



Kimene (Being Sued on Behalf of the Estate of Isaac Kimene Nabea alias Isaac Gituma Nabea) v Murithi alias M'inoti Kiautha (Environment and Land Appeal E021 of 2023) [2023] KEELC 17714 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E021 OF 2023**

CK NZILI, J

MAY 31, 2023

BETWEEN

**PATRICK KIMENE APPELLANT
BEING SUED ON BEHALF OF THE ESTATE OF ISAAC KIMENE NABEA
ALIAS ISAAC GITUMA NABEA**

AND

STEPHEN MURITHI ALIAS M'INOTI KIAUTHA RESPONDENT

RULING

1. This court, by an application dated March 29, 2023, is asked to stay the execution of a judgment dated March 1, 2023, pending a hearing and determination of this appeal. The reasons are contained on the face of the application and the sworn supporting affidavit of Patrick Kimene on March 29, 2023.
2. The applicant contends that the decision made by the trial court directed that he be evicted from the suit land, where he has lived alongside his family. He deposed that if evicted, he would be rendered homeless, his appeal would be rendered nugatory, and his uncle, the respondent, would not be prejudiced if the application was allowed.
3. The applicant averred that the respondent has never been on the land and was willing to provide any security imposed by the court.
4. Through a replying affidavit sworn on April 18, 2023, Stephen Murithi, the respondent, opposes the application. His grounds are that the applicant holds the land in trust for him and his siblings, so the trial court ordered rectifying the register and replacing his name with that of the applicant. The respondent termed the application as a delaying tactic, made in bad faith, lacking merits, and in which the applicant has filed to satisfy the requirements under order 42 rule 6 of the *Civil Procedure Rules*.



5. With leave of court, parties filed written submissions on April 18, 2023 and April 19, 2023 respectively.
6. The applicant relied on [Lenah D. Korir v K.U](#) (2012) eKLR, [RWW v EKW](#) (2019) eKLR, [Stanley Kiplagat Rono & another v William Kiprotich Cherus](#) (2021) eKLR, [Machira t/a Machira & W. Advocates v East Africa Standard](#) (2012) KLR 63, [Nation Media Group Ltd v Faith Muthoni](#) (2021) eKLR, [Ndubiu Gitabi & another v Ann Wambui Warugongo](#) (1988) 2 KAR, on the principles applicable. He urged the court to find that there would be substantial loss and damage if evicted. Additionally, the court was urged to find that the application was filed within the time and that Kshs 50,000/= security has been provided.
7. On the other hand, the respondent submitted that the applicant was not likely to suffer any substantial loss since the land has always belonged to the respondent. Further, it was submitted that no substantial loss had been demonstrated as held in [James Wangalwa & another v Agnes Cheseto Naliaka](#) (2012) eKLR; otherwise, there was a need to suspend the enjoyment of the fruits of his labor since no exceptional circumstances have been demonstrated for the court to grant the stay orders as held in [Machira t/a as Machira](#) (supra). Reliance was placed on [Joseph Odide Walome v David Mbadi Akello](#) (2022) eKLR.
8. To stay or not to stay a decree pending an appeal is a discretionary power exercised by considering the parameters set under order 42 rule 6 of the [Civil Procedure Rules](#) and sections 1A, 1B, and 3 of the [Civil Procedure Act](#) and article 159 of the [Constitution](#).
9. In this application, the appeal was filed on March 20, 2023 against a judgment delivered on March 1, 2023. This application was filed on March 29, 2023. Therefore, the delay was of 28 days. It is unclear if the decree was extracted and the process of execution commenced. This would have been confirmed by the respondents, who stand to lose if the stay was granted. Therefore, I find there was no inordinate delay in applying for stay.
10. The next aspect is whether the applicant has demonstrated substantial loss, as held in [Machira](#) (supra) must be proved with specific details and particulars. The essence is ideally to preserve the subject matter in dispute so that the right of the appellant to exercise his undoubted right of appeal is safeguarded and the appeal, if successful, is not rendered nugatory. See [RWW v EKW](#) (supra). It is that loss that has to be prevented by preserving the status quo. See [Mukuma v Abuoga](#) (1988) KLR 645.
11. In [Charles Wabome Getbi v Angela Wairimu Getbi](#) (2008) eKLR, the court observed that it was not enough for a party to say that they live or reside on the suit land but must go further and show the substantial loss that they stand to suffer should execution issue.
12. In this application, the applicant has averred that he will be rendered homeless alongside his family. On the other hand, the respondent says he was entitled to enjoy the fruits of his judgment since the applicant has held the land in trust for him, which the court has now confirmed. The applicant has offered to deposit the security, which he has already done. To be rendered homeless, in my view, is a substantial loss, which, once stated, would have required the respondent to counter it through denial or by pointing out other options available to his family. The applicant is undoubtedly entitled to a right of appeal and the preservation of the substratum of the appeal.
13. Consequently, I find the application with merits. On top of the security posted before the court, the applicant shall surrender the original title deed before the Deputy Registrar within seven days from the date hereof; otherwise, the stay orders shall lapse. Lower court file be availed and the matter to be mentioned before the Deputy Registrar on July 13, 2023.



**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 31ST DAY OF MAY 2023**

In presence of

C.A John Paul

Igweta for applicant

Kimathi for Kiara for respondent

HON. CK NZILI

ELC JUDGE

