



**M’Muketha v Kimathi & another (Environment and Land Appeal
E007 of 2023) [2023] KEELC 20900 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20900 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E007 OF 2023
CK NZILI, J
OCTOBER 18, 2023**

BETWEEN

DAVID KIGUNDA M’MUKETHA APPLICANT

AND

FAITH NKATHA GITONGA 1ST RESPONDENT

FRANCIS KIMATHI 2ND RESPONDENT

RULING

1. Through an application dated 20.1.2023, this court is asked to stay the execution of a decree from the lower court on the basis that the appeal is arguable, irreparable loss and damage was imminent, there is a willingness to furnish adequate security, and that the land may be disposed off to third parties, rendering the appeal nugatory. Further, the applicant averred that the respondents were unlikely to reconstitute the substratum once the appeal succeeds. All these grounds are found on the face of the application and the supporting affidavit sworn by Betty Kiyuki advocate on 20.7.2023, where she has also attached a copy of the memorandum of appeal, lower court judgment, copy of the land certificate, and copy of records as annexures marked DKM “1” & “2” respectively.
2. Faith Nkatha Gitonga, the 2nd respondent, on behalf of the respondents, opposed the application by a replying affidavit filed on 25.9.2023. It was averred that the appellant is her uncle who took away all the suit land, which is ancestral in nature, leaving them landless, and that the trial court ordered the suit land to be shared equally, which execution process was yet to commence.
3. The respondents averred that the applicant has failed to satisfy the requirements of a grant of stay since no substantial loss has been demonstrated, the appeal would not be rendered nugatory, they will suffer more for their landlessness, and the security offered was already registered under the applicant’s name.
4. Through written submissions undated but filed on 15.9.2023, the applicant stated that he had met the threshold to be granted a stay; the appeal as per the memorandum of appeal has arguable grounds



since the suit was on the wrong forum due to the succession case, the grounds of appeal are not frivolous, the substantial loss was apparent, security has been offered, and it was only fair that the orders sought to be granted. Reliance was placed on *Motor Vessel Lillian "S" vs. Caltex Oil (K) Ltd* (1989) KLR 1 and *Equity Bank (K) Ltd vs. West Link MBO Ltd* C. App no. 78 of 2011 on the jurisdiction, *Konene Narankaik vs. Rehema Ahmed (administrator of estate of Ahmed Abdi Murasa & another* (2020) eKLR and *Reliance Bank Ltd vs Norlake Investments Ltd* (2002) E.A 227 on substantial loss *Gianfranco Manenti & another vs. AMACO Assurance Company Ltd* (2019) eKLR on security and *Francis Githinji Karobia vs Stephen Kageni Gitau* (2017) eKLR on land being unique in character, so damage may not be adequate.

5. By written submissions dated 22.9.2023, the respondents submitted that under Order 42 Rule 6 (2) of the *Civil Procedure Rules*, there must be a demonstration of irreparable harm and substantial loss, which the applicant has failed to substantiate since execution has not commenced. Reliance was placed on *Awale Transporters Ltd vs Kelvin Perminus Kimanzi* (2020) eKLR that the intention to begin execution was not reason enough to grant stay since some execution was a legal process.
6. Further, the respondents relied on Gianfranco (supra) that a winner should be allowed to the enjoy the fruits of his judgment. Additionally, the respondents submitted that willingness to deposit a title deed, there was no official search to prove its current registration status for it could be encumbered and more so when a copy of the green card was in the name of another person apart from the applicant.
7. To grant or not to grant stay is a discretionary power that a court of law should exercise on sound legal principles. In *Kithinji vs DPP* (2023) KESC 18 (KLR) (Civ) 20th February 2023 (Ruling), the court held that a party must show how the appeal will be rendered nugatory if the stay order was not granted. In *Njau vs Mbuko* (Civil Application E 415 of 2022) KECA 524 (KLB) 12th May (2023) (Ruling), the court cited with approval *Wasike vs Swala* (1984) KLR 591 that an arguable appeal was into one that would necessarily succeed but one that merited consideration by the court for raising a bonafide issue which is not idle or frivolous.
8. On the nugatory aspect, the court, guided by *Reliance Bank Ltd vs Norlake Investment Ltd* (2002) 1 EA 227, held that factors capable of rendering an appeal nugatory must be considered within the circumstances of each case as well as the conflicting claims on both sides. Again, the court cited *African Safari Club Ltd vs Safe Rentals Ltd NRB* Civil Appeal No. 53 of 2010, that the court must pursue the overriding objective to act fairly and justly to put the hardship of both sides on a scale and balance them while treating both parties with equality or placing them on equal footing in so far as practicable. The court cited with approval *Africa Eco Camps vs Exclusive African Treasures Ltd* (2014) eKLR, that a legal duty was placed on the applicant to prove that its intended appeal would be rendered nugatory because the applicant would be unable to pay back the decretal amount. In *Reliance Bank Ltd* (supra), the court considered that the applicants' tenants were likely to suffer demolition, and the tenancy relationship was not likely to be restored.
9. The applicant has not stated his development's status, nature, and value on the suit land in this application. He has not shown what was likely to befall him should subdivision occur and registration in favor of the respondents. He has not addressed the issue of the landlessness of the respondents, who have an unfettered right to execute the decree to enjoy the fruits of their judgment and perhaps, settle down on their ancestral land. Besides offering security, the title deeds for L.R. No's Nyaki/Thura /713 and 2034 lack nexus with LR No's. Nyaki/Thuura/962 and its subdivisions into L.R No .5434 – 5439, which were canceled in the judgment.
10. The judgment in the lower court was based on specific land parcels. The applicant has not demonstrated how the cancellations and the order to have LR No. Nyaki/Thuura/962 divided in



equal shares in favor of the respondents and himself would substantially change the substratum of the appeal. He has not said that he was occupying the suit land and would lose some of his developments if the land was subdivided. Unfortunately, the supporting affidavit to the application is sworn by Betty Kiyuki, an advocate who has no authority and should not descend on an arena of litigants and swear on matters she may not be privy to. For instance, the applicant is the one who is conversant with the likely implications of the execution of the decree on his overall daily life and co-existence with his nephew and niece. The deponent herein may not answer the discrepancies between the attached title deed and the copy of records.

11. Therefore, my finding is that no substantial loss has been substantiated. Similarly, the security offered has no relationship with the decreed parcel of land to the respondents. All in all, I find nothing to show that the appeal shall be rendered nugatory and the appellant put in more hardship than the respondents who have expressed their need to be resettled in the ancestral land.
12. The application is dismissed with costs. Lower court file be availed. Mention before deputy registrar on 16.11.2023.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 18TH DAY OF OCTOBER 2023**

In presence of

C.A Kananu

Miss Kiyuki for appellant

Miss Gachoki for respondent

HON. CK NZILI

ELC JUDGE

