860,861,878 and 879.
  - b. Upon pronouncement of the said judgement on the 30<sup>th</sup> of September 2022, the Trial Court did not release the Court file within the prescribed time to facilitate further action by the parties therein.
  - c. In the meantime, during the period when the Court file was still in the custody of the Trial Court, the Respondent herein forcefully encroached the 5<sup>th</sup> Respondent to the 10<sup>th</sup> Respondent's land and began surveying it and thereby triggering an unnecessary dispute capable of degenerating to violence.
  - d. The Applicant herein has begun the process of filing an appeal against the judgement/Decree of the Court by filing a Notice of Appeal dated 18<sup>th</sup> November 2022.
  - e. The Applicant herein intends to raise serious and weighty issues of law which require to be heard and determined through an Appeal in conformity with the provisions of Article 50 of *the Constitution* of Kenya, 2010.
  - f. It was the Applicant's prayer that this present application be granted so that Applicant's do not suffer substantive loss and injury as the dispute between the parties began way back in 1985 with the Applicant having occupied the disputed properties since 1971.
  - g. The Applicant further stated that they were ready and willing to abide to any orders issued by the Court in terms of security if need be.
3. The 5<sup>th</sup> Respondent/Applicant further swore an Affidavit dated 18<sup>th</sup> November 2022 to expound on the grounds outlined in the present application herein.
4. The present Application was then served on the Petitioner/Respondent who opposed the same through a Replying Affidavit sworn on the 30<sup>th</sup> of January 2023.
5. The Petitioner/Respondent relied upon the following grounds in opposing the present application herein.



- a. The Petitioner/Respondent herein lodged a suit against the 5<sup>th</sup> to 10<sup>th</sup> Respondent seeking various orders in respect of a property known as L.R.No.transmara/Olalui/15.
  - b. The Petitioner/Respondent suit was indeed heard substantively and a judgement pronounced on the 30<sup>th</sup> of September 2022.
  - c. The 5<sup>th</sup> Respondent/Applicant being aggrieved with the decision pronounced on the 30<sup>th</sup> of September 2022 by the Trial Court proceeded to file a Notice of Appeal dated 4<sup>th</sup> October 2022 indicating their intentions to appeal against the said judgement.
  - d. The Petitioner/Respondent states that although the 5<sup>th</sup> Respondent/Applicant has lodged an Appeal, the granting of stay of execution orders by this Court is not automatic thereof.
  - e. The Petitioner/Respondent affirmed that the granting of Stay of Execution must be granted upon compliance of the conditions provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010.
  - f. The Petitioner/Respondent identified the conditions provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010 as substantial loss, furnishing of security and lastly unreasonable delay.
  - g. On the issue of substantive loss, the Petitioner/Respondent pleaded that he had not extracted the Decree from the judgement pronounced on the 30<sup>th</sup> of September 2022 and consequently therefore, there was no threat of the suit property being interfered with as alleged by the 5<sup>th</sup> Respondent/Applicant.
  - h. Further to that, the Petitioner/Respondent also informed the Court that the 5<sup>th</sup> Respondent/Applicant as well as the 6<sup>th</sup> to 10<sup>th</sup> Respondents were not in occupation of the suit properties and therefore there was no loss or injury to be visited on them even if the prayers in the present application were not granted.
  - i. Further to that, the Petitioner/Respondent informed the Court that the 5<sup>th</sup> Respondent/Applicant had not furnished the Court with any form of security as is required by the law.
  - j. The Petitioner/Respondent pointed out to the Court that the present application if granted would stop the implementation of the Orders issued on the 30<sup>th</sup> September 2022 and therefore technically setting-aside and/or vacating the said orders pre-maturely.
  - k. The Petitioner/Respondent was of the view that the present application was an effort to deny him of the fruits of his judgement pronounced on the 30<sup>th</sup> September 2022 without any valid grounds.
  - l. In conclusion therefore, the Petitioner/Respondent sought this Court to dismiss the present application with costs.
6. Upon filing of this Replying Affidavit by the Petitioner/Respondent, the Court directed parties to file their written submissions in support of their positions.
  7. The 5<sup>th</sup> Respondent/Applicant filed their submissions on the 27<sup>th</sup> of February 2023 while the Petitioner/Respondent filed his submissions on the 10<sup>th</sup> of March 2023.
  8. The Court upon perusing the present application, the Replying Affidavit by the 5<sup>th</sup> Respondent/Applicant and the submissions thereof, identifies the main issue for determination to be whether or



not the 5<sup>th</sup> Respondent/Applicant should be granted a stay of execution order pending the hearing and determination of their intended Appeal.

9. The present Application was filed under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and well as Rule 5 (2) (b) of the *Appellate Jurisdiction Act* and Article 159 of *the Constitution* of Kenya, 2010.

10. The Provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 state as follows; -

11. Order 42 rule 6 (1) (2) of the Civil Procedure Rules which provides:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

12. As pointed out by the authority of *Clement Wakari Njoroge v Daniel Mwangi Wahome*(Suing As The Legal Representative of The Estate Of Julia Waimaitha Mwangi) [2022] eKLR, presented by the 5<sup>th</sup> Respondent/Applicant herein, the Court held as follows; -

“Order 42 Rule 6 of the Civil Procedure Rules sets out the grounds which an Order for stay of execution pending the determination of an appeal can be granted.

An applicant has to demonstrate the following; -

a. Substantial loss may result to the applicant unless the order was made.

b. The Application was made without delay.

c. Such security as the Court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

13. On the guidance of the above authority, the Court will now proceed to evaluate the present application on the basis of the above principles thereof.

#### **A. Substantial Loss.**

14. The first issue for determination is whether or not the Applicant stands to suffer substantial loss if the order of stay of execution sought is not granted.



15. In the case of James Wangalwa & Another v Agnes Naliaka Cheseto (Bungoma High Court Miscellaneous Application No. 42 OF 2011), the Court described substantive loss as follows; -

“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. This is what substantial loss would entail.”
16. In another case of Samvir Trustee Limited v Guardian Bank Limited Nairobi HCCC No. 795 of 1997, the Court stated as follows; -

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”
17. Turning to the facts before the Court in the present application, it is clear from the judgement pronounced on the 30<sup>th</sup> September 2022 that the Petitioner/ Respondent herein is seeking to nullify the properties known as L.R.No. Transmara/Ololchani/163,860,861,878 & 879.
18. Further to the above, the Petitioner/Respondent also sought a permanent injunction restraining the 5<sup>th</sup> to 10<sup>th</sup> Respondents from entering, taking possession and or in whatsoever manner interfering with the Petitioner’s property known as L.R.No.transmara/Olalui/15.
19. Indeed, the Trial Court on the 30<sup>th</sup> of September 2022 granted all the prayers sought in the Petitioner/ Respondent’s Petition dated 12/11/2020.



20. Further to the prayers sought in the Petition dated 12/11/2000, the Court also made a finding that the 5<sup>th</sup> and 6<sup>th</sup> Respondents did not have any locus standi to participate in the said proceedings thereof.
21. It is the 5<sup>th</sup> Respondent/Applicant that has filed the present application before the Court.
22. Be as it may, the 5<sup>th</sup> Respondent/Applicant is required to place before the Court adequate grounds pointing to substantive loss to enable it exercise its discretion thereof in his favour.
23. A perusal of the grounds pleaded in the substantive application and/or the affidavit in support thereof sworn on the 18<sup>th</sup> of November 2022, this Court is not able to identify any pointed-out scenario and/or evidence that depict the 5<sup>th</sup> Respondent/Applicant will suffer any substantive loss if a stay of execution order is not issued.
24. What the 5<sup>th</sup> Respondent/Applicant emphasises is that he had lodged a Notice of Appeal which in law is an Appeal and therefore the court should issue stay of execution orders thereof.
25. Unfortunately, the filing of an Appeal alone can not be a basis of granting an order of stay of execution.
26. As pointed out in the decision of *Samvir Trustee Limited v Guardian Bank Limited Nairobi HCCC No. 795 of 1997*, the Learned Judge stated as follows; -

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss”

27. In this present application, the Court has not been furnished with any evidence and/or documentary evidence that there would be any substantial loss suffered by the 5<sup>th</sup> Respondent- 10<sup>th</sup> Respondents / Applicants if the stay of execution orders sought herein were not issued.
28. Further to the above, the Petitioner pleaded that the 5<sup>th</sup> Respondents- 10<sup>th</sup> Respondents/Applicants were actually not in occupation of any of the properties nullified by the judgement of 30<sup>th</sup> September 2022.
29. This allegation by the Petitioner/Respondent against the 5<sup>th</sup>- 10<sup>th</sup> Respondent/Applicants was not denied and/or rebutted through a Further Affidavit and in essence therefore, it does unchallenged.
30. If the 5<sup>th</sup>-10<sup>th</sup> Respondents/Applicants are not on the ground and their occupation thereof not interfered with, then this Court would be reluctant to grant any stay of execution of the judgement pronounced on the 30<sup>th</sup> September 2022 because whatever outcome will be pronounced by the Court of Appeal will be implemented through rectification of land records only and not displacement of any person on the ground.
31. In another case of *Machira T/a Machira & Company Advocates v East African Standard [2002] KLR 63*:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite



knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

32. In conclusion therefore, this Court has not found any grounds adduced by the 5<sup>th</sup>-10<sup>th</sup> Respondents/Applicant in the present Application to persuade it to exercise its discretionary powers and issue a stay of execution against the judgement pronounced on the 30<sup>th</sup> September 2022.

#### **B. The Application Should Be Made Without Delay.**

33. On this principle, the law requires that the application for stay of execution must be brought before the Court without delay.
34. In the present application, no party has made any allegation that the application has been filed after an inordinate delay.
35. Consequently therefore, the Court’s finding is that indeed, the present application was filed without any delay as provided in law.

#### **C. Security**

36. The last principle applicable in applications of stay of execution is the provision of security pending the hearing and determination of the Appeal.
37. However, the issue of security is usually addressed once the Court is satisfied that the Applicants therein have established a case warranting the issuance of a stay of execution order.
38. In the present application, the 5<sup>th</sup>-10<sup>th</sup> Respondents/Applicants have not persuaded the Court to exercise its discretion and issue a stay of execution order.

#### **Conclusion.**

39. In conclusion therefore, the Court hereby makes the following Orders as appertains the Application dated 18<sup>th</sup> November 2022; -
- A. The Application Dated 18<sup>th</sup> November 2022 be and is Hereby Dismissed With Costs.
- B. The Orders For Stay of Execution of the Judgement Pronounced on the 30<sup>th</sup> of September 2022 issued on the 23/01/2023 be and are Hereby set-aside and/or Vacated Forthwith.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 25<sup>TH</sup> APRIL, 2023.**

**EMMANUEL.M.WASHE**

**JUDGE**

**IN THE PRESENCE OF:**

**Court Assistant: Ngeno/mempe**

**Advocate For The Petitioner: Mr. O.m. Otieno**

**Advocate For The Respondent: Mr. Wafula**

