



Mati v Gichuki & 2 others (Environment and Land Case Civil Suit 740 of 2013) [2023] KEELC 17555 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE CIVIL SUIT 740 OF 2013
EC CHERONO, J
MAY 25, 2023**

BETWEEN

PENINA MUTHONI MATI PLAINTIFF

AND

MOSES MURIITHI GICHUKI 1ST DEFENDANT

JOHN P. KARANJA 2ND DEFENDANT

JAMES JOE NYAMU MURIITHI 3RD DEFENDANT

RULING

1. The 1st and 2nd defendant’s application dated August 31, 2022 seeks the following principal prayers;
 - a. The court be pleased to grant an order of stay of execution of the orders issued on July 22, 2022 pending the hearing and determination of the intended appeal to the Court of Appeal.
 - b. Costs of the application abide the outcome of the intended appeal.
2. The the application is predicated on the ground on the face of the motion and the affidavit of John P Karanja Mwangi which inter alia are; this court delivered judgement on July 22, 2022 directing the defendants/applicants to surrender Title Deeds to the Land Registrar, Kirinyaga District as the subdivision was illegal and un-procedural and failed to declare the proceedings in Kerugoya SPMCC No 168 of 1992 irregular. That should the judgement be excuted, they stand to suffer substantial loss since they have undertaken massive developments on the suit parcels of land.
3. The plaintiff/respondent opposed the application through her replying affidavit sworn on September 12, 2022 deponing that the applicants delayed in filing the application, that the developements thereon were done during the pendency of the suit and knew the consequences of which would follow after judgement. That she should be allowed to enjoy the fruits of her judgement and that the applicans have



not annexed a Memorandum of Appeal showing the merits of the appeal. She thus sought a dismissal of the application.

4. The parties agreed to dispose of the said application by way of written submissions. Both parties complied and their respective arguments have been put into consideration.

Analysis and determination

5. This being an application for stay of execution, the applicable law is Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides;
 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, 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;
 - i. 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
 - ii. 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. The duty of this Honourable court is then to establish whether the applicant has established the conditions for the grant of the order. It is not in contention that Judgment was delivered by this Honourable court on July 22, 2022 declaring the defendants' title deeds to have been obtained un-procedurally and liable for cancellation. The defendants/applicants have expressed their wish to appeal against the said finding.
7. The respondent on her part opposes the application stating that she is entitled to appeal against the findings of the court. It is trite that whereas it is the applicants' undoubted right to appeal against the findings of the court, it is also the respondent's right to enjoy the fruits of her judgement. This Honourable court must therefore balance the two competing interests on whether the application for stay pending appeal should succeed or not.
8. Under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which is the applicable Law, the applicant is required to establish three conditions for stay pending appeal as follows;
 - a. The applicant to bring such application without unreasonable delay
 - b. He must show that he will suffer substantial loss unless the order is granted; and
 - c. Give security as the court may require for the due performance of the judgment/decree as may ultimately be binding on him.
9. On the first condition, I note that the applicants filed their notice of appeal on the July 26, 2022, 4 days after the delivery of the judgement and therefore I find that the notice was filed without unreasonable delay.



10. As regards the second condition, the applicant at paragraph 6 of the supporting affidavit has deposed that he stands to suffer substantial loss in that after obtaining the title to the suit land parcel No Kabare/Mikarara/725 in 2006, he constructed a slaughter House which serves the whole of Kutus Town and its environs and closing the slaughter House would greatly inconvenience members of the public. At paragraph 7 of the supporting affidavit, the applicant states that on land parcel No Kabare/Mikarara/726 stands a magnificent Hospital christened Tamani Hospital which offers both inpatient and outpatient services. What constitutes substantial loss has been the subject of numerous decisions in the superior Courts. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* Bungoma High Court Misc Application No 42 of 2011 (2012) KLR Gikonyo J held 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.

11. The applicant appears to be apprehensive of the respondent demolishing the structures erected in the suit property as well as his businesses. There is no evidence given that the respondent has commenced execution of the Judgment and the decree of the court. This Honourable court has pronounced itself that the process under which the applicants/defendants acquired the suit properties is shrouded in illegalities and procedural irregularities which is a criminal offence. There are no factors shown that are likely to negate the very essential core of the applicant as the successful party in the appeal. In my view, the applicant has not shown that he would suffer substantial loss unless the orders of stay pending appeal are granted.
12. The third and final condition is the giving of security by the applicant as may be binding on the applicant for the due performance of the decree as the court may demand. The applicant at paragraph 11 of the supporting affidavit has deposed that they are willing to abide with conditions as this Honourable court may require for the grant of the orders.
13. It is trite that before an order of stay pending appeal is granted, the court must be satisfied that the applicant has established all the three conditions set out in order 42 Rule 6(2) *CPR* sequentially. In the present application, the applicants have fallen short of the threshold required.
14. For all the matters stated hereinabove, I find the Notice of Motion application dated August 31, 2022 devoid of merit and the same is hereby dismissed with Costs. Orders accordingly.

DATED, READ AND DELIVERED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 25TH DAY OF MAY, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr Ndana for the Respondent

Applicant/Advocate-absent

M/S Joy C/A

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