



Kiambuthi v Gitonga & 4 others; Kiambuthi (Interested Party) (Environment & Land Case 3 of 2020) [2023] KEELC 17850 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 3 OF 2020**

JG KEMEI, J

JUNE 8, 2023

BETWEEN

SAMUEL NG'ANG'A KIAMBUTHI PLAINTIFF

AND

ERIC MUNENE GITONGA 1ST DEFENDANT

CLEMENT GICHOHI KUNGU 2ND DEFENDANT

CHRISTOPHER WARUINGI 3RD DEFENDANT

WILSON MBUKI 4TH DEFENDANT

SAMUEL MACHARIA 5TH DEFENDANT

AND

NAOMI KABARA KIAMBUTHI INTERESTED PARTY

RULING

1. The application dated the February 17, 2023 is filed by the applicants/defendants seeking temporary stay of execution of the orders delivered on the February 13, 2023. In particular, the orders holding the 1st and 4th defendants in contempt and requiring them to purge the contempt in default show cause why they should not be punished for contempt. *interalia*, the orders sought are as follows;
 - i. That due to the urgency of this matter service be dispensed with in the first instance.
 - ii. That there be temporary stay of execution of the orders made herein on February 13, 2023.
 - a. Permitting the plaintiff to amend his plaint and giving timelines within which, the parties shall be required to file and exchange amended pleadings.



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 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.”

11. It is trite that for an applicant to succeed in an application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the application and the furnishing of security.
12. This court is guided by the decision in the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
 - a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 - c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
 - d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
13. In this case the applicants have submitted that they are not in contempt of the court orders since they have not been constructing on the land since the orders were issued and as such they have no way of purging the contempt. The 1st and 4th defendants were found guilty of contempt and the court allowed them time to purge the contempt but being aggrieved by the said orders have filed an appeal. They seek that the purging of the contempt is stayed because they are innocent of any construction on the land and are apprehensive that because they have not purged the contempt, they shall be committed to civil jail. I find that the applicants have established substantial loss which is the loss of their personal freedom.
14. The court finds that the application was filed timeously and in the upshot the application is allowed.
15. I make no orders as to costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 8TH DAY OF JUNE, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Kirwa for Plaintiff

Njuguna for 1st – 5th Defendants

Njugi for Interested Party

Court Assistants – Kevin & Lilian

