



Tormoi (Suing as Personal Representative of the Estate of David Kiptormoi) v Saina (Suing as Personal Representative of the Estate of Joel Kipsaina Korir) (Environment & Land Case 90 of 2015) [2025] KEELC 1391 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 90 OF 2015
LA OMOLLO, J
MARCH 20, 2025**

BETWEEN

**SIMON KIBET TORMOI PLAINTIFF
SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID
KIPTORMOI**

AND

**MOSES KIBORE SAINA DEFENDANT
SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOEL
KIPSAINA KORIR**

RULING

Introduction.

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 20th May, 2024. The application is expressed to be brought under Order 7 Rule 9, Order 22, Order 51 Rule 1 & 3 of the Civil Procedure Rules and Section 3A of the [Civil Procedure Act](#).
2. The Defendant/Applicant seeks the following orders;
 1. Spent
 2. The firm of J.K Bosek and Company Advocates be granted leave to come on record for the Defendant/Applicant.
 3. Spent



4. There be an interim order staying the Plaintiff/Respondent either by himself, agent, servants, auctioneers and any other person whomsoever asking on his behalf from (sic) interfering with the Defendant possession and enjoyment of the suit parcels of land pending the filing of appeal.
 5. Costs of this application be provided.
3. The application is based on the grounds on its face and the supporting affidavit of Moses Kibore Saina sworn on 20th May, 2024.

Factual Background.

4. The Plaintiff/Respondent commenced the present proceedings vide the Plaint dated 7th June, 2011 which plaint was amended on 25th September, 2015 and further amended on 11th November, 2019. He sought the following orders;
 - a. (AA). A declaration that the Defendant is holding the title numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”), Kericho/Koita-Burut/289 and Kericho/Manaret/14 in trust for himself and the Plaintiff.
 - b. (BB). An order that the said trust be dissolved and the Defendant’s registration as the proprietor of title numbers Kamara/Mau Summit Block 4/153(Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) Kericho/Koita-Burut/289 and Kericho/Manaret/14 be cancelled and Kamara/Mau Summit Block 4/153(Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) be registered in the name of the Plaintiff and L.R No. Kericho/Koita-Burut/289 be subdivided into equal portions and each portion be registered in the names of the Plaintiff and the Defendant respectively
 - c. (CC). A mandatory injunction be issued compelling the Defendant by himself, his workers, servants, employees and/or agents to vacate his crops from all that portion of land in Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) measuring 5.348 hectares until the hearing and determination of this suit.
 - d. (DD). A perpetual injunction restraining the Defendant himself, his workers, servants, employees and/or agents from entering, working on, transferring, leasing and/or in any way or manner whatsoever interfering with the Plaintiff’s possession and/or use of land parcel numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) and the Plaintiff’s portion in LR No. Kericho/Koita-Burot/289.
 - e. Costs of the suit.
 - f. Any other relief that the Court deems fit to grant.
5. The Defendant filed a Statement of Defence dated 7th October, 2011 which was subsequently amended on 26th October 2016, further amended on 5th February, 2018 and further amended on 17th December, 2019. In his Counterclaim he sought the following orders;
 - a. A declaration that the Defendant (now Plaintiff) is the absolute sole and legal proprietor of the parcel of land known as Kamara/Mau Summit Block 4/153 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14.
 - b. An eviction order against the Plaintiff (now Defendant) from the parcel of land known as Kamara/Mau Summit Block /153 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14.



- c. A permanent order of injunction restraining the Plaintiff (now Defendant), his servants, agents, representatives, assigns and heirs from putting up any structures, both temporary and permanent, transferring, planting, grazing or doing any activities on land parcel numbers Kamara/Mau Summit Block 4/153 (Boror "B"), Kericho/Koita-Burot/289 and Kericho/Manaret/14 to the detriment of the Defendant (now Plaintiff).
 - d. Mesne profit.
 - e. Costs of the suit.
6. The Court in its judgement delivered on 9th May, 2024 made the following orders;
- a. The deceased Defendant's registration to land parcel LR No. Kericho/Koita-Burot/289 shall be cancelled within 30 days wherein the suit property shall be shared equally among the deceased Defendant and the deceased Plaintiff.
 - b. Secondly, the deceased Defendant's registration to land parcels Kamara/Mau Summit Block 4/153 (Boror "B") and Kamara/Mau Summit Block 4/157 (Boror "B") which are the resultant subdivisions of No. Kamara/Mau Summit Block 4/115 (Boror "B") shall be cancelled within 30 days and registered in the name of the deceased Plaintiff.
 - c. Therein after, there is herein issued an injunction restraining the original deceased Defendant's estate, his workers, servants, employees and/or agents from entering, working on, transferring, leasing and/or in any way or manner whatsoever interfering with the original deceased Plaintiff's estate's possession and/or use of land parcel numbers Kamara/Mau Summit Block 4/153 (Boror "B"), Kamara/Mau Summit Block 4/157 (Boror "B") as well as his portion in LR No. Kericho/Koita-Burot/289.
 - d. Since this suit is between family members there shall be no order as to costs.
7. The application under consideration first came up for hearing on 3rd June, 2024. The Court directed that it be served upon the Plaintiff/Respondent.
8. The application came up for hearing on 1st July, 2024 and since neither of the parties were present in Court, the hearing of the application was adjourned to 23rd July, 2024.
9. On the said date, the Court gave directions that the application be heard by way of written submissions. It was mentioned to confirm filing of submissions and reserved for ruling on 23rd October, 2024.

The Defendant/Applicant's Contention

10. The Defendant/Applicant contends that he is the representative of the estate of Joel Kipsaina Korir (Deceased) and that he has the authority and consent of the other beneficiaries to prosecute the matter. He adds that he has always been represented by M/S Obondo Koko & Company Advocates.
11. He also contends that on 9th May, 2024 Judgement in this matter was delivered. He adds that he was dissatisfied with the said judgement and he intends to lodge an appeal against it.
12. It is his contention that he instructed the firm of J.K Bosek & Company Advocates to take over the conduct of this matter and the appeal before the Court of Appeal.
13. It is also his contention that he is advised by his new Advocates that the Court has to grant them leave to come on record after notice has been served upon the advocates who represent the respective parties.



14. It is further his contention that the said firm of Advocates is in the process of lodging a Notice of Appeal and has requested certified copies of proceedings.
15. He contends that the Court gave them a timeframe of thirty days but the said time will not be sufficient for them to get the certified copies of proceedings for drafting the Memorandum of Appeal.
16. He also contends that he is currently residing on one of the suit properties with his family where they have been in occupation for several years. He adds that the Plaintiff/Respondent's family has intimated that they are going to evict him and his family from the property.
17. He further contends that his family is utilizing the other farm in Kericho and they are apprehensive that the Plaintiff/Respondent's family will evict them.
18. It is his contention that they will suffer irreparable loss should the eviction be carried out in line with the judgement of the Court which judgement they intend to challenge.
19. It is also his contention that in the present application he is seeking for stay of execution of the judgement pending the lodging of the appeal and its determination before the Court of Appeal.
20. He ends his deposition by stating that it is in the interest of justice that the application be granted.

Plaintiff/Respondent's Response.

21. In response to the Defendant/Applicant's application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 28th June, 2024.
22. He deposes that the averments at paragraphs 5 and 6 of the Defendant/Applicant's affidavit in support of the application are ambiguous as he had already lodged a Notice of Appeal which was filed on 13th May, 2024.
23. He also deposes that he has been advised by his advocates on record that it was not necessary in the Appellate Court for the Defendant/Applicant's advocates to seek leave to come on record. They could have either filed a Notice of Appointment of Advocates or a Notice of Change of advocates.
24. He further deposes that the Defendant/Applicant's intended advocates have failed to demonstrate why they are seeking leave to come on record in place of Obondo Koko & Co. Advocates and yet there is no pending application and neither has the judgement that was delivered been reviewed.
25. It is his deposition that there is no existing appeal in the appellate Court to warrant the Defendant/Applicant to seek stay of the judgement and therefore the application under consideration has no "legs to stand" and it is an abuse of the Court process.
26. It is also his deposition that even if there was an appeal before the Court of Appeal, the application for stay of execution has been overtaken by events since the decree has already been implemented.
27. It is further his deposition that the Defendant/Applicant is not in possession of the suit properties as he resides at Rironi Village on his own land. This is as per the Chief's letter dated 28th June, 2024.
28. He deposes that the averments at paragraphs 6 to 14 of his supporting affidavit are not true.
29. He ends his deposition by stating that the Defendant/Applicant's application is defective and an abuse of the Court process and it should therefore be dismissed with costs.



Issues for determination.

30. The Defendant/Applicant filed his submissions on 5th August, 2024 and his supplementary submissions on 22nd October, 2024 while the Plaintiff/Respondent filed his submissions on 7th October, 2024.
31. The Defendant/Applicant in his submissions reiterates his averments in his affidavit in support of the application and while relying on S.K Tarwadi v Veronica Muehlemann [2019] eKLR submits that his appeal has high chances of success.
32. The Defendant/Applicant also submits that the main crux of his appeal is that the Court failed to address his Counterclaim dated 15th May, 2024 and there is therefore need to issue orders of stay pending appeal.
33. The Defendant/Applicant relies on the judicial decision of Butt vs Rent Restriction Tribunal Civil Application No. 6 of 1979 (1982) KLR and submits that there are other third parties who have an interest in the suit properties whose interest was not taken into consideration.
34. The Defendant/Applicant submits that Kenya Commercial Bank is a chargor of the property and that in his submissions dated 28th November, 2023 he provided a list of the following third parties who have an interest in the suit properties;
 - a. Kamara/Mau Summit Block 4/154 is registered in the name of Kelvin Ngatah Mburu.
 - b. Block 14/155 (Boror “B”) is registered in the name of Kelvin Ngatah Mburu.
 - c. Block 4/156 (Boror “B”) is registered in the name of Kelvin Ngatah Mburu.
 - d. Block 4/158 (Boror “B”) is registered in the name of Stephen Kipkemoi Ngeno.
35. The Defendant/Applicant submits that the Plaintiff/Respondent was aware that there were third parties who had claims over the suit properties but failed to bring them to the attention of the Court.
36. The Defendant/Applicant relies on Order 21 Rule 17 of the Civil Procedure Rules and submits that the decree issued on 15th May, 2024 is irregular as due process was not followed in its issuance.
37. It is the Defendant/Applicant’s submissions that the decree was issued six days after judgement was delivered and yet the law provides that a draft decree is prepared and submitted for approval by the other party. This was not done.
38. The Defendant/Applicant therefore urges the Court to allow his application as prayed.
39. The Plaintiff/Respondent submits that he does not oppose the Defendant’s new advocates to come on record in place of Koko & Company Advocates,
40. The Plaintiff/Respondent also submits that what is in contest is whether the orders sought in the application under consideration are justifiable.
41. The Plaintiff/Respondent further submits that the Defendant/Applicant filed a Notice of Appeal on 18th May, 2024.
42. It is the Plaintiff/Respondent’s submissions that as per the Court of Appeal Rules, once a Notice of Appeal has been lodged, an Appellant has to file an appeal within sixty days. He adds that by the time



he was being served with his (Defendant/Applicant) submissions, no appeal had been filed before the Court of Appeal.

43. It is also the Plaintiff/Respondent's submissions that since sixty days for filing the appeal have lapsed, there is no appeal and therefore the application for stay of execution is not justified.
44. It is further the Plaintiff/Respondent's submissions that he has already executed the decree as the land registry has registered the suit properties as per the decree of the Court.
45. The Plaintiff/Respondent submits that he together with his siblings have been in occupation of land parcel No. Mau Summit Block 4/153 (Boror "B").
46. The Plaintiff/Respondent also submits that the parcels of land enumerated by the Defendant/Applicant in his submissions are not contested and the owners thereof are not parties to the suit.
47. The Plaintiff/Respondent further submits that the original land parcel No. Kamara/Mau Summit Block 4/115 was closed and subdivided and the contested properties were registered as Kamara/Mau Summit Block 4/153 and 157 (Boror "B"). After the subdivision was done, the pleadings were amended to reflect the same. Therefore, the Defendant/Applicant's arguments that third parties stand to suffer is untenable and misleading.
48. It is the Plaintiff/Respondent's submissions that the decree of this Court was procedurally issued and if the Defendant/Applicant intends to challenge it, he should do it before the appellate Court and not this Court.
49. The Plaintiff/Respondent relies on the judicial decision of Kungu *v Kaarumbi (Civil Appeal 335 of 2023)* [2024] KEHC 3062 (7th March 2024) (Ruling) and urges the Court to dismiss the Defendant/Applicant's application.
50. The Defendant/Applicant in his supplementary submissions reiterates that land parcel No. Kericho/Koita-Burot/289 is charged to Kenya Commercial Bank Limited.
51. The Defendant/Applicant submits that the sixty days' statutory period of lodging an appeal can be extended where there are certified copies of proceedings. The Defendant/Applicant submits that to date he is yet to be furnished with certified copies of proceedings.
52. The Defendant/Applicant relies on Rule 84(1) of the Court of Appeal Rules, 2022 and submits that he will rely on the ground that despite requesting certified copies of proceedings within the required time, he is yet to be furnished with the same.
53. He reiterates that he was not involved in the preparation of the decree of the Court and that it is in the interest of justice that stay of execution be granted.

Analysis and Determination.

54. I have considered the application, the response thereto and the rival submissions filed by the parties herein. It is my view that the only issue that arises for determination is whether the Defendant/Applicant's application dated 20th May, 2024 has merit.
55. The law relating to stay pending Appeal is Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows;

“(2) 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.”

56. In the judicial decision of *RWW v EKW* [2019] eKLR the Court held 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.”

57. In *Absalom Dova v Tarbo Transporters* [2013] eKLR it was stated thus:

“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...”

58. The first criterion set under Order 42 Rule 6 (2) of the Civil Procedure Rules is that the Defendant/Applicant should file his application without unreasonable delay. Judgement in this matter was delivered on 9th May, 2024 while the application under consideration was filed on 31st May, 2024. It is my view that the application has been filed without unreasonable delay.

59. The second criterion is that the Defendant/Applicant must demonstrate that he is bound to suffer substantial loss if orders of stay of execution are not granted. In the judicial decision of *Silverstein v Chesoni* (2002)1 KLR 867 it was held that;

“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.”

60. The Defendant/Applicant contends that his family has been in occupation of one of the suit properties and that they are utilizing the farm in Kericho.

61. The Defendant/Applicant also contends that they are apprehensive that the Plaintiff/Respondent will evict them from the said parcel of land.

62. The Defendant/Applicant further contends that they stand to suffer irreparable loss if the eviction is carried out.



63. In response the Plaintiff/Respondent contends that the Defendant/Applicant does not live on the suit properties as he lives in Rironi Village.
64. In the judicial decision of *Karungu v Masira & another* (Environment & Land Case 540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling) the Court held as follows;

“It should also be noted that where there is an order of eviction, it is not enough to say that a party shall be evicted, as that is a decree that was issued after the parties have been heard and a case is determined. A mere mention of imminent eviction is not proof of substantial loss.” (Emphasis mine)
65. As was held in the above cited judicial decision, imminent eviction is not proof of substantial loss. That being the case, the Defendant/Applicant has not demonstrated that he will suffer substantial loss if orders of stay of execution are not granted.
66. This Court notes that both the Defendant/Applicant and the Plaintiff/Respondent submitted extensively on the following issues;
 - a. Whether there are third parties who were affected by the judgement of this Court who are not parties to the suit.
 - b. Whether the decree was procedurally issued.
 - c. Whether there is an appeal pending before the Court of Appeal as sixty days have lapsed since the Defendant/Applicant lodged a Notice of Appeal and no record of appeal has been filed.
67. It is important to note that the application under consideration is seeking for orders of stay of execution of the judgement of this Court pending appeal.
68. It is my view that the issue of whether or not there are third parties affected by the judgement delivered in this matter is inconsequential in the determination of the present application. Further, no such third parties have filed any application before this Court.
69. It is the Defendant/Applicant’s contention that Order 21 Rule 8 of the Civil Procedure Rules requires any party to a suit to prepare a draft decree and submit it for approval by the other party.
70. The Defendant/Applicant contends that the Plaintiff/Respondent did not submit a draft decree for approval before it was signed. He adds that the decree was issued six days after judgement was delivered.
71. In response the Plaintiff/Respondent contends that the decree was procedurally issued and if the Defendant/Applicant is contesting it then he ought to challenge it on appeal.
72. The issue of whether or not the decree was issued procedurally is irrelevant to the present application which as afore stated is seeking orders of stay pending appeal.
73. The Plaintiff/Respondent submits that the statutory period for filing an appeal before the Court of Appeal lapsed before the Defendant/Applicant could file an appeal and therefore is no pending appeal.
74. In response the Defendant/Applicant contends that he intends to seek for extension of time once he gets certified copies of the proceedings. The Defendant/Applicant relies on Rule 84(1) of the Court of Appeal Rules in support of his submissions.
75. My view is that the question whether or not there is an appeal pending before the Court of Appeal and/or whether or not the Court of Appeal should extend time are for the Court of Appeal to determine.



76. Taking the foregoing into consideration, prayer No. 4 of the application cannot issue.
77. In prayer No. 2 of the application under consideration, the Defendant/Applicant seeks that leave be granted to J.K Bosek & Company Advocates to come on record on his behalf.
78. The Plaintiff/Respondent opposed the grant of the said prayer in his replying affidavit but conceded in his submissions. Consequently, there is no reason to disallow the said prayer.

Disposition.

79. In the result, the Defendant/Applicant's application dated May 20, 2024 is allowed in terms of prayer two (2). That is;
- a. Leave is hereby granted to the firm of J.K Bosek and Company Advocates to come on record for the Defendant/Applicant.
 - b. Each party shall bear own cost of the application.
80. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 20TH DAY OF MARCH, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Koske for the Plaintiff/Respondent

Mr. Bosek for Defendant/Applicant

Court Assistant; Mr. Joseph Makori.

