



**Magut & another v Kerich (Environment & Land Case E008 of 2023)  
[2023] KEELC 22299 (KLR) (11 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22299 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE E008 OF 2023  
MN MWANYALE, J  
DECEMBER 11, 2023**

**BETWEEN**

**STEPHEN MAGUT ..... 1<sup>ST</sup> APPELLANT**

**ABRAHAM K. RONO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HENRY K KERICH ..... RESPONDENT**

**RULING**

1. Before Court for determination is the Notice of Motion application dated 14<sup>th</sup> July 2023 seeking primarily stay of execution of the judgment delivered on 29<sup>th</sup> May 2023 pending hearing and determination of an Intended Appeal.
2. The application is premised on grounds inter alia, that the Applicants being aggrieved by the judgment delivered on 29<sup>th</sup> May 2023 have preferred an Appeal against the said judgment and that execution is imminent noting that the stay period granted by the Trial Court had lapsed and the Appeal would be rendered nugatory yet the Appeal was arguable and touched on a 2 acre land dispute, and that interests of justice would be best served if the application is allowed.
3. The Application is supported by the supporting Affidavit of Stephen Magut the first Appellant who reiterates the grounds thereof, and further depones having purchased Nandi/Kamobo/2541 in 1993 from the Respondent and having sold the same to the 2<sup>nd</sup> Appellant and having planted tea thereon.
4. The Appellant deponed having made the application timeously; and urges the Court to allow the application.
5. The Respondent allude to filing a Replying Affidavit dated 8/8/2023 however the said affidavit was not on the Court file and was thus not considered by the Court in this ruling.



6. At the ex parte stage, when the matter came up under certificate of urgency on 28/7/2023, the Court directed parties to file written submissions on the application and granted an order of maintenance of status quo.

#### **Applicant's Submission:**

7. The Applicant submits that the purpose for a stay of execution pending appeal application is to preserve the subject matter in dispute, so that the Appellants rights are safeguarded. In this regard the Applicant placed reliance in the decision in the case of *Nicholas Okaka vs Alfred Waga Wesonga* (Siaya HCC Civil Appeal No. E033/2022).
8. The Applicant further submits having filed the Memorandum of Appeal dated 26.6.2023 against the decision delivered on 29/5/2023, hence the application was made timeously, and that he has met the principles of grant of stay of execution pending appeal under order 42 rule 6 of the *Civil Procedure Rules* in that, substantial loss may result to the Appellants unless the orders are made, that the application has been made without undue delay, and that the Appellant are able to comply with any orders as to security for costs.

#### **Respondents Submissions:**

9. In their submissions, Respondents submit that the Applicant has not demonstrated any substantial loss and are thus not entitled to the reliefs sought.
10. In this regard the Respondent place reliance on the decision in the case of *Elena Doudoladova Korir vs Kenyatta University* (2014) eKLR, as well as the decision in *Charles Mbaabu vs Daniel M'mwirebua Anampia*.
11. The Respondents further submit that no commitment to furnish security has been made by the Applicant hence the Applicant is not deserving of the orders sought. The Respondents argue the Court to dismiss the application.

#### **Issues For Determination:**

12. The Court frames the sole issue for determination, as to whether or not the application is merited. For the application to be merited, the Court has to examine whether the same meets the threshold set out under Order 42 Rule 6 of the *Civil Procedure Rules*.
13. The Applicant has to demonstrate substantial loss, unreasonable delay as well as the application being made timeously.
14. On substantial loss, the Court of Appeal in its decision in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR, emphasized the centrality of substantial loss, by holding inter alia;  

“The issue of substantial loss is the corner stone of both jurisdictions. The substantial loss is what is to be prevented by preserving the status quo, because such loss would render the Appeal nugatory.”
15. The Applicant has not deponed the nature of the substantial loss he is likely to suffer if the application is not granted. He deponed on the appeal being rendered nugatory, yet he did not annex a copy of the Memo of Appeal and the impugned judgment.
16. Having not demonstrated any substantial loss, the Court is of the view that the application has not met the threshold for grant of a stay of execution pending appeal.



17. The Court notes that the Applicant has submitted on the need to preserve the subject matter of the Appeal and accordingly I order to preserve the subject matter pending appeal, the Court directs maintenance of status quo, on the ground, as is currently and on the register of Nandi/Kamobo/2541. The Appellant to file record of Appeal within 30 days from today, failure to which the orders herein shall lapse.

**RULING, DELIVERED AND DATED AT KAPSABET THIS 11<sup>TH</sup> DAY OF DECEMBER, 2023.**

**HON. M. N. MWANYALE**

**JUDGE**

In the presence of;

Mr. Misoy for the Appellant/Applicant

Ms. Karuga for the Respondent

