M'rinjiru (Replaced by Bernard Gituma M'Rimberia) v National Land Commission & 3 others (Environment & Land Petition E005 of 2024) [2025] KEELC 233 (KLR) (29 January 2025) (Ruling)

Neutral citation: [2025] KEELC 233 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND PETITION E005 OF 2024

CK NZILI, J

JANUARY 29, 2025

IN THE MATTER OF THE PROVISIONS OF THE CONSTITUTION OF KENYA 2010 ARTICLES 21, 22, 23, 42, 60, 69, 70 AND 71

AND

IN THE MATTER OF PROTECTION OF IMENTI FOREST IN THE COUNTY OF MERU AND ENFORCEMENT OF ENVIRONMENTAL RIGHTS

AND

IN THE MATTER OF SECTION 58 OF THE FOREST ACT 2005

BETWEEN

AMOS THURANIRA M'RINJIRU (REPLACED BY BERNARD GITUMA M'RIMBERIA) ..... PETITIONER

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

KENYA FOREST SERVICE ..... 2ND RESPONDENT

MINISTRY OF ENVIRONMENT AND FORESTRY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. The interested party, by an application dated 16/12/2024, seeks a stay of execution of the judgment delivered on 4/12/2024 under Rules 19 and 32(3) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules* 2013, pending hearing and determination of the intended appeal to the Court of Appeal.

2. The grounds are set out in the supporting and supplementary affidavits sworn by Hosea Mutembei Peter on the 16th and 18th of December 2024. The applicant avers that he has filed a notice of appeal as per a notice annexed as HMP '1' since the judgment, among other reliefs, nullified the Special User Licence (SUL) against him and the 2nd respondent, which has five years before it lapses.

3. The applicant avers that considering the length of the Special User Licence (SUL), he sought a third party to assist in investing in machinery for the purposes of running the quarry.

4. The applicant avers that he joined hands with Electric Recycles and Systems Ltd in a joint venture and purchased a Tata lorry by way of financing by NCBA Bank in May 2023 as per the letters of offer dated 21/5/2023 and 6/10/2023 on top of a crasher machine costing Kshs. Twenty-five million as per an agreement dated 8/11/2023 and 14/11/2023, attached as annexure HMP '3' 'e,' 'f,' and 'g.'

5. The applicant avers that in October 2024, he paid the annual rent for the quarry up to October 2025 to the 2nd respondent as per a receipt dated 23/10/2024 marked as exhibit HMP '7'. Equally, the applicant avers that he also formally deposited a bank guarantee of Kshs.1,000,000/= dated 2/8/2024 with the 2nd respondent, on 25/10/2024.

6. Therefore, the applicant avers that the joint venture parties would suffer immense financial loss if the order of stay is not granted because they have invested close to Kshs. Fifty million in the said quarry business, and was ready to offer Kshs.500,000/= as security for the due performance of the decree of this court.

7. The applicant avers that after the judgment was delivered, he dismantled and removed the asphalt mixer and making machine from the quarry area. If stay of execution is granted, the applicant guarantees the court that he will restrict his activities to quarrying only as a condition for stay and also will join hands with the 2nd respondent to commence restorative measures on the quarry. The applicant attached copies of photos as HMP'10' and copies showing that the asphalt mixer has been moved.

8. The applicant avers that he is ready, in conjunction with the 2nd respondent, to carry out such activities and actions in the interim to make sure that the quarrying does not harm the surrounding environment, since he has already submitted a restoration plan for the quarry to the said 2nd respondent.

9. The applicant avers that his intended appeal has arguable points or questions as per the draft memorandum of appeal, namely:

   (1) If the Special User Licence (SUL) was unconstitutional for failure to involve NLC.

   (2) If the Special User Licence (SUL) was unconstitutional for failure to align with the *Climate Change Act*.

   (3) If the court has jurisdiction to cancel the Special User Licence (SUL).

   (4) If the court should have relied on a partisan report prepared by the 2nd respondent without the input of all stakeholders.

10. The applicant avers that the finding by the court on page 154 of the judgment outlining all quarrying activities in forests all over Kenya was grave, and therefore, there is a need for the Court of Appeal to settle the law and grow the jurisprudence on climate change.

11. In the supplementary affidavit the applicant avers that it has come to his attention that the petition was sponsored by his competitors in the quarrying business, and in particular Isico Holdings Ltd. The applicant avers that Isico Holdings Ltd, who own a sizeable quarrying business along Isiolo Road, deposited crusher stones along the Meru - Nanyuki road opposite Meru National Polytechnic, immediately the judgment was delivered as per annexed photos marked HMP '11', whose loader on site belongs to the company as per annexure marked HMP '12' and '13', from NTSA and the Registrar of Companies.

12. In written submissions dated 18/12/2024, the applicant submits that he has demonstrated substantial loss, offered security, the application was filed on time and has an arguable appeal. Reliance was placed on *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* [2022] eKLR, *Mata & Another v Ronoh & Another* Civil Appeal E034 of 2024 [2024] KEHC 2799 (KCB) (19th March 2024 (Ruling) and *Kin & Another v Khaemba & Others* Civil Appeal Application E270 of 2021 [2021] KECA 318 (KCB) (17th December, 2021 (Ruling).

13. The petitioner opposes the application through written submissions dated 18/12/2024 that the court is functus officio. On arguable appeal, it was submitted that there are no arguable issues that are bigger than the denial of the petitioner, his family, and the people of Imenti North Sub-County of their constitutional right to a clean and healthy environment, in seeking to continue with eternally irreversible impunity acts.

14. The petitioner submitted that an appeal was likely to be finalized in four years; hence, the damage to the environment would be a lot, and therefore, the applicant should wait for the conclusion of the same; otherwise, the forest is protected, gazetted and will always be available,

15. The petitioner submitted that the applicant has belatedly brought other parties to the application as a weak attempt to seek sympathy, whose alleged interests cannot outweigh the petitioner's constitutional rights and other people whose rights have been violated.

16. The petitioner submitted that it was too late to drag new parties and allege that the motor vehicles would be idle, yet they could still engage in other economic activities elsewhere as the appeal awaits a hearing.

17. The 2nd, 3rd, and 4th respondents to the main petition rely on written submissions dated 18/12/2024, terming an application for stay of execution as a balancing act as held in *Butt v Rent Restriction Tribunal* 91979] eKLR and *Tassam Logistics Ltd v David Macharia & Another* [2019] eKLR citing with approval *KCB Ltd v Sun City Properties Ltd & Others* [2012] eKLR, *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* [2022] eKLR, which cited with approval *RWW v EKW* [2019] eKLR, and lastly, *Martin Muthee v Patrick Muchiri* [2021] eKLR.

18. It was submitted that the alleged security by the applicant could not compensate for public interest which was at stake in this petition. Further, the 2nd, 3rd, and 4th respondents submitted that the interested party's rights cannot override public interest.

19. Order 42 Rule 6 *CPR* provides that a court from which an appeal is preferred may, for sufficient cause, order a stay of execution of its decree or order. Order 42 Rule 2(a) *CPR* provides that an applicant must demonstrate substantial loss, not delay in applying for a stay, and must offer sufficient security for due realization of the decree. In *Butt v Rent Restriction Tribunal* [1979] eKLR, the court held that

whether to grant or refuse a stay is a discretionary power exercised by the court to prevent the appeal from being rendered nugatory, where there are reasonable grounds and or exceptional circumstances.

20. In *Vishran Ravji Hatai v Thorton & Turpin* [1990] KLR 385, the court said that the application must be made without unreasonable delay. The substantial loss must be demonstrated through cogent and tangible evidence, as held in *James Wangalwa & Another v Agnes Naliaka Chesaeo* [2012] eKLR. An applicant has to demonstrate also that he has an arguable appeal as held in *Gatiran Peter Munya v Dickson m Kithinji & 2 Others* [2014] eKLR. An arguable appeal is not a frivolous one, as held in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR. It need not succeed on appeal. A single issue will suffice as held in *Transouth Conveyors Ltd v K.R.A. & Another* [2007] eKLR. It has to raise serious questions of law worthy of consideration by the court. It is one in respect of which a reasonable argument can be put forth in support. See *Retreat Villas Ltd v Equatorial Commercial Bank Ltd & Others* CA No. 40 of 2006.

21. As to security, the court in *RWW v EKW* [2019] eKLRand in *Gianfranco Manenthi & Another v Amaco Ltd* [2019] eKLR, said that security is aimed at providing a situation where if the applicant fails to succeed in the appeal, there would no return to status quo on the part of the plaintiff to initiate execution proceedings, as the court would simply order for the release of the deposited security to the respondent in the appeal. The court said that security ensures that the court does not merely assist an applicant to delay execution through filing frivolous appeals.

22. In *Arun C. Sharma v Ashana Raikudalia T/A Rairundalia & Co. Advocates & Others* [2014] eKLR, the court observed that security is not aimed accrued at punishing the judgment debtor but acts as security for the due performance of such decree or order as may be ultimately binding on the applicant.

23. While considering whether to grant stay orders, the right of appeal must be balanced against the equally weighty rigid right of the plaintiff to enjoy the fruits of his judgment. In *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR, the court affirmed Portreizt Maternity v James Karanga Kabiu C.A No. 63 of 1991 that there must be just cause for depriving the plaintiff enjoyment of his fruits of judgment.

24. Applying the foregoing case law, the applicant has confirmed that he filed a notice of appeal. In *Nicholas Kiptoo Arap Korir Salat v IEBC & Others* [2013] eKLR, the Apex Court held that a notice of appeal is the primary document to be filed outright whether or not the subject matter requires leave or not, since it is a jurisdictional prerequisite. The applicant has submitted that he has arguable points to be raised on appeal as per the draft memorandum of appeal. An arguable appeal need not succeed but refers to one that ought to be argued fully before the court. See *KCB Ltd v Nicholas Ombija* [2009] eKLR.

25. The court has perused the grounds of the intended appeal vis a vis the judgment. I do not think the grounds are idle or frivolous.

26. On substantial loss, public interest, and the applicant's interests, the respondents have submitted that any issuance of orders of stay to the applicant will perpetuate more harm to the environment. On the other hand, the applicant has tendered evidence of compliance with some of the conditions in the Special User Licence (SUL), such as the bank guarantee and the requisite annual rent or fees, which was done during the pendency of the hearing of the petition.

27. The 2nd respondent has not disputed receipt of the same or refuted that the applicant has proposed mitigation measures to avoid injury or damage to the environment. Equally, the applicant has averred on oath that there was the removal and dismantling of the offensive asphalt plant from the forest. The 2nd respondent and the rest of the respondents have not denied that the applicant has removed the primary cause or source of the pollutants in the forest.

28. The applicant has pleaded that he has submitted a restoration plan with the 2nd respondent and was also willing to undertake remedial or mitigation actions or measures to restore the environment to its original status in line with the Special User Licence (SUL).

29. The 2nd respondent has not denied receipt of the restoration plan and the proposal for restoration measures to the environment to be undertaken by the applicant. Other than alleging irreversible damage to the forest, the respondents have not shown how the proposed measures by the applicant would breach their right to a clean and healthy environment. In *Reliance Bank Ltd v Norlake Investments Ltd* [2002] EIEA 227, the court said that the factors that render an appeal nugatory must be considered within the circumstances of each particular case, and in doing so, the court is bound to consider the conflicting claims of both sides especially the proportion on any suffering that the respondent might undergo while waiting for the appeal to be heard and determined. The workload of the appeal court is not one of the factors to consider to deny the applicant a stay.

30. The respondents have urged the court to decline the stay orders; otherwise, the applicant will continue perpetuating unconstitutional conduct, denying the petitioner and the residents of Imenti North Subcounty the right to a clean and healthy environment. The 2nd, 3rd, and 4th respondents urge the court to find that the individual rights of the applicant cannot outweigh the public interest. Public interest has been termed as a legitimate consideration. See *Kenya Hotels Properties Ltd v Willesden Investment Ltd & Others* [2013] eKLR. In *Cabinet Secretary Ministry of Health v Aura & Others* Civil Application No. E583 of 2023 [2014] KECA 2 [KLR] (19th January 2024) (Ruling), the court discussing public interest, observed that the confusion, lacuna, risk, and harm to citizens, real and present danger to the health rights of countless parties was a price too dear to pay and it would have the effect of rendering the appeal nugatory, having regard to the duty to give the term its whole meaning. The court said that the irreversible effect of some of the provisions of the *Social Health Insurance Act* were some of the matters to be considered.

31. The fulcrum of the appeal by the applicant centers on whether the court had jurisdiction to invalidate the Special User Licence (SUL) and if any quarrying activities would continue in forests across the country if they are not aligned with the *Climate Change Act*. The applicant urges the court to stay the implementation of the judgment on the conditions alluded to in the supporting affidavit as the law and the jurisprudence in the issues are settled by higher courts. A cardinal principle of our Constitution is for a party to be heard before an adverse order is made against that party.

32. Equally, such a party has an unconditional right to advance that fair hearing through an appeal, as held in *Potters House Academy v Leah Chemeli Kemer* [2022] eKLR. The applicant urges the court to find that it is in the interest of justice to stay the implementation at least since the offensive pollutant contributed has been removed and a bank guarantee deposited with the 2nd respondent. The primary purpose of a guarantee in a license of this nature under the *EMCA* is to offer security to to clean up the environment at the end of the license period. It, therefore, binds the license holder to ensure compliance with the terms and conditions of the license. Should there be a breach, the 2nd respondent may recall the funds and or refer the issue to Nema for action against the applicant.

33. In *East African Cables Ltd v The Public Procurement Complaints, Review & Appeals Board & Another* [2007] eKLR, the court said that if the consequences of allowing the application would harm the most significant number of people, as per John Stuart Mill, the court should weigh or choose the alternative which tends to produce the greatest happiness for the most significant number of people and produce the most goods. Further in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] EA 227, the court was of the view that to refuse to grant the order of stay must be weighed against whether the hardship to the

applicant would be out of proportion to any suffering the respondent might undergo, while waiting for the hearing and determination of the appeal.

34. In this application, other than written submissions, the respondents have not sworn on oath any affidavit to discount, challenge, and or refute the averments on oath by the applicant regarding the safeguard measures proposed or put in place to avoid breach of the petitioner's rights to clean and health environment. The respondents have not termed the measures inappropriate, insignificant, impossible, or unworkable. Written submissions cannot amount to evidence or pleadings before a court of law as held in *D.T. Moi v Stephen Muriithi & Another* [2014] eKLR.

35. The respondents have termed the inclusion of the alleged parties to the application as belated and an afterthought. In my view, the applicant was in order to swear on such issues to demonstrate the likely substantial loss. The rights of the applicant to exercise the unlimited right of appeal and also stay of execution cannot be termed as subservient to the public interest, in the circumstances especially where the 2nd respondent has unconditionally accepted, during the pendency of this petition, the bank guarantee and annual rents from the applicant.

36. Equally, the 2nd respondent has not told this court if it has formally communicated the formal cancellation of the Special User Licence(SUL) and also given the applicant formal notice to vacate the subject quarry on account of invalidation of the Special User Licence (SUL).

37. The upshot is that I find that application with merit. The interim conditional stay orders granted on 19/12/2024 are confirmed that:

    1. Stay of execution of the judgment is hereby granted on condition that the Interested Party deposits Kshs.500,000/= as security for costs, to be held by the Court until the appeal is heard and determined.

    2. On top of that, the quarrying activities of the Interested Party on the Suitland shall as per the performance bond strictly be regulated by NEMA and the 2nd and 3rd Respondents. In default of any of the above conditions, the stay orders shall lapse.

    (3) Should there be any breach of the conditions of the stay orders or the Special User Licence(SUL), any party is at liberty to apply.

38. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT ON THIS 29TH DAY OF JANUARY 2025.

HON. C.K. NZILI

JUDGE.

In the presence of :

Mwirigi Kaburu for the Interested Party present

Anampiu for Petitioner/Objector

Miss Miramba for Mugambi Njeru for 2nd, 3rd and 4th Respondents