



**Mamba & another v Kariuki (Sued as the legal representative of the Estate of Erastus K Apollo – Deceased) & another (Environment & Land Case 43 of 2021) [2023] KEELC 20752 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20752 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT & LAND CASE 43 OF 2021**  
**GMA ONGONDO, J**  
**OCTOBER 17, 2023**  
**(FORMERLY MIGORI ELCC OS NO. 72 OF 2018 (OS))**

**BETWEEN**

**RAPHAEL OBUDHO MAMBA ..... 1<sup>ST</sup> PLAINTIFF**

**PETER OTIENO OBALA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOHN KAMAU KARIUKI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ERASTUS K APOLLO – DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**NICHOLAS OWAKA OTIENO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 21<sup>st</sup> June 2023 (The application herein) by the plaintiffs/applicants through the firm of G.S Okoth and Company Advocates for;
  - a. Spent
  - b. Spent
  - c. The Honourable Court be pleased to issue an order of temporary injunction restraining the defendants, their workers, agents next of kin or anyone deriving authority and/or interest from them from entering into or in any other manner using Land Parcel No. Kanyamwa/Kabonyo-Kwandiku/206 in a manner adverse to or interfering with the plaintiff's peaceful use and possession thereof pending the hearing and determination of the plaintiffs' intended appeal to the court of appeal.
  - d. The costs of this application be costs in the cause.



2. The application is premised upon grounds 1 to 5 stated on its face alongside the 1<sup>st</sup> plaintiff/applicant's supporting affidavit of even date. In summary, the applicants claim that they planted commercial sugar cane on the land in dispute, LR No. Kanyamwa /Kabonyo-Kwandiku/206 during the long rains in April 2023. That they are afraid that after judgment was delivered on 20<sup>th</sup> June 2023 in this matter and their suit dismissed, the defendants/respondents may enter the land in dispute and destroy their investments including sugarcane farms thereon. That they have lodged a notice of appeal against this court's judgment and should the defendants enter the suit land, the prospective appeal shall be rendered nugatory
3. By a replying affidavit of thirty paragraphs sworn on 10<sup>th</sup> July 2023 by both defendants/respondents, the application is opposed. They deposed in part that the same does not disclose any cause, it is fatally defective, an abuse of the court process and that the notice of appeal dated 21<sup>st</sup> June 2023 is not incompetent as it is neither endorsed with the filing date nor signed by the Deputy Registrar. That thus, the application be dismissed with costs.
4. The respondents further deposed that the land in dispute has a long history and their rights thereon are protected under Article 40 of the [Constitution](#) of Kenya, 2010 and sections 24 and 26 [Land Registration Act](#), 2016 (2012). That sugar cane has already harvested and maize matured for harvesting on the land. They urged the court to balance the rights and interests of the parties herein.
5. The application was heard by way of written submissions further to this court's directions given on 29<sup>th</sup> June 2023; see Order 51 Rule 16 of the [Civil Procedure Rules](#), 2010 and Practice Direction number 32 of the [Environment and Land Court Practice Directions](#), 2014.
6. The plaintiffs/applicants' submissions dated 3<sup>rd</sup> July 2023 refer to the orders sought in the application, that the suit was dismissed on 20<sup>th</sup> June 2023 and that they are in occupation of the land in dispute. That they have equitable title over the land and the same ought to be preserved as there are issues including prima facie and irreparable harm which would not be adequately compensated by an award of damages in the event the application is dismissed. To buttress their submissions, the applicants relied on [Kenleb Cons Ltd-vs-New Gatitu Srvce Station Ltd and another](#) (1990) eKLR and [Paul Gitonga Wanjau-vs-Gathuthis Tea Factory Company & 2 others](#) (2016) eKLR and urged the court to allow the application with costs.
7. In the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents' submissions dated 10<sup>th</sup> July 2023, reference is made to the orders sought in the application and brief facts of the application including their dissatisfaction with this court's judgment rendered on 20<sup>th</sup> June 2023. The respondents framed a twinned issue for determination, inter alia, substantial loss rendering the appeal nugatory if the application is disallowed. That the applicants have not shown any substantial loss they would suffer if the orders sought in the application are not granted. To fortify the submissions, their counsel cited [Giella-vs-Cassman Brown & Co. Ltd](#) (1973) EA 358....[Kenya Shell Ltd-vs-Benjamin Karuga Kibiru and another](#) (1986) KLR 410 hence, urged the court to dismiss the application with costs.
8. I have duly considered the entire application, the replying affidavit and the rival submissions. So, is there merit in the application?
9. The application is generated under Order 42 Rule 6 (4) and (6) of the [Civil Procedure Rules](#), 2010 regarding the triple conditions for stay of execution. These conditions apply cumulatively as held in [Trust Bank Limited versus Ajay Shah and 3 others](#) (2012) eKLR.
10. In respect of substantial loss condition, this court is conscious of various forms of the condition which is the cornerstone of both jurisdictions for granting stay of execution of judgment and decree. That is



what has to be prevented and the applicant has to avail evidence thereof as held in the case of *Kenya Shell Ltd (supra)*.

11. Regarding delay, Order 50 Rules 1,2, 6, 7 and 8 of the *Civil Procedure Rules*, 2010 provides for time. The applicants delayed for a day to lodge this application and they have not given any explanation herein as noted in *Raphael Musa Mutiso and 3 others versus Joseph Ndava Ntbuka and another* (2019) eKLR.
12. Concerning security, I subscribe to the decision in the case of *Halai and Another-vs-Thornton & Turpin (1963) Ltd* (1990) eKLR the court appealed from may for sufficient cause order stay of execution of a decree or order made or passed by it. Clearly, this condition is within the discretion of the court.
13. It is trite that the power of the court to stay the execution of a decree pending appeal is discretionary; see *Butt-vs-Rent Restriction Tribunal* (1982) KLR 417.
14. In the instant case, this court dismissed the suit. Therefore, negative orders are in place. In the case of *Kanwal Sarjit Singh Dhiman-vs-Kashavji Jivraj Shab* (2008) KLR, the Court of Appeal held as follows:

“ .....The order of 18<sup>th</sup> December, 2006 merely dismissed the application.....By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or pay any sum. It was thus, a negative order which is incapable of execution.....”
15. Similarly, in *Registered Trustees Kenya Railways Staff Retirement Benefits Scheme-vs-Millimo, Muthomi & Co. Advocates & 2 others* (2021) KLR KECA 363 (KLR), the court held:

“ .....Negative orders cannot be stayed.....”
16. It is crystal clear that the applicants have sought injunctive relief in the application and I am guided by Giella case (supra). Furthermore, they lodged a notice of appeal to the Court of Appeal which is deemed duly lodged under Order 42 Rule 6 (4) of the *Civil Procedure Rules*, 2010. Therefore, it would not be right for this matter to be heard simultaneously by this court and the Court of Appeal; see also *Judicial Commission of Inquiry into Goldenberg Affair & 3 others-vs-Job Kilach* (2003) eKLR.
17. In the foregone, it is the considered view of this court that the instant application is devoid of merit.
18. Accordingly, the application is hereby dismissed with costs to abide the outcome of appeal at the Court of Appeal.

**DATED AND DELIVERED AT HOMA BAY THIS 17<sup>TH</sup> DAY OF OCTOBER 2023.**

**G.M. A ONG'ONDO**

**JUDGE**

