



**Nyanchongi & 4 others v Nyanchongi & 2 others (Environment and Land Appeal 29 of 2022) [2023] KEELC 17481 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17481 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL 29 OF 2022**

**M SILA, J**

**MAY 18, 2023**

**BETWEEN**

**JOSPHAT NYABUTO NYANCHONGI ..... 1<sup>ST</sup> APPELLANT  
RONALD AYUNDA NYANCHONGI ..... 2<sup>ND</sup> APPELLANT  
PETER OMWERI NYANCHONGI ..... 3<sup>RD</sup> APPELLANT  
ALFRED MAINA NYANCHONGI ..... 4<sup>TH</sup> APPELLANT  
ERNEST NYANCHONGI MAKORI ..... 5<sup>TH</sup> APPELLANT**

**AND**

**JOSEPH AYUNGA NYANCHONGI ..... 1<sup>ST</sup> RESPONDENT  
GEORGE PETER OMWERI ..... 2<sup>ND</sup> RESPONDENT  
NATHAN ONDUSO ONDUMA ..... 3<sup>RD</sup> RESPONDENT**

*(Application for stay pending appeal; application allowed)*

**RULING**

1. The application before me is that dated 30 January 2023 seeking an order of stay of execution of the judgment delivered on 16 November 2022 in the suit Ogembo SPMCC No. 29 of 2019. The application is opposed.
2. From the limited material before me, I discern that the applicants were the defendants in the suit Ogembo SPMCC No. 29 of 2019. It would appear that the applicants and respondents are relatives, most probably from two different houses of the same father, and they had a dispute over the manner in which the property of their father should be shared between the two houses. The case was heard and judgment entered for the respondents (plaintiffs in the said suit). I have seen the decree which is to the effect that the titles issued to the applicants, that is South Mugirango/Boikanga/3453,3454,3455



and 3457 be nullified so that they revert back to the title South Mugirango/Boikanga/1622. There is a further order that this parcel No. 1622 be subdivided equally between the two houses in the ratio of 1 ¼ to ¾ to the defendants and plaintiffs respectively and each house to retreat to their portion. There was no order made as to costs. Aggrieved by this judgment, the applicants have preferred an appeal to this court and now seek to have the judgment stayed pending appeal.

3. In the supporting affidavit, sworn by the 5<sup>th</sup> applicant, it is averred that the District Surveyor had issued notice that he would visit the land so as to effectuate the decree. It is averred that the land is set to be subdivided in accordance with the decree appealed against and if the decree is executed the appeal will be rendered nugatory. The applicants wish to have the status quo maintained pending hearing of the appeal.
4. The application is opposed by the replying affidavit of the 1<sup>st</sup> respondent. He is of opinion that the Land Registrar and Surveyor cannot be restrained as they are not parties to the suit and that the applicants have not demonstrated any prejudice that they are likely to suffer if stay is not granted. It is added that the applicants have not documented any substantial loss that they are likely to suffer.
5. I have considered the above depositions together with the submissions of counsel. First, there is no substance in the argument of the respondent that the Land Registrar and Surveyor cannot be restrained as they are not parties herein. They can be restrained as they are acting as agents of the respondent in executing the decree. There is no point in saying more on that.
6. To the substance of the matter, this is an application for stay pending appeal. The purpose of stay is to see to it that the subject matter is preserved so that if the appellant is successful his appeal will not be rendered nugatory. To guide the court on the principles to be applied, Order 42 Rule 2 (6) provides as follows :-
  - (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.
7. From the above, it will be seen that the applicant needs to demonstrate that he stands to suffer substantial loss if the order is not granted; provide security for the due performance of the decree; and also lodge his application without unreasonable delay.
8. Starting with delay, I observe that the decree is yet to be executed and I will consider that it has been filed timeously. On substantial loss, it follows that if the decree is to be executed, the land parcels will change and there may be need for relocation of the settlements of the parties on the land. If the appeal succeeds, the applicants will certainly have suffered substantial loss. It is indeed wise that the subdivision of the land and relocation of the parties awaits a determination on the appeal. The last point regards security for the due performance of the decree but I do not see any issue here nor any substance that risks disposal so that security is offered. What I will order is that the current status quo on both titles and possession of the disputed parcels of land be maintained as they were before the judgment of the Magistrates' Court until the appeal is heard and determined.
9. The costs of this application to abide the outcome of the appeal.
10. It is so ordered.



**DATED AND DELIVERED AT KISII THIS 18 DAY OF MAY 2023**  
**JUSTICE MUNYAO SILA**  
**JUDGE, ENVIRONMENT AND LAND COURT**  
**AT KISII**

