



**Cherere v Wandarwa & another (Environment & Land Case
18 of 2020) [2025] KEELC 282 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 18 OF 2020
LN GACHERU, J
JANUARY 29, 2025**

BETWEEN

BENSON MWANGI CHERERE APPLICANT

AND

CHARLES FRANCIS KIMINDIRI WANDARWA 1ST RESPONDENT

STEPHEN MURAYA KAMURI 2ND RESPONDENT

RULING

1. This is a post-Judgment Notice of Motion Application dated 18th September, 2024, brought by the Applicant herein premised under the provisions of Order 40 Rules 1 to 4 as read together with Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, wherein the Applicant has sought for the following Orders:
 - a. There be a stay of execution until this application is heard and determined, and thereafter till the intended appeal is heard and determined.
 - b. The status quo existing before the suit was dismissed be restored till the intended appeal is heard and determined.
 - c. Any other order this honourable Court may deem fit to grant.
 - d. Costs of this application be in the cause.”
2. This Notice of Motion herein is supported by the grounds set out on its face, as well as the Supporting Affidavit of Benson Mwangi Cherere (the Applicant herein) sworn on 18th September, 2024.
3. The history of the dispute herein is as follows: The Applicant claimed ownership of land parcel No. LOC.Gakoigo/975 (the suit property), currently registered in the name of the 2nd Respondent herein, on the strength of an agreement for the disposal of the same dated 18th June 2001, between himself and



- the 1st Respondent. He alleged he was in occupation of the said property for more than the statutory period of 12 years, and had become entitled to it pursuant to the doctrine of adverse possession.
4. This Court, vide a Judgment delivered on 18th July 2024, dismissed the Applicant's suit; found and held that the Applicant had failed to establish his claim of Adverse Possession, and breach of contract in respect of the suit land on a balance of probabilities.
 5. The Applicant averred that he has lodged a Notice of Appeal before the Court of Appeal challenging this Court's Judgment dated 18th July, 2024, which Notice suffices as proof that an Appeal has been commenced.
 6. Further, he averred that he is in occupation of the suit land, and the Order for the Applicant to remain in situ pending the determination of his cause was vacated upon the dismissal of the said suit. The Applicant further contended that the Respondents have no intention of occupying the suit property as they have dispatched their agents, dealers and brokers to assess the suit land, with a view to marketing the same before members of the public for purchase.
 7. That the Applicant stands to suffer irreparable loss and his impending Appeal before the Court of Appeal will be rendered nugatory unless the prayers sought in the instant Application are allowed.

The 2nd Respondent's Response

8. The 2nd Respondent opposed the instant Application vide a Replying Affidavit sworn by himself, Stephen Muraya Kamuri, on 18th October, 2024. He described this Application as an attempt to delay the Respondents from enjoying the fruits of a successful Judgment, and he also described it as an abuse of the due process of the Court.
9. Further, he controverted the Applicant's contention that he is in occupation of the suit property, and averred that the Applicant no longer occupies nor utilizes the suit land. That during the trial, it was established that the Applicant was not in occupation of the suit property.
10. It was the 2nd Respondent's further contention that being the registered proprietor of the land in question, he is entitled to all the rights appertaining to such ownership under the law; therefore, the Applicant cannot seek an injunction preventing the 2nd Respondent from enjoying his proprietorship rights.
11. Further, that the Applicant has failed to establish that he has an arguable Appeal or an Appeal with a high chance of success. It was his contention that the Applicant lodged a notice of Appeal before the Court of Appeal on 2nd August 2024, however, he failed to file a Record of Appeal within the timelines set out under Rule 82 (1) of the Court of Appeal Rules, hence the period for filing the Record of Appeal has lapsed.
12. Further, that the Applicant failed to object to the sub-division of the suit land into 11 parcels by the 2nd Respondent, despite being aware of the said subdivision; the Court is rendered functus officio in respect of the suit property, and, the instant Application is a mere delaying tactic, aimed at preventing the Respondents from enjoying the fruits of a successful Judgment.
13. This Application was canvassed by way of written submissions.

The Applicant's Submissions

14. The Applicant filed his written submissions dated 11th December, 2024 through Kimwere Josphat & Co Advocates, and submitted that there is no contest that the Applicant is in occupation of the suit



property, and he stands to be evicted therefrom once the 2nd Respondent executes the said Judgement against him; thereby, rendering his impending Appeal nugatory.

15. It was further submitted that on account of the congestion in the Court of Appeal due to the high number of cases filed before that Court coupled with the shortage of Judges, the Orders sought in the present suit will be overtaken by events if presented before the Court of Appeal, and the foregoing facts are common knowledge.
16. He implored this Court not to overlook or turn a blind eye to the duty to render justice to all parties appearing before it, which entails allowing the instant Application to be heard and determined. Furthermore, that there are brokers who have visited the suit land, and who have expressed the wish to procure title deeds in respect of the said land, which threats if not prevented by the Court will result in irreparable loss being visited upon the Applicant.
17. He urged the Court to exercise its inherent power and order for a stay of execution until the intended Appeal is heard and determined.
18. The 2nd Respondent did not file written submissions. Accordingly, the Court will rely on his Replying Affidavit dated 18th October 2024.
19. The court has considered the instant Application, the Replying Affidavit in opposition to it, the written submissions, and the relevant provisions of the law, and finds the issues for determination are;
 - i. Whether the Applicant is entitled to the Orders sought?
 - ii. Who shall beat the costs of the suit?

i). Whether the Applicant is entitled to the Orders sought?

20. The Applicant's claim of ownership over the suit property was premised on the Agreement for the disposal of the suit property, which was executed with the 1st Respondent dated 18th June 2001, during which time the suit property was registered in the name of the 1st Respondent's father, who was deceased and no succession proceedings had been instituted in respect of the deceased's estate.
21. Upon considering the evidence placed before it by the parties, the Court determined on paragraph 75 of the Judgment dated 18th July 2024, as follows:

“It is not in doubt that the suit land was not in the name of the 1st Respondent, and he was not the administrator of the estate of his deceased father. Whatever action he carried on the estate of his father was a nullity”.
22. Accordingly, this Court ruled against the enforcement of the contract for the purchase of the suit land dated 18th June 2001, on the ground that it offended the provisions of Section 45 of the [Law of Succession Act](#).
23. On the question of computation of time for purposes of Adverse Possession, the Court held that time could not start running for purposes of Adverse Possession because the 1st Respondent lacked capacity to deal with the deceased's property. However, the Court allowed the Applicant's prayer for a refund of the amount of money delivered by the Applicant to the 1st Respondent, being the agreed-upon purchase price in respect of the suit property with interest from the date of the said Judgment until payment in full.



24. The gist of the instant application is a prayer for a stay of execution of the Judgment of this Court that was rendered on 18th July 2024, pending the Applicant’s intended Appeal, that is allegedly filed before the Court of Appeal.
25. The Applicant has contended that he is in occupation of the suit property, and is likely to be rendered destitute in the event the Court does not grant a stay of execution of its Judgment dated 18th July 2024, and consequential Decrees thereto.
26. The principles upon which this Court may grant stay of execution pending appeal are set out under Order 42 Rule 6(2)(a) and (b) of the Civil Procedure Rules, which states as follows:
- “No order for stay of execution shall be made under sub-rule (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.”
27. In the case of *Absalom Dova vs Tarbo Transporters* [2013] eKLR, the Court reasoned as follows:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”
28. Further, in the case of *RWW v EKW* [2019] KEHC 6523 (KLR), the Court declared 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.”
29. The Court in the case of *Nicholas Stephen Okaka & another Vs Alfred Waga Wesonga* [2022] eKLR declared as follows:
- “... an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.”



30. In the case of Jason Ngumba Kagu & 2 Others Vs Intra Africa Assurance Co. Limited [2014] eKLR, the Court held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

31. The instant Application was filed on 18th September 2024, while the Judgement that is sought to be stayed was delivered on 18th July, 2024. The Applicant lodged a Notice of Appeal against the said Judgment before the Deputy Registrar of this Court on 2nd August, 2024. It suffices to note that some sixty (60) days separate the delivery of the decision of this Court that is sought to be stayed and the present Application. No reason whatsoever has been offered by the Applicant as to why the instant Application was not brought earlier, in light of the fact that the Applicant filed a Notice of Appeal before this Court dated 2nd August, 2024.

32. Be that as it may, the Applicant argued and submitted that he is in occupation of the suit property and that he stands to suffer irreparable loss unless this Court stays execution of its own Judgment dated 18th July, 2024. He further submitted that the Respondents are not in occupation of the suit land, and they have been sending their agents and brokers to the suit property to harass him with threats to the effect that fresh title deeds in respect of the suit land are in the process of being procured.

33. On the element of possession, the Court in the case of Alphonse Agutu Dera v Fanuel Dera Achongo [2022] eKLR reasoned as follows:

“Possession is a matter of fact and there must be actual possession which requires some sufficient degree of physical occupation.”

34. On the basis of the totality of the evidence placed before this Court, it finds and holds that the Applicant has not demonstrated by means of photographic evidence or an occupation/valuation report prepared by a licensed valuer that he is actually occupying the suit property; and, therefore, he is likely to be rendered homeless and destitute in the event that the Court does not grant a stay of execution as sought.

35. The Court has perused the pleadings and has carefully considered the evidence and submissions tendered by the parties in respect of the instant Application and has considered the holding in the case of Awale Transporters Ltd v Kelvin Perminus Kimanzi HCCA No 161 of 2019, where the Court declared that:

“In this case it was the applicant’s case that unless the stay is granted, the appeal will be rendered nugatory. It was not explained in what manner the said appeal would be rendered nugatory. The Applicant has not explained what loss, if any, it stands to suffer if the stay is



not granted. That the Respondent intends to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement. Therefore, in proceeding with the execution process the Respondent is simply exercising a right which has been bestowed upon him by the law and such an exercise cannot be stayed unless good reasons are given by the Applicant.”

36. Further, the court has considered the holding in the case of; RWW v EKW [2019] eKLR, wherein the purpose of a stay of execution order pending appeal was considered 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.”

37. The Applicant herein has not satisfied the Court by availing sufficient evidence that he is in possession and occupation of the suit property, and therefore, it follows that any interest held over the suit property is capable of being adequately compensated by an award of costs issued by the Court of Appeal in the event that his Intended Appeal is successful.

38. The decision of this Court which the Applicant seeks to be stayed through the instant Application was a dismissal order, wherein the Court dismissed the said suit on the basis that the Applicant’s claim over the suit property on the basis of adverse possession and breach of Contract could not stand. It is trite that a negative Order issued by the Court is incapable of being the subject of Orders for stay of execution, save in respect of the Order as to the costs thereto.

39. In the case of Ndungu vs Mutua (Civil Appeal E047 of 2024) [2024] KEHC 6276 (KLR) (6 June 2024) (Ruling), the Court understood a ‘negative Order’ in the following terms:

“From the court record, the ruling dated 7th March 2024 dismissed the applicant’s application dated 21st December 2023. Notably, the court cannot grant stay of the impugned ruling as it dismissed the application dated 21st December 2023, which in essence is a negative order and incapable of execution.”

40. Further, in the case of Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR, the Court held as follows:

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.”



41. Similarly, in the case of Raymond M. Omboga -Vs Augustine Pyan Maranga Kisii HCCA No. 15 of 2010, the Court proclaimed as follows:

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”.

42. The Respondents filed their Bill of Costs dated 14th August 2024. It is noteworthy that the Applicant has not offered any security in respect of the Respondents’ costs as a sign of good faith in support of his suit for stay of execution of this Court’s Judgment.

43. Having regard to the foregoing jurisprudence developed by the Superior Courts, this court finds and holds that the instant Application is not merited, and consequently, the said Application is hereby dismissed entirely, with costs.

44. The Respondents being the successful parties in this Application are entitled to costs thereof pursuant to the provisions of Section 27 of the Civil Procedure Act.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29TH DAY OF JANUARY 2025

L. GACHERU

JUDGE

29/1/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

N/A for the Plaintiff/Applicant

M/s Waititu for the Defendants/Respondents

L. GACHERU

JUDGE

29/01/2025

