



Masango v Njiru (Sued as the Personal Representative of Florence John - Deceased) (Environment and Land Appeal E010 of 2023) [2023] KEELC 17660 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17660 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

**A NYUKURI, J
MAY 30, 2023**

BETWEEN

JEREMIAH MUTIE MASANGO APPELLANT

AND

**BERNET MUTHONI NJIRU (SUED AS THE PERSONAL REPRESENTATIVE
OF FLORENCE JOHN - DECEASED) RESPONDENT**

*(Being an appeal from the Judgment and orders of the Principal Magistrate
C. N. Ondieki, delivered on the 15th day of March 2023 in the Chief
Magistrate at Machakos Environment and Land Case No. E063 of 2021)*

RULING

Introduction

1. Before court is a Notice of Motion dated March 17, 2023 filed by the Appellant seeking the following orders;
 - (a) Spent.
 - (b) Spent.
 - (c) Spent.
 - (d) That there be a stay of execution of the judgment and orders of the lower court dated March 15, 2023 pending interparty hearing and determination of the appeal.
 - (e) That there be an order of injunction against the Respondent by himself, his agents and/or servants restraining them from interfering/burying the body of the Respondent's sister who was the original Defendant Florence Kaari John in Plot No 1021 situated in



Katelembo Athiami Muputi Farming and Ranching Society Limited pending the hearing and determination of the appeal.

- (f) That costs of this application be provided for.
2. The application is anchored on the grounds on its face together with the affidavit sworn on March 17, 2023 by Jeremiah Mutie Masango the Appellant herein. The Applicant's case is that he filed Civil Suit No E063 of 2021 before Machakos CMC Court seeking to be declared the registered owner of Plot No 1021 situated at Katelembo Athiani Muputi Farming and Ranching Society (suit property), orders of injunction against the Respondent from interfering with the suit property and orders for demolition of the Respondent's structures on the suit property.
 3. The Applicant complained that on March 15, 2023, the lower court delivered its judgment and granted orders not sought for by the Plaintiffs and awarded half of the suit property to the Respondent when there was no counterclaim. The Applicant stated that he was apprehensive that the Respondent may execute the judgment by subdividing the suit property and registering it in his name which may render the appeal nugatory.
 4. The Applicant further averred that Florence Kaari John who was the original Defendant in the suit before the lower court passed on during the pendency of the suit and was substituted with the Respondent herein and that the lower court did not order where her body would be interred. The Appellant further averred that he was apprehensive the deceased would be buried on the suit property.
 5. The application was opposed. The Respondent filed a replying affidavit sworn on October 19, 2021. The Respondent's case was that the Appellant/Applicant's appeal is not merited as the suit property belongs to Katelembo Ranching, which has power to move any party to any part of their land. He maintained that his sister bought the suit property in January 2001 and was shown Plot Number 1437 as her plot on which she settled in 2013 by putting up a permanent house.
 6. He further stated that when the deceased lost her son in 2019, she buried him on the suit property. He stated that the deceased had sold part of the suit property. According to the Respondent, the trial court properly made the orders it gave as the court is empowered in law to facilitate expeditious, proportionate and affordable resolution of disputes. He asserted that the Applicant has no claim against the deceased as his claim ought to have been against Katelembo Athiami Muputi Farming and Ranching Society Limited. He stated that the body of the deceased remains in the morgue and further delay in burying it will lead to psychological trauma on the relatives.
 7. The application was disposed by way of written submissions. On record are the Appellant's submissions dated April 18, 2023 and the Respondent's submission dated April 24, 2023, which this court has duly considered.

Analysis and Determination

8. Having considered the application as well as the replying affidavit and submissions; in my view, the issue that arises for determination is whether the Appellant/Applicant has met the threshold for grant of stay of execution and orders of injunction pending appeal.
9. This court's jurisdiction, while sitting as an appellate court, to grant stay of execution of judgment as well as injunction, pending appeal, is provided for in Order 42 Rule 6 (1), (2) and (6) of the [*Civil Procedure Rules*](#) 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 buy, the court



appealed form 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.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
10. Essentially therefore this court sitting as an appellate court, has jurisdiction to grant orders of stay of execution and injunction respectively, pending appeal. The prayer for stay of execution may be granted where it is shown that the Applicant stands to suffer substantial loss if stay of execution is not granted and an Applicant has to show that he has moved the court without undue delay.
11. In the case of *RWW v. EKW* [2019] eKLR, the court discussed the purpose of an order for stay of execution and stated as follows;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.

12. Courts have held that for an Applicant to obtain stay of execution pending appeal, they must demonstrate the threat of substantial loss if stay is not granted. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court held that;

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 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.



13. In the instant suit, the Applicant has attached copies of the plaint and amended defence. Clearly no counterclaim was filed by the Respondent. However, in the judgment, the court ordered that Plot No 1021 and Plot No 1437 be equally divided between the Plaintiff and the Estate of Florence Kaari John. The Appellant says that he is apprehensive that the suit property shall be subdivided and transferred to the Respondent which may not be available at the point of judgment in the appeal. Having considered the implication of the judgment of the lower court, I agree with the Applicant that there is a risk of substantial loss should the judgment of the lower court not be stayed and therefore it is my view that the Applicant has shown that he deserves orders of stay of execution.
14. On whether the Applicant is entitled to an order of temporary injunction, the Applicant ought to prove the conditions for grant of temporary injunction. It is now settled that to obtain orders of temporary injunction, a claimant must demonstrate a prima facie case, that they stand to suffer irreparable loss that may not be compensated in damages and where the court is in doubt, the court ought to consider where the balance of convenience tilts. (See *Giella v Cassman Brown* [1973] EA 358).
15. In the instant matter, the Applicant argues that he has raised an arguable appeal because while the Respondent did not file a counterclaim, the trial court granted her half of the suit property. In addition, the Appellant argued that he did not claim for Plot No. 1437 yet the court gave him half of that property. In his Memorandum of Appeal, the Applicant has raised 22 grounds of appeal, his major complaint being that the trial court failed to address the issues raised and granted orders not sought by the parties in the name of the doctrine of *aequitas est quasi aequalitas* meaning equity is equality and equality is equity. Having considered the pleadings in the lower court as juxtaposed against the judgment, I am convinced that indeed the Appellant's Memorandum of Appeal has raised arguable grounds one of them being whether the court could grant positive orders in favour of the Respondent who had no counterclaim. An arguable case need not succeed ultimately. It is a case that would call for a response from the opposite party on the rights of the claimant. It is therefore my finding that the Applicant has demonstrated a prima facie case with chances of success.
16. On whether the Applicant stands to suffer irreparable injury, the Applicant has argued that if the temporary injunction is not granted, the deceased may be buried on the suit property. I am aware that in many African cultures, the remains of a deceased person and matters of the graves of the dead are grave matters which are held with some degree of sacredness. Indeed, in the Respondent's defence filed in the lower court, the Respondent averred that she could not leave the suit property as her son's grave was there and leaving would mean abandoning their son's grave, which would cause her psychological suffering. While irreparable loss is a matter that must be given an objective assessment by the court, irreparable loss is contextual and may vary from one case to another. In the premises, I am persuaded that allowing the deceased to be buried in the suit property may cause irreparable loss to the Applicant.
17. On whether the balance of convenience tilts in favour of the Applicant, I note that from the judgment and pleadings, it was not contested that the suit property was owned by the Appellant. What is in dispute is the legality of the decision by Katelembo Athiani Muputi Farming and Ranching Cooperative Society to exchange the property with Plot No 1437. In my view therefore that being the position, the balance of convenience tilts in favour of grant of temporary injunction.
18. In the end, I find the Notice of Motion dated March 17, 2023 merited and I grant the following orders;
 - (a) An order be and is hereby granted for stay of execution of the judgment and orders of the lower court dated March 15, 2023 pending the hearing and determination of the Appeal.
 - (b) An order of injunction be and is hereby granted against the Respondent by himself, his agents and/or servants restraining them from interring/burying the body of the Respondent's



sister who was the original Defendant Florence Kaari John in Plot No 1021 situated in Katelembo Athiani Muputi Farming and Ranching Society Limited pending the hearing and determination of the appeal herein.

(c) The costs of the application shall abide the appeal.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 30TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of:

Mr. Kimeu holding brief for Mr. Mutua for Appellant/Applicant

Mr. Omino for the Respondent

Josephine – Court Assistant

