



REPUBLIC OF KENYA



**Awinja & 2 others v Awinja & 2 others (Environment and Land Appeal
E008 of 2022) [2023] KEELC 17341 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E008 OF 2022**

E ASATI, J

MAY 11, 2023

BETWEEN

WYCLIFFE MUHUNYI AWINJA 1ST APPELLANT

WILBERFORCE MULAMBA AWINJA 2ND APPELLANT

JASS NYAMWANDA 3RD APPELLANT

AND

KENNEDY NEHEMIAH AWINJA 1ST RESPONDENT

VIHIGA COUNTY LAND REGISTRY 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

*(Being an appeal from the Judgement of the Senior Resident Magistrate's court at
Vihiga and delivered on the 21st day of July 2022 by honourable R. M. Ndombi
SRM in Vihiga Senior Principal Magistrate's Court ELC Case No. 50 of 2020)*

RULING

1. This ruling is in respect of the Notice of Motion application dated January 24, 2023 brought pursuant to the provisions of Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 *Civil Procedure Rules* 2010 and Sections 3, 3A and 63(e) of the *Civil Procedure Act* 2010. It seeks for orders that there be stay of proceedings on the Notice to Show Cause listed to be heard on February 6, 2022 pending the hearing and determination of the appeal ELC No 8 of 2022, that there be stay of execution of Judgement and decree dated July 21, 2022 and all consequential orders pending hearing and determination of the Appeal ELC No 8 of 2022 and costs of the application.
2. The grounds upon which the application was brought are that the court delivered a Judgement dated July 21, 2022 and the applicant being dissatisfied with the Judgement filed the appeal herein. That the Respondent has listed the matter for Notice to Show Cause in execution of the decree and unless



the orders sought are granted the appeal will be rendered nugatory. The application was supported by the contents of the Supporting Affidavit sworn by Jassy Nyamwanda on January 24, 2023 and the annexures thereto.

3. The application was opposed *vide* the Replying Affidavit sworn by Kennedy Nehemiah Awinja on February 28, 2023. The Respondent contended that the application is misconceived, bad in law, improperly on record, made in bad faith and that the same ought to be dismissed. That the Applicants are guilty of laches. That it has not been demonstrated that the Applicants have an arguable appeal. That the Applicants have not demonstrated their ability to pay the costs and their willingness to deposit the decretal sum in an interest earning account as a condition for grant of the orders sought.
4. The application was, by consent, canvassed by way of written submissions.
5. Written submissions dated March 9, 2023 were filed on behalf of the Applicant by the firm of Shumila Mudanyi Associates Advocates. Counsel submitted that the appeal raises triable issues because the property in dispute is a family property for which no succession has been undertaken. That there are two parallel titles on the property and that one of them was procured by fraud. Replying on the case of *RWW Vs EKW* (2019) eKLR, Counsel submitted that the purpose of the order of stay is to preserve the subject matter of the suit pending appeal.
6. On whether or not the Applicant will suffer substantial loss, the Applicant submitted that the Respondent changed ownership of the property fraudulently and blocked the Applicant from accessing the land and is exclusively harvesting indigenous trees thereon.

Counsel relied on the case of *National Industrial Credit Bank Ltd Vs Aquines Wasike and another* (2006), and *Michael Ntouthi Mutheu Vs Abraham Kavindo Musau* (2021) eKLR to support the submissions.

7. On security, the Applicant submitted that they shall comply with directions given by the court on the issue of security. That it is not a must that the entire of the decretal sum be deposited but a reasonable amount which can serve as a security. Counsel relied on the case of *Arun C Sharma Vs Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 Others* [2014]eKLR where the court held that the purpose of the security requirement under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant.
8. Written submissions dated March 27, 2023 were filed on behalf of the 1st Respondent by the firm of Mukholi & Associates Advocates. Counsel submitted that filing an appeal is not a stay of execution. That the Advocates on record for the Applicant are not properly on record as they never sought leave to come on record despite them doing so after entry of judgement. That the applicants have not demonstrated their willingness to provide security. That the Applicants did not make application for stay of execution in the court that gave the judgement.

The 1st Respondent relied on the case of *Antoine Ndiaye vs African Virtual University* (2015)eKLR and *Michael Ntouthi Mitheu vs Abraham Kivondo Musai* (2021) eKLR to submit that an order of stay of execution is granted on condition of provision of security. That should the court be inclined to grant a stay of execution, it is imperative that the applicant provide security by paying half of the awarded costs to the Respondent and to deposit the remaining half in a joint interest earning account in court as a condition precedent to granting of the orders sought.

9. I have carefully considered the application, the reply thereto and the submissions made. I have noted the submissions of both parties on the issue of security. I have noted that the record of appeal is already filed. To preserve the subject matter of the appeal and to balance the interest of the decree holder and those of the Appellant, I allow the application and make the following orders: -



- a. An order of stay of execution of the judgement dated July 21, 2022 in Vihiga PMCC ELC NO 50/2020 and all consequential decrees and/or orders is hereby issued pending hearing and determination of the appeal herein.
- b. The Applicant deposits Kshs 100,000/= in a joint interest earning account in the names of Counsel appearing for the applicants and for the 1st Respondent within forty-five (45) days hereof in default whereof the stay order will lapse.
- c. Costs of the application to the 1st Respondent.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 11TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Neville- Court Assistant.

Owuor holding brief for the Applicants

Shumila Advocate for the 1st Respondent

