



**Kwoba v Musundi (Environment and Land Appeal E004 of 2023)
[2023] KEELC 16822 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E004 OF 2023
EC CHERONO, J
APRIL 17, 2023**

BETWEEN

MARTHA SHITANA KWOPA APPELLANT

AND

ALICE KIMUNGUYI MUSUNDI RESPONDENT

*(Being an application for stay execution of the judgment and or
decree delivered on 18/1/2023 in Webuye SPM-ELC No. 11 of 2018.)*

RULING

1. Vide a Notice of Motion application brought under certificate of Urgency dated 2nd February, 2023 the applicant seeks the following orders;
 - i. (Spent)
 - ii. That pending the hearing and determination of this application interparties this court be pleased to stay execution of the judgment and or decree delivered on 18/1/2023 in Webuye SPM-ELC No. 11 of 2018
 - iii. That pending the hearing and determination of this application this Court be pleased to stay execution of the judgment and or decree delivered on 18/1/2023 in Webuye SPM ELC No. 11 of 2018
 - iv. That pending the hearing and determination of this appeal this Court be pleased to stay execution of the judgment and or decree delivered on 18/1/2023 in Webuye SPM-ELC No. 11 of 2018
 - v. That in the event that the L.R NO. Bokoli/Misikhu/1901 & 1902 have been cancelled as per the decree in Webuye SPM-ELC No. 11 of 2018 the same be restored in the name of the plaintiff pending this appeal.



- vi. That costs be in the cause.
2. The application is premised on 12 grounds shown on the face of the application and the affidavit of the applicant sworn on even date. The application is opposed by the respondent who filed a replying affidavit sworn on 21st February 2023

Applicant's Summary Of Facts

3. The applicant in her supporting affidavit deposed that she was dissatisfied with the judgment by the trial court delivered on 18/1/2023 and preferred this appeal. She further stated that the respondent has extracted the decree and served the Land Registrar with a view to cancel her Title deeds for land parcels No. Bokoli/Misikhu/1901 & 1902.
4. The applicant further stated that this appeal has high chances of success and that the substratum would be rendered an academic exercise unless the stay of execution order is granted. She said that it is her constitutional right to make this appeal and unless the stay of execution order is granted, the appeal herein will be rendered nugatory. She stated that She is ready to surrender the title deed for land parcel NO. Bokoli/Misikhu/1901 in this Honourable Court as security pending hearing and determination of this appeal.
5. She stated that the respondent will not suffer any harm if the orders of stay of execution are granted.

Respondent's Summary Of Facts

6. The respondent in her replying affidavit stated that the intended appeal is a ploy to delay her from enjoying the fruits of her judgment. She stated that She has partly executed the judgment by registering the decree with the Land Registrar for purposes of executing the same. She said that the applicant will not suffer any substantial loss since she has been residing and using the excess portion which she obtained title by misrepresentation and which title was cancelled by the trial Court.
7. She stated that the Memorandum of appeal does not raise any arguable legal issues with any likelihood of success and that the application and the intended appeal have been overtaken by events as execution has commenced.

Analysis and Decision

8. I Have considered the Notice of Motion application dated 2nd February 2023, the supporting affidavit of Martha Shitana Kwoba, the applicant herein and the replying affidavit of Alice Kimunguyi Musundi as well as the rival submissions by the advocates. I have also considered the relevant law. The applicant has invoked Order 42 Rule 6(2) of the CPR which sets out the following principles for stay of execution pending appeal;
 - i. The application is brought without undue delay
 - ii. The Court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered.
 - iii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the applicant.
9. The impugned Judgment and subsequent decree was delivered by the trial Court on 18/1/2023 while this application for stay of execution was filed on 2nd February, 2023. It took the applicant about two (2) weeks to file this application. A delay of two weeks in my view is not inordinate in the circumstances.



10. The second condition which is the cornerstone for stay of execution pending appeal is the applicant to demonstrate that unless the orders for stay are granted, her appeal, if successful, will be rendered nugatory. The applicant must therefore go an extra mile to show any factors which are likely to render the appeal nugatory as a successful party.
11. In her supporting affidavit, the applicant at paragraph 4 thereof has deposed that the respondent has extracted the decree herein and served the land Registrar to cancel her Title Deed L.R No. Bokoli/misikhu/1901 & 1902. The applicant has not demonstrated that the suit property will be beyond this Honourable court's power thereby rendering this appeal nugatory if the suit property is registered in the name of the respondent and she ultimately becomes the successful party.
12. It behoves the applicant to show that if the suit property is registered in the name of the respondent, it will be beyond the power of this Honourable Court to restore the same in her name if she becomes successful on appeal. This is because execution in itself is a lawful process and cannot render an appeal nugatory. The applicant must demonstrate other factors that arise from execution of the judgment and decree which may lead to the appeal being rendered nugatory. In this case, the applicant has not shown any. In the case of *James wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, the court was faced with a similar application and rendered itself as follows;

“ An applicant must establish 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 a successful party.”
13. I fully associate myself with the interpretation of the law by the learned judge in that decision.
14. The third and last condition is the applicant to give security for the due performance of the decree or order as may ultimately be binding on him should the appeal not succeed. At paragraph 8 of her affidavit in support of this application, the applicant stated that she is ready to surrender Title deed subject of this appeal as security L.R No. Bokoli/misikhu/1901. The title deed to Land parcel No. Bokoli/misikhu/1901 & 1902 are resultant subdivisions of land parcel No. Bokoli/misikhu/1817 which the trial court ordered to be cancelled and restored to the personal representative to the estate of Bramwel Wafula Murunga. The title deed referred by the applicant is no longer a personal property of the applicant to be given as a security since the same has been ordered by the trial court to be surrendered for cancellation. The applicant cannot therefore give that which she does not have. Again the threshold for the third condition has not been met.
15. The upshot of my finding is that the application dated February 2, 2023 is devoid of merit and the same is hereby dismissed with costs

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 17TH APRIL, 2023

HON. E.C. CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wamalwa R for the Applicant
2. Mr. Shiku for the Respondent
3. C/A Joy

