



**Kabiru & another v Moses (Environment and Land Appeal
E020 of 2022) [2023] KEELC 18674 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18674 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E020 OF 2022**

JO OLOLA, J

JULY 14, 2023

BETWEEN

MOSES NGUTHUKO KABIRU 1ST APPELLANT

CHRISTOPHER MUCHURU KABIRU 2ND APPELLANT

AND

JOHN BARU MOSES RESPONDENT

RULING

1. By the Notice of Motion dated July 18, 2022, the two appellants herein pray for an order that pending the hearing and determination of the Appeal, an order of stay of execution does issue restraining the respondent from in any way acting on the Judgment delivered on June 21, 2022 in Mukurweini PMELC Case No. 2 of 2020.
2. The application which is supported by an affidavit sworn by the 1st appellant – Moses Nguthuko Kabiru is premised on the grounds that:
 - (i) By the Judgment delivered on the said date, the Trial Magistrate found against the Appellants herein and gave orders that were averse to them; and
 - (ii) The appellants are apprehensive that unless the respondent is restrained by way of stay, he will proceed and execute the Judgment which will have the effect of unjustly enriching the respondent to the detriment of the appellants.
3. John Baru Moses (the respondent) is opposed to the application. In his replying affidavit sworn on October 6, 2022 and filed herein on October 11, 2022, the Respondent avers that there is no basis for staying execution of the said Judgment.



4. The respondent denies that the enforcement of the Judgment will result in his unjust enrichment and asserts that on the contrary, the effect is to serve him justice after many years of unjust enrichment by the appellants.
5. The respondent avers that the appellants have not demonstrated the prejudice they will suffer if stay is not granted as sought. It is his case that he has suffered greatly and will continue to suffer great prejudice if the stay is granted as the appellants have occupied and continue to occupy the suit land to his detriment.
6. I have carefully perused and considered both the application as well as the response thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Parties.
7. By the application before me, the appellants pray for a stay of execution of the Judgment delivered on June 21, 2022 in Mukurweini PMELC Case No. 2 of 2020. It is the Appellant's case that in the event the Respondent is allowed to proceed with execution of the Judgment, the effect will be to unjustly enrich the Respondent to their detriment.
8. As was stated in [RWW v EKW](#) [2019] eKLR:

“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.”
9. In the matter before me, the respondent had by his Plaint dated January 21, 2020 sought the following orders against the appellants:
 - (a) A declaration that title No. Githi/Muthambi/370 is registered in the name of the deceased Kabiru s/o Nguthuko to hold in trust for the Plaintiff;
 - (b) An order directing that the trust registered against the title Githi/Muthambi/370 be dissolved, the title (be) cancelled and be registered in the name of the Plaintiff John Baru Moses absolutely; and
 - (c) Costs of the suit and interest on the same
10. In his Judgment rendered on June 21, 2022, the Honourable D. K. Matutu, P.M did find that the Respondent had established that the land in question was clan and family land and that the same had been registered in the name of the Appellant's father in trust for the Plaintiff and his family.
11. As the Court of Appeal stated in *Vishram Ravji Halai v Thornton & Turpin* [1990] KLR 365, whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, this court's jurisdiction to do so under Order 41 Rule 6 (now Order 42 Rule 6) of the [Civil Procedure Rules](#) is fettered by three conditions, namely, the establishment of a sufficient cause, satisfaction of substantial loss and the requirement to furnish security.
12. Going by that trajectory, the first requirement then for consideration is whether or not the intended Appeal is arguable. In that respect, a cursory look at the Memorandum of Appeal herein dated July 18, 2022 reveals that the grounds raised therein are triable. This court will in that regard be required to



investigate whether or not the registration of the appellant's father as the proprietor of the suit property in 1959 and the subsequent issuance of title in his name in the year 1971 was indeed in trust for the respondent and his family.

13. As to whether or not the failure to grant the orders would occasion substantial loss to the appellants, it was clear to me that they had been in possession of the suit property and had developed it for a long period of time and that the registration of the respondent as the sole proprietor thereof would occasion great prejudice to the appellants.
14. In the circumstances, I was persuaded that in order to preserve the subject matter of the Appeal, it was just and proper that the suit property be maintained in its current status pending the hearing and determination of the Appeal.
15. In the premises, I find merit in the Motion dated July 18, 2022 and I allow the same in terms of Prayer No. 4 thereof.
16. The costs of the application shall be in the Appeal.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 14TH DAY OF JULY, 2023.**

In the presence of:

No appearance for the Appellant

Mr. Kimunya for the Respondent

Court assistant – Kendi

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J. O. OLOLA

JUDGE

