



**Kithoka & 26 others v Deputy County Commissioner, Kyuso Sub County & 6 others
(Environment & Land Petition 23 of 2020) [2023] KEELC 19182 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 23 OF 2020
CA OCHIENG, J
JULY 26, 2023
IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS
AND FREEDOMS OF INDIVIDUALS UNDER ARTICLES 2, 10, 27,
28, 40, 43 AND 47 OF THE CONSTITUTION
AND
IN THE MATTER OF RIGHT TO USE AND OCCUPY LR NO.
KYUSO/NGOMENI 'A'/337 – 1096**

BETWEEN

KIMWELE KITHOKA & 26 OTHERS PETITIONER

AND

**DEPUTY COUNTY COMMISSIONER, KYUSO SUB COUNTY 1ST
RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 2ND
RESPONDENT**

CHIEF LANDS REGISTRAR 3RD RESPONDENT

LANDS REGISTRAR, KITUI COUNTY 4TH RESPONDENT

OFFICE OF DIRECTOR OF PUBLIC PROSECUTION 5TH RESPONDENT

THE OFFICER IN CHARGE OF KYUSO POLICE STATION 6TH RESPONDENT

ITAVWA MULI MAANGI 7TH RESPONDENT



RULING

1. What is before Court for determination is the 7th Respondent's Notice of Motion Application dated the June 10, 2022 where he seeks for the following orders:
 1. Spent
 2. Spent
 3. That there be a stay of execution of the Judgment delivered on February 3, 2022 pending the hearing and determination of the Appeal.
 4. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Mercy Kaloki, an Advocate in conduct of the matter on behalf of the 7th Respondent where she deposes that Judgment was entered on February 3, 2022 in favour of the Petitioners against the 7th Respondent. She explains that an order of mandatory injunction was issued directing that all Title Deeds issued in the name of the 7th Respondent comprising parcels of land parcel numbers Kyuso Ngomeni/ 385, 387, 483, 488, 499, 501, 510, 513, 514, 518, 520, 773, 774, 775, 776, 777, 778, 779, 781, 839, 1089, 1090, 1091, 1095 and 1096, to be cancelled. She contends that the 7th Respondent was dissatisfied with the aforementioned Judgment and wishes to lodge an Appeal to the Court of Appeal. Further, that he has already lodged the Notice of Appeal. She states that the 7th Respondent is apprehensive that the Petitioners may proceed with execution and he will end up suffering as he will lose his parcels of land which are worth millions and the same will not be easy to recover from the Petitioners should the intended Appeal succeed. She claims the delay in filing the instant Application was caused by delay in communication between the 7th Respondent and his Advocates when Judgment was delivered and failure by the Court to supply him with certified copies of proceedings including Judgment. She reiterates that the intended Appeal will be rendered nugatory if the stay of execution of the Judgment delivered on February 3, 2022 is not granted and execution proceeds with Title Deeds in the name of the 7th Respondent cancelled by the Land Registrar. She insists that the intended Appeal has high chances of success and it is in the interest of justice that the orders sought are granted.
3. One of the Petitioners Joel Maithya Syengo opposed the instant Application and filed a Replying Affidavit where he confirms that Judgment was delivered on February 3, 2022. He insists that the instant Application lacks merit and should be dismissed with costs. He contends that the Applicant has not given valid reasons as to why he never filed the Appeal. Further, that he has not sought for leave to file the intended Appeal out of time. He argues that there is no Appeal that has been filed and there is nothing to stay pending the non-existing Appeal. He states that the Applicant has not demonstrated what substantial loss he stands to suffer if the order for stay of execution is not granted. He avers that the right of Appeal must be balanced against equal right to enjoy the fruits of Judgment delivered in his favour.
4. The Applicant filed a Further Affidavit sworn by Mercy Muthoni Kaloki advocate where she explains that the delay in lodging the Appeal was occasioned by the Court's registry's delay in providing their offices with copies of proceedings and Judgment for purposes of lodging the said Appeal. Further, a Certificate of Delay was issued on the September 23, 2022. She confirms that the Appeal was filed and lodged at the Court of Appeal on November 17, 2022 being Civil Appeal No E 794 of 2022.

The instant Application was canvassed by way of written submissions.



Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and rivaling submissions, the only issue for determination is whether there should be a stay of execution of the Judgment delivered on February 3, 2022, pending the outcome of the Appeal.

The Applicant in his submissions reiterates his averments as per the Supporting Affidavit and contends that he has satisfied the principles set out in Order 42 Rule 6 of the [Civil Procedure Rules](#). Further, that the instant Application is merited and should be allowed. He contends that he should be allowed to exercise his statutory right of Appeal which is achievable through granting of stay of execution sought herein. Further, he will suffer substantial loss as he will lose his parcels of land. He states that he has been in occupation of the suit land and the Petitioners will not be able to compensate him even in monetary terms. He reaffirms that the Application has been made without unreasonable delay and the issue of security of costs does not arise. To buttress his averments, he relied on the following decisions: [Masisi Mwita Vs Damaris Wanjiku Njeri](#) (2016) eKLR; [RWW Vs EKW](#) (2019) eKLR; [James Wangalwa & Another Vs Agnes Naliaka Cheseto](#) (2012) eKLR and [Arun C Sharma Vs Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 Others](#) (2014) eKLR.

6. The Petitioners in their submissions insist that the Applicant has not demonstrated the substantial loss he stands to suffer if the instant Application is not allowed. They explain that the instant Application has been made mischievously to enable the Applicant execute a Judgment which he obtained in the Kyuso Senior Resident Magistrate's Court ELC No 10 of 2020 on December 19, 2022. Further, that the hearing of the said lower court suit including Judgment came after determination of this Petition; and the said Judgment is meant to be used to evict the Petitioners from land parcel number Kyuso/ Ngomeni 'A'/1090 which was subject in this suit. They argue that the Applicant is not candid as he failed to disclose material facts including existence of Judgment in this matter. They contend that the Applicant has failed to provide security for the due performance of the Decree. They aver that the Applicant has not provided plausible reasons for the delay in filing the instant Application. To support their averments, they have relied on the following decisions: [Shell Ltd Vs Kibiru & Another](#) Civil Appeal No 97 of 1996 and [Charles N Ngugi Vs ASL Credit Limited](#) (2022) eKLR.
7. The legal provisions governing stay of execution pending Appeal are contained in Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides *inter alia*:

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.”

8. Further, Rule 5(2) (b) of the [Court of Appeal Rules](#) provides that:

Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

9. In this instance, Judgment was entered in favour of the Petitioners on the February 3, 2022 wherein an order of mandatory injunction was issued directing that all title deeds issued in the name of the 7th Respondent comprising parcels of land Kyuso Ngomeni/385, 387, 483, 488, 499, 501, 510, 513,



514, 518, 520, 773, 774, 775, 776, 777, 778, 779, 781, 839, 1089, 1090, 1091, 1095 and 1096, to be cancelled.

The 7th Respondent being dissatisfied with the whole of the said Judgment filed a Notice of Appeal on February 15, 2022. He only proceeded to file a Memorandum of Appeal on the November 17, 2022, which was several months after filing the instant Application, despite being given a Certificate of Delay dated the September 23, 2022. It has also emerged that the Applicant had filed Kyuso Senior Resident Magistrate's Court ELC No 10 of 2020 and obtained Judgment on December 19, 2022, after the decision herein had been rendered and now intends to use it, to evict the Petitioners from land parcel number Kyuso/Ngomoni 'A'/ 1090. From the averments in the Supporting Affidavit, I do not find any plausible reasons provided by the Applicant why he never filed the Memorandum of Appeal on time but I note he only proceeded to do so after filing the instant Application. Further, he has not indicated if he obtained leave to file the intended Appeal out of time, hence I am of the view that at the point of filing the instant Application, the Appellant was seeking for a stay pending nothing. It is my considered view that the Applicant's action of filing a lower court case, obtaining another Judgment on December 19, 2022 and failing to inform this court of the same, reeks of dishonesty and amounts to an abuse of court process. It seems to me that the Applicant seeks to stay execution of the Judgment herein and use the Lower Court Judgment to evict the Petitioners.

10. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an Application for stay of execution pending Appeal held that the Court has discretionary power to grant it. Further, a stay must be granted so that an appeal may not be rendered nugatory and 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.

While in *James Wangalwa & Another Vs Agnes Naliaka Cheseto* (2012) eKLR the Court held that:

The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect on negate the essential are of the Applicant as the successful party in the Appeal. This is what substantial loss would entail..."

11. While in *Machira t/a Machira & Co Advocates vs East African Standard (No 2)* [2002] KLR 63 it was held that:

To be obsessed with the protection of an Appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his Judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

12. From the facts before me while associating myself with the decisions quoted, I find that the Appellant filed the instant Application as an afterthought. Further, he has failed to demonstrate why he took so long to apply for a stay pending Appeal and only did so, four (4) months later, after which he lodged a Memorandum of Appeal after the set statutory timelines. He has not informed court whether the said Memorandum of Appeal was admitted or not. Insofar as he is the registered proprietor of the suit



lands, noting that some of the Petitioners are public bodies, I am of the view that they will be able to compensate him in the event the Appeal is successful.

In the circumstance, I find the instant Application unmerited and will dismiss it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF JULY,
2023**

CHRISTINE OCHIENG

JUDGE

