



REPUBLIC OF KENYA



**Kivuva & 12 others v Nzomo & 10 others (Environment and Land Appeal E010 of 2024) [2025] KEELC 260 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 260 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E010 OF 2024**

**TW MURIGI, J  
JANUARY 29, 2025**

**BETWEEN**

- EMMA KIVUVA ..... 1<sup>ST</sup> APPELLANT
- ARAFA JUMA ..... 2<sup>ND</sup> APPELLANT
- SOFIA KIVUI ..... 3<sup>RD</sup> APPELLANT
- KALWA PETER ..... 4<sup>TH</sup> APPELLANT
- MARY PAUL ..... 5<sup>TH</sup> APPELLANT
- MARY MUNYIVA ..... 6<sup>TH</sup> APPELLANT
- KOKI MANGÉLE ..... 7<sup>TH</sup> APPELLANT
- KOKI MUASA ..... 8<sup>TH</sup> APPELLANT
- MUTUTKU MUOKI ..... 9<sup>TH</sup> APPELLANT
- ALICE KITUU ..... 10<sup>TH</sup> APPELLANT
- BEATRICE MUNYAO ..... 11<sup>TH</sup> APPELLANT
- MUNYIVA MAKAU ..... 12<sup>TH</sup> APPELLANT
- KOKI NZOMO ..... 13<sup>TH</sup> APPELLANT

**AND**

- DIANA NZOMO ..... 1<sup>ST</sup> RESPONDENT
- RAEL MBITHUKA ..... 2<sup>ND</sup> RESPONDENT
- KAMANTHE KIVASU ..... 3<sup>RD</sup> RESPONDENT
- ZUHURA NDUNDA ..... 4<sup>TH</sup> RESPONDENT
- NZIVILI KATUA ..... 5<sup>TH</sup> RESPONDENT



KILOKO NGUI .....	6 <sup>TH</sup> RESPONDENT
MARY KYUNGU .....	7 <sup>TH</sup> RESPONDENT
DIANA SALIM .....	8 <sup>TH</sup> RESPONDENT
AJELINA PETER .....	9 <sup>TH</sup> RESPONDENT
ALII MUSYOKA .....	10 <sup>TH</sup> RESPONDENT
MICHEAL MUNGUTI .....	11 <sup>TH</sup> RESPONDENT

## RULING

1. Before me for determination is the Notice of Motion dated 14<sup>th</sup> August, 2024 brought under Order 40 Rule 1, 2, 3, 6(1)(6) of the Civil Procedure Rules in which the Applicants seek the following orders:-
  1. Spent.
  2. Spent.
  3. An order do issue staying execution of orders contained in the Ruling delivered by Hon Benson Ireri SPM at Makindu on 12<sup>th</sup> August 2024 and restraining the Respondents from sale and or in any other manner deal with the developed property contained in Plot No. 86 Makindu Township pending the hearing and determination of the intended appeal.
  4. Costs.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Agnes Sofia Kiviu sworn on her own behalf and on behalf of the Applicants.

### **The Applicants' Case**

3. The deponent averred that vide a ruling delivered on 12/08/2024, the trial magistrate ordered that collections from Ivuso ya Manyatta Women Group be deposited in Account No.130xxxxxxx held with Kenya Commercial Bank. That in addition, the Appellants were restrained from holding any meetings or dealing with Plot No. 86 Makindu pending the hearing and determination of the suit. It is the Applicant's case that the Respondents did not seek for an order of temporary injunction in their application dated 30/08/2023.
4. The deponent contended that the Respondents who are not members of Ivuso ya Manyatta Women Group have threatened to collect and deposit rent in a foreign account held with Kenya Commercial Bank. She further contended that the Respondents have threatened to sell the suit property. She asserted that the Appellants are the bona fide members of the group and added that they are not indebted to the Respondents in any way. She contended that the appeal will be rendered nugatory if the order of stay is not granted.

### **The Respondents' Case**

5. The Respondents opposed the application through the replying affidavit of Diana Mukene Nzomo sworn on her own behalf and on behalf of the Respondents. The deponent averred that the Appellants and Respondents are members of Ivuso ya Manyatta Women's Group and they have collectively acquired properties including the suit property. She further averred that the Applicants chased away



the Respondents despite having contributed towards the acquisition of the properties. She deposed that she is the secretary of the group and she has not handed over her position thereof.

6. She argued that the Appellants are introducing new evidence that was not presented in the pleadings in the suit before Makindu Law Courts. The deponent averred that they instituted the suit after the Applicants threatened to sell the suit property to their detriment. She denied the allegations that the account held in Kenya Commercial Bank is alien to the Applicants. She asserted that both parties attended the meeting held at the Deputy County Commissioner's office whose agenda was to open a new bank account for the group. She further averred that during the said meeting, it was agreed that the rent collected would be deposited in the new bank account which the Appellants have failed to honour. She deposed that the Applicants have sold a portion of the suit property to a third party and are intending to sell the other remaining portion. She contended that the Respondents will suffer irreparable loss if the orders sought are granted.

### **The Response**

7. The Applicants filed a further affidavit in which they denied the contents of the replying affidavit.
8. The application was canvassed by way of written submissions.

### **The Appellants/applicants Submissions**

9. The Applicant's submissions were filed on 19<sup>th</sup> September, 2022.
10. On their behalf Counsel raised the following issues for the Court's determination:-
  - i. Whether the Respondents application in the lower court dated 30<sup>th</sup> August 2024 was merited.
  - ii. Whether the trial court's ruling delivered and dated 12<sup>th</sup> August 2024 should be stayed.
  - iii. Whether the application dated 14<sup>th</sup> August 2024 is merited.
11. On the first issue, Counsel submitted on the conditions for the grant of an injunction as set out in case of *Giela versus Cassman Brown (1973) E.A 358* and in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others (2014) eKLR*. Counsel submitted that in the application dated 30/08/2023 the Respondents did not demonstrate their relationship with *Ivuso Ya Manyatta Women Group* or that they would suffer irreparable harm if an injunction is not granted. Counsel submitted that the balance of convenience tilts in favour of the Applicants who are in possession of the suit property where they have constructed rental units.
12. With regards to the second issue, Counsel submitted that parties are bound by their pleadings. Counsel further submitted that the trial court went outside the pleadings as the Applicants had not sought for a temporary injunction pending the hearing and determination of the suit. According to Counsel, the trial Magistrate did not take into account the evidence on record in arriving at his decision. Counsel further submitted that the Respondents did not adduce any evidence to show that they are members of the group. Counsel submitted that the trial magistrate issued contradicting statements in his ruling.
13. On the third issue, Counsel submitted that the Applicants have adduced evidence to show that they are members of the group whilst the Respondents have not. Concluding his submissions, Counsel urged the court to allow the application as prayed.

### **The Respondents Submissions**

14. The Respondents filed their submissions dated 23<sup>rd</sup> October, 2024.



15. On their behalf, Counsel submitted that the only issue for determination is whether the application is merited. Counsel submitted that the orders sought cannot be issued as they are premised on the wrong provisions of the law.
16. Counsel identified the conditions for the grant of stay of execution pending appeal as set out in Order 42 Rule 6 of the Civil Procedure Rules. On the first condition, Counsel submitted that the Applicants have not demonstrated that they will suffer irreparable loss if the orders sought are not granted. Counsel further submitted that the dispute between the parties revolves around membership and management of the properties owned by Ivuso ya Manyatta Women Group. Counsel opined that the dispute can only be determined in a full hearing.
17. Counsel argued that there is need to preserve the suit property and the proceeds therefrom pending the hearing and determination of the suit. Counsel cited Section 63 of the Civil Procedure Act to submit that the court can issue an order of injunction to preserve a property from being wasted.
18. Counsel further submitted that the account held with Kenya Commercial Bank is not alien to the Applicants as the deponent of the affidavit in support of the application appended her signature in the minutes of the meeting held at the DC'S office where the parties resolved to open a new account.
19. Concluding her submissions Counsel submitted that the Applicants have not met the legal threshold for the grant of the orders sought and urged the court to dismiss the application with costs.

### **Analysis And Determination**

20. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.
21. The Respondents contended that the orders sought herein cannot be issued because the application is premised on the wrong provisions of the law. The application herein is brought under Order 40 of the Civil Procedure Rules, 2010 which provides for the law on injunctions. In the matter at hand, the Applicants are not seeking for an injunction. This is a procedural technicality which does not affect the substance of the application.
22. Order 42 Rule (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides that;
  - 6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay 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.
  - 6(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



such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.

23. The grant of an order of stay of execution is a discretionary one. In the case of *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal gave the following guidelines on how a court should exercise its discretion as follows;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

24. Similarly, in the case of *RWW Vs EKW* (2019) eKLR the Court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”

25. The Court is therefore called upon to balance both the rights of the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.

26. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi)* the Court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

27. The Court will now determine whether the Applicants have satisfied the conditions upon which the orders can be granted.

28. On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.

29. In the case of *Charles Wahome Gethi Vs Angela Wairimu Gethi* (2008) eKLR the Court of Appeal held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss



that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

30. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga (1988) KLR* where the Court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.

31. In *Tropical Commodities Suppliers Ltd and Others Vs International Credit Bank Ltd (in Liquidation) (2004) 2EA 331* the court defined substantial loss as follows;

“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

32. The Applicants contended that the Respondents are not members of *Ivuso Ya Manyatta Women’s Group*. They further contended that the Respondents are threatening to issue notices to tenants to deposit rent in an alien account held with Kenya Commercial Bank. The Applicants claim that they are apprehensive that they will lose their property which will render the Appeal nugatory.

33. The Respondents on the other hand contended that they are members of the group and have no intention of selling the suit property. They further contended that the order of injunction was issued to preserve the suit property pending the hearing and determination of the suit.

34. The ruling delivered on 12/08/2024 by Hon B Ireri in respect of the application dated 30/02/2023 shows that the Applicants had sought in prayer Nos. 2,3 and 4 for an order of temporary injunction.

35. From the ruling, it is crystal clear that the Applicants were restrained from selling, subdividing or in any other manner interfering with Plot No. 86 Makindu Town, pending the hearing and determination of the suit. The tenants on Commercial Plot No. 86 were also directed to deposit their rent in Kenya Commercial Bank A/C No. xxxxxx pending the hearing and determination of the suit.

36. The purpose of an injunction is to preserve the suit property pending the hearing and determination of the suit. The Applicants did not adduce any evidence to show that the Respondents intend to dispose of the suit property or utilise the proceeds realised from the rent. I therefore find that the Applicants have not demonstrated that they will suffer irreparable loss if the order of stay is not granted.

37. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that the ruling was delivered on 14<sup>th</sup> of February, 2022. The present application was filed in Court on 26<sup>th</sup> of April, 2022. I find that the application was filed without undue delay.

38. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of *Arun C Sharma Vs Ashana Rakundalia T/A Raikundalia & Co. Advocates & 2 Others (2014) eKLR*, the court held that;

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is



why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

39. The Applicants have not expressed their willingness to provide security for due performance of the decree.
40. From the foregoing, I find that the Applicants have not met the threshold for the grant of stay of execution pending appeal.
41. In the end I find that the application dated 14/08/2024 is devoid of merit and the same is hereby dismissed with costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF JANUARY, 2025.**

In The Presence Of: -

Court Assistant – Mr.Ahmed

Ms Mutuku for the Respondents.

Babu for the Appellant.

