



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwakuandika v Muriithi & 4 others (Environment & Land Case  
255 of 2021) [2023] KEELC 22647 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 22647 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 255 OF 2021**

**AE DENA, J**

**JULY 26, 2023**

**BETWEEN**

**ATHUMAN JUMA MWAKUANDIKA ..... PLAINTIFF**

**AND**

**MARTHA WANGUI MURIITHI ..... 1<sup>ST</sup> DEFENDANT**

**ELIJAH WAICHANGURU MURIITHI ..... 2<sup>ND</sup> DEFENDANT**

**JIMMY MUINDE ..... 3<sup>RD</sup> DEFENDANT**

**MARK MUINDE ..... 4<sup>TH</sup> DEFENDANT**

**VYONNE MUINDE ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The subject of this ruling is the application dated 27<sup>th</sup> April 2020 filed pursuant to the provisions of Order 51 Rule 1, Order 42 rules 6[1] and [2],[4] of the *Civil Procedure Rules* and all other enabling provisions of the law. The application seeks for order stay of execution pending appeal against the judgement of the court delivered on 19/12/2019 and costs.
2. The application is supported by the affidavit of Jimmy Ndaka Muinde the with authority of Robert Muinde, Mark Muinde and Yvonne Muinde. It is deponed that they are aggrieved with the decision of the court delivered on 19/12/2019 and have preferred an appeal. The applicant states that he stands to suffer irreparable loss and damage if the orders sought in the application are not granted as the respondent is in the process of extracting the decree in the High Court and will at any time effect the decree by eviction of the applicants.
3. The applicant further states that he has an arguable appeal with high chances of success and that he is ready and willing to comply with any conditions laid down by the court and which include releasing security for due performance of the decree.



4. In opposing the application is the replying affidavit sworn by the 1<sup>st</sup> Defendant Martha Wangui Muriithi on 6/3/20. The deponent admits that they were in the process of extracting the decree and states that the applicant has not fulfilled the mandatory requirements of Order 42 Rule 6 of the Civil Procedure Rules. That no material has been placed before the court to demonstrate the appeal is arguable and would be rendered nugatory if stay was not granted.
5. It is argued that the effects of the judgement was that the applicant be restrained from transferring, leasing and disposing off the suit property, yet no undertaking has been given in this regard nor had any form of security been offered.
6. The respondent states that it has not been demonstrated how the applicant stands to suffer irreparable loss and damages as the applicants have never taken possession of the suit premises from the time of the purported purchase and neither have they made any developments. Moreover, it had not been demonstrated what steps had been taken by the applicant to ensure that the appeal shall be heard expeditiously. The court is urged to dismiss the application with costs.
7. The parties agreed to canvass the application by way of written submissions. The respondents filed their submissions on 12/4/2023. The applicant did not file any submissions. On 27/4/23 the court was informed of the existence of submissions filed by the applicant on 13/10/2020. However, at the time of writing this ruling the same were not on record.
8. Referring to the case of Butt & Rent Restriction Tribunal [1982] KLR 417 it is submitted that stay of execution is a discretionary power bestowed upon the court. It is submitted that the applicant must satisfy the following requirements before the court exercises its discretion;
  - a. That substantial loss may result to him unless the stay is granted
  - b. That the application has been made without delay
  - c. That the applicant has given security or is ready to give security for due performance of the decree.
9. On whether substantial loss may result to the applicant unless the stay is granted it is pointed that the respondent has affirmed it the replying affidavit that the applicant has never taken possession of the suit premises from the time of the purported purchase neither have they made any developments therein. The cases of Cosmas Cherono & 2 Others Versus Veronica Cherono [2022] eKLR and Sammy Some Kosgei Versus Grace Jelel Boit [2013] eKLR among other authorities on what constitutes substantial loss were cited.
10. On whether the application has been made without undue delay it is submitted that the delay of 1 ½ months has not been explained.
11. It is submitted that this being a non-monetary decree the applicant should be excused from providing security for due performance as this might deny the applicant the right to prosecute this appeal. The court is referred to the case of Focin Motorcycle Co Limited Versus Ann Wambui Wangui & Another [2018] eKLR.
12. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the replying affidavit and submissions together with case law cited.
13. The court sees the main issue for determination to be whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.



14. The principles guiding the grant of a stay of execution pending appeal are laid out under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“No order for stay of execution shall be made under subrule (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.

15. Therefore, arising out of the above provisions the applicant must satisfy the court that they will suffer substantial loss if the order of stay of execution is not granted. There is also the requirement to furnish security and the application must be made without unreasonable delay. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.

16. But what comprises substantial loss? The court in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, stated as follows; -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... 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.”

17. Applying the above to the application herein, I must state at the outset that the applicants argument that the respondents were in the process of extracting the decree for execution cannot be a sufficient cause for a court to order a stay of execution. The applicant must go beyond this and prove that there will be substantial loss. At paragraph 4 of the supporting affidavit Mr. Muinde depones that the execution of the decree will lead to the eviction of the applicants. But it cannot be enough to just state they would be evicted. It is expected to demonstrate that such eviction would create a state of affairs that will irreparably affect them. What comes to my mind then would be the extent of the occupation of the suit premises. No effort has been made by the deponent to explain what would make their eviction extraordinary and why. This is in fact amid the averment by the respondent decree holder at paragraph 7 of the replying affidavit that the applicants have never taken possession of the suit property neither have they developed the property. Photographs were annexed. This was not refuted when indeed the applicant had an opportunity to respond further to the said averments. I'm not persuaded that the applicant has discharged the burden of proof in this regard.

18. I will add that my review of the final orders in the judgement delivered herein mainly affects the parcel register at the Lands Registry. In my view should the decree be executed and the appellant succeeds on appeal the register can still be reverted in compliance to the outcome of the said intended appeal. I do not see the appeal being rendered nugatory in any way. The applicant also urges that he has an arguable appeal with high chances of success. This is not a criteria available under Order 42 herein. I say so because this is an argument that can only be canvassed when stay is being sought at the Court of Appeal. To make a determination of whether there is an arguable appeal would amount to the court



that rendered the judgement interrogating its own judgement and casting a doubt. I will not belabor the point.

19. Based on the foregoing discussions I find that the applicant has not met the requirements for the grant of orders for stay of execution pending appeal.

20. Consequently, the application dated 27<sup>th</sup> April, 2020 is hereby dismissed with costs to the respondent.  
It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 26<sup>TH</sup> DAY OF JULY, 2023.**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Akiro for the Applicant

Ms. Mango for Respondents

Mr. Daniel Disii- Court Assistant.

