



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT**  
**MOMBASA LAW COURTS**

**ELC CIVIL APPEAL NO. 31 OF 2020**

**HEZEKIAH MACHARIA WANYOIKE.....1<sup>ST</sup> APPELLANT**

**CECILIA WANJIRU WAMAITU.....2<sup>ND</sup> APPELLANT**

**VERSUS –**

**KENYA MEDICAL RESEARCH INSTITUTE .....1<sup>ST</sup> RESPONDENT**

**JOWAKINS (K) LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Preliminaries.**

1. What is before this Honorable Court for determination is the Notice of Motion application dated 27<sup>th</sup> September, 2021 filed by the Appellants/Applicants herein. It is brought under the Provision of Order 42 Rule 6 and Order 51 Rule 1 of the Civil procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya.

**II. The Appellants/Applicants Case.**

2. The Appellants /Applicants seeks for the following orders.

**(a) Spend**

**(b) That this Honorable Court be pleased to issue a stay of execution of the judgment of Taveta Principal Magistrate’s Court vide Civil Case No. 22 of 2015 delivered on 1<sup>st</sup> day of February, 2019 by Benson S. Khapoya pending the hearing and determination of this application inter-parties.**

**(c) That this Honorable Court be pleased to issue a stay of execution of the judgment of Taveta Princpal Magistrate’s Court vide Civil Case No. 22 of 2015 delivered on 1<sup>st</sup> day of February, 2019 by Benson S. Khapoya pending the hearing and determination of this Appeal.**

**(d) That costs of this application be provided by the Respondents in any event.**

3. The Appellants/Applicants notice of motion application is grounded on the facts, testimony and averments of the 17 paragraphed Supporting Affidavit of HEZEKIAH MACHARIA WANYIOKE – the 1<sup>st</sup> Appellant/Applicant sworn and dated 27<sup>th</sup> September, 2021 and five (5) annexures marked as “HMW – 1-5” annexed thereto.

He deposed that he had the authority of the 2<sup>nd</sup> Appellant/Applicant herein to swear, pled and act on his behalf on this matter as he was well conversant it matter. He held that in the year 2015, they filed a case against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents at the Taveta Principal Magistrate’s Court whereby the case was heard and finally determined. The judgment was delivered on the 1<sup>st</sup> February 2019 by Hon. Benson Khapoya and in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein. They annexed a copy of the said judgment – marked as “HMW – 1”. Being dissatisfied, they preferred an appeal vide Voi Civil Appeal No. 8 of 2019. Subsequently, taking that the said court had no jurisdiction to handle the case the filed appeal was transferred to this court on 6<sup>th</sup> April, 2020.

4. He held that from that time their case had never been heard. According to him, recently the 1<sup>st</sup> and 2<sup>nd</sup> Respondents invaded the suit property and started fencing it and in so doing they were blocking them from accessing his house which was situated inside the land. He informed court that he had already constructed on it and was carrying out diary farming and business on it.

5. He claimed they had been the legal and absolute owners to the suit land known as Land Reference Number. MAJENGO MAPYA T/MM/115/1 and TMM/115 – 2 for almost 22 years. They were allocated the parcels of land by the then County Council of Taveta through a letter of allotment and the Gazette notice dated 18<sup>th</sup> October, 2013. They annexed the said letter of allotment and the gazetted notice marked as “HMW – 4 & 5” Respectively. He stressed that these plots were gazette as theirs.

6. He averred that the 1<sup>st</sup> Respondent was their neighbor and had his own share besides theirs. Thus they urged the Honorable court to issue the orders of stay of execution as an order to preserve the suit land. They contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein would not suffer any prejudice, damages nor irreparable loss if the orders were granted. They averred that if not granted and their filed appeal would be rendered nugatory which would be against the rules of natural justice. They urged court to grant the orders sought with costs.

### **III. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Case**

7. On 5<sup>th</sup> November, 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein Advocates the Law Firm of Messrs. Muriu, Mungai & Co. Limited Advocates while opposing the Notice of Motion Application dated 27<sup>th</sup> September, 2021 filed a two (2) pointer grounds of opposition dated 4<sup>th</sup> November, 2021. They held that (a) The trial Court merely dismissed the Applicants suit with costs. They argued that being a negative order there was nothing capable of being stayed by this Honorable court. (b) in any event, judgment having been delivered on 1<sup>st</sup> September, 2019 a delay of two (2) years to be seeking for the orders of stay of execution was inordinate and plainly inexplicable .

### **III. Submissions**

8. On 8<sup>th</sup> November, 2011 in the presence of all the parties herein, this Honorable Court directed that the said Notice of Motion application be canvassed by way of written submissions. They all obliged Pursuant to that, the Honorable Court reserved a ruling for being 21<sup>st</sup> February, 2022.

#### **A. The Appellant/Applicant’s Written Submissions**

9. On 23<sup>rd</sup> November, 2021, the Advocates for the Appellants/Applicants the Law Firm of Messrs. Ragura Gideon & Co. Advocates filed their written submission dated 22<sup>nd</sup> November, 2021. They averred that judgment was delivered on 1<sup>st</sup> February, 2019 by the Taveta Magistrate’s Court – Taveta Civil Case 22/2015 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein and being aggrieved by the said decision they preferred an appeal – Voi High Court Appeal No. 8 of 2019. In the course of time the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Motion application on 2<sup>nd</sup> May, 2019 under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 for the filed Memorandum of Appeal dated 1<sup>st</sup> March, 2019 by the Applicants be struck out for lack of jurisdiction and costs. Upon hearing of this application, the court delivered ruling directing the transfer of the suit to this court. Unfortunately, according to them though without demonstrating it with any tangible evidence the Learned Counsel apportioned blame onto the previous Advocates handling the matter for their failure to follow up the matter and to have the appeal heard and determined. Hence they urged the Appellants/Applicants should not be punished on account of the mistake of their previous Advocates.

10. They admitted indeed that the Ruling was delivered on 27<sup>th</sup> May, 2020 but it took a while to transfer the file to this court. They only filed this application after the Respondents invaded the disputed land on 17<sup>th</sup> August, 2021 and started cutting the fence and blocking the Appellants/Applicants from accessing their house. So in the given circumstances, they argued, the application for stay of execution had been brought in good time since previously there had been no threat to the suit property.

The Learned Counsel held that the Appellants/Applicants were likely to suffer substantial loss if the orders were not granted as the Applicants had constructed houses on the disputed land and had been operating from there for the last 20 years with the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein and that they had documentary evidence of legal ownership of the suit land.

They submitted that the said Application was made without inordinate delay on 27<sup>th</sup> September, 2021 immediately after the 1<sup>st</sup> and 2<sup>nd</sup> Respondents invaded the land on 17<sup>th</sup> August, 2021 as according to them from the time of the judgment by the Sub-ordinate Court on 1<sup>st</sup> February, 2019 there had been no imminent danger on the execution of the said decree.

They submitted that they were ready to give an undertaking as to security for costs provided that the orders sought were granted considering that this was a land matter. They prayed to be granted the orders sought from the filed Notice of Motion application.

#### **B. The 1<sup>st</sup> Respondent’s Written Submissions**

11. On 1<sup>st</sup> December, 2021 the Advocate for the 1<sup>st</sup> Respondents the Law firm or Muriu Mungai & Company Advocates filed their written submissions dated 8<sup>th</sup> November, 2021. They submitted they would fully rely on the grounds of opposition dated 4<sup>th</sup> November, 2021. They submitted being alive to the principle of law that a court could only grant that which had been sought and it had not jurisdiction to grant a relief that was not sought.

They relied on the decision of “*Benard Njroge Kibaki t/a Njowa Njemu Enterprises –Versus- Equity Bank Limited And Another (2020) eKLR*.”

They strongly held that the suit was dismissed and hence there was nothing to be stayed at all after they submitted that. It was not part of the courts business to fashion remedies for the parties in a suit whatsoever. It could not do so without descending into the arena of litigation and losing the tag of impartiality which any system of law must cherish at all times.

They further held that the application by the Applicant was being made on 27<sup>th</sup> September, 2021 yet the judgment by the Sub-ordinate Court was delivered on 1<sup>st</sup> February, 2019 which was close to two (2) years with no good explanation for the inordinate delay. In the long run they prayed for the notice of motion application dated 27.9.2021 to be dismissed with costs.

## **VI. Analysis and Determination.**

12. I have keenly read through all the pleadings in this appeal, the Notice of Motion appeal dated 27<sup>th</sup> September, 2021 by the Appellant/Applicant, the written submissions by the parties, and the relevant provisions of the law relied upon.

In order to arrive at an informed determination of the matter at hand I have framed the following issues for considerations:-

**a. Whether the Appellants/Applicants through the Notice of Motion application dated 27<sup>th</sup> September, 2021 have established and/or met the fundamental threshold for grant or stay of execution as founded under Order 42 Rule 6 of the Civil Procedure Rules, 2012.**

**b. Whether the parties are entitled to the orders sought.**

**c. Who will bear the costs of the Notice of Motion application by the Appellant/Applicant**

**ISSUE (a) Whether the Appellants/Applicants through the Notice of Motion application dated 27<sup>th</sup> September, 2021 have established and/or met the fundamental threshold for grant or stay of execution as founded under Order 42 Rule 6 of the Civil Procedure Rules.**

### **Brief Facts.**

13. Before embarking on the detailed analysis of the above framed issues, it is imperative I first and foremost extrapolate on the brief facts of this case. From the pleadings, this is an appeal from the decision/Judgment of the Sub-ordinate Court based at the Taveta Magistrate's Court – Civil Case No. 22 of 2015 delivered on 1<sup>st</sup> February, 2019. The Appellant/Applicant and the Respondents have had an ownership dispute over all the suit parcel of land. Taking the judgment of the trial court was in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the Appellant on 6<sup>th</sup> September, 2020 preferred an appeal but before the Voi High Court – HCCC No. 8 of 2019 following an objection by the Respondent vide Notice of Motion application dated 2<sup>nd</sup> May, 2019 the Honorable Court directed that the matter be transferred to this court.

14. On 27<sup>th</sup> May, 2019, the High Court at Voi delivered its Ruling the file transferred to this Court. Nonetheless, the Appellant claims that from time onwards their Advocates on record then went silent. They stated that they were depending on their previous Advocate to take action. It was until on 27<sup>th</sup> September, 2021 they decided to file this application following the invasion, cutting of trees and fencing off the land by the Respondents on 17<sup>th</sup> August, 2021 denying them access to their house which is situated in the midst of the suit land. Otherwise they had never bothered to move court for the orders of stay of execution as the suit land was not under any eminent danger.

15. Now, let me proceed with the analysis of the above framed issue under this sub - heading. The legal substratum of stay of execution is founded under the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010. It is entitled - "**Stay in Case of Appeal**" and hold "*inter alia*":-

**“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 an 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”.**

While the provision of Order 42 rule (6), (6) of the Civil Provision Rules, 2010 provides:-

**“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the sub-ordinate Court or tribunal has been complied with.**

16. In considering whether to grant the stay of execution and/or temporary injunction, the High Court based on the doctrine of "**Stare Decisis**" relies on settled decisions or precedents and the set out principles under the above provisions of the law. There are plethora of decided cases on the issue of grant of stay of execution pending appeal. For instance, in the Civil Appeal **No. 107 of 2015 – Masisi Mwita – Versus - Damaris Wanjiku Njeri [2016] eKLR** the court held that:-

**“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another –Versus - Thornton & Turpin Limited where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Court’s discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient**

**Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo –Versus - Straman E.A. Ltd.[2013] as follows:-**

**“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded then the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other.**

**The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of Vishram Rouji Halal – Versus - Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,**

17. To strengthen this legal position further, I also make reference to the case of “*Canvass manufacturers Limited –Versus - Stephen Reuben Korunditu Civil application No. 158 of 1994 [1994] LLR 4853* – where the court held that:-

**“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”** Further in the case of “*Stephen Wanjiku –VS- Central Glass Industries Ltd. Nbi) HCC No. 6726 of 1991* the court held that:-

Therefore, it follows that for the court to order a stay of execution, there **MUST** four (4) fundamental ingredients to be met to qualify for the said orders. These are:-

**a. There being sufficient cause of action**

**b. There being substantial loss likely to be suffered by the Applicant if not granted the orders.**

**c. The application should be made without inordinate and unreasonable delay.**

**d. For he performance of the appeal there should be security for costs to be placed and/or undertaken by the Appellant.**

18. Based on the above graphically set out principles, in the instant case, this Honorable court will then proceed to determine whether the Appellants/Applicants herein have satisfied the required standard for granting of stay orders pending appeal. Firstly, the Appellants/Applicants must show that they may suffer substantial loss. It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously.

While considering all these ingredients the Honorable Court must always be privy and not far from being informed that the party who succeeded in getting a judgment in his or her favour should not be denied unnecessary from enjoying the fruit of their judgment.

19. As the court also embarks on determination of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants’ application dated 27<sup>th</sup> September, 2021, it will take into account that it is not the practice of the courts to deprive a successful litigant, in this case the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, of the fruits of their litigations from the judgment entered in their favour. Further, the Honorable court will take into consideration that the purpose of stay of execution pending appeal is to preserve the subject matter as stated out in the case of *Consolidated Marine – Versus - Namprijad An. Civil Appeal No. 93 of 1989* Nairobi where 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.**

20. In the instant case, being aggrieved by the Judgement of the Sub – ordinate court, on 1<sup>st</sup> February, 2019, the Appellant/Applicants filed a Notice of appeal at the Voi High Court and later on a Memorandum of appeal dated 1<sup>st</sup> March, 2019. Eventually, arising from an application by the 1<sup>st</sup> Respondent to strike out the filed appeal on the grounds of the court lacking jurisdiction, the suit was transferred to this court.

Ideally, and as indicated herein above, the purpose of an application for stay of execution is with an aim to preserve the subject matter in dispute so that the right of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants is safeguarded.

21 Be that as it may, the Appellant/Applicants’ claim to have constructed a house in the middle of the suit land, carrying out dairy farming and business on it hence likely to suffer substantial loss if not granted the orders for stay is too circumstantial and without any empirical documentary evidence to back the said facts. For instance, it would have been prudent for them to have at least provided some set of photographs, copies of business documents – receipts, ledger books, structural designs and so forth rather than to merely state that they are the owners of the land through copies of letters of allotment and gazette, These are not sufficient to demonstrate that there exists any cause of action and that they would suffer any substantial loss whatsoever. For these reasons the Honorable Court is not satisfied on the assertion that the Appellant/Applicants are likely to endure any substantial loss whatsoever.

22. Secondly, the Appellants/Applicants must satisfy court that the notice of motion application was made without “**undue and unreasonable delay**”. Undoubtedly, the judgment by the sub – ordinate court was delivered on 1<sup>st</sup> February, 2019. It took the Appellant/Applicant upto 27<sup>th</sup> September, 2021 to have moved court supposedly seeking for the stay of execution orders on grounds that the suit property was under imminent danger arising from the invasion by the Respondent. The Appellant/Applicants do not dispute there was

delay in moving court. Nonetheless, the three (3) explanation adduced ostensibly having caused the delay in filing this application being that:- a). taking the said action after the Respondents invaded the suit land on 17<sup>th</sup> August, 2021; b). the lethargy by their previous lawyers who were not keen on pushing for the hearing of the appeal and hence the mistakes of the Advocate should not be visited on the litigants and c). finally the long period it took to have the file transferred from Voi High Court to this court as a justification for the long delay were wishy washy, not convincing and inexcusable. The law dictates the Applicants should move court without much delay from the date of judgment not when there is imminent danger as alluded to by them. Although, the exact timeframe of delay has not been defined, this court has tolerated such periods of upto one (1) to two (2) months with very reasonable and cogent sufficient reasons but certainly not a period of two (2) years. The Honorable Courts have found this to be unreasonable, inordinate and/or inexcusable.

23. Thirdly, on the issue of security for costs, the court must always be conscious to this fact whatsoever. Nonetheless, the court is also compelled to balance the scale of justice as it needs to ensure that the Applicant who has an arguable appeal is not rendered nugatory and hence prejudiced in the long run. All said and done, in the instant case, the Appellant /Applicant has casually and conditionally stated that they are ready to give undertaking as to costs provided the orders sought are granted. The Honorable Court fails to see any level of commitment on the part of the Appellant/Applicant. To apportion the land to the security is not convincing as the ownership of the land is the integral part of the dispute hereof. Again the Appellant/ Applicants application is unsuccessful hereof.

#### **ISSUE b). Whether the parties are entitled to the orders sought.**

24. Finally, under this sub heading, I need not say much as clearly it has been demonstrated on what each of the parties are entitled to from the application filed. The only remaining issue of great importance to state is one. I would like want to fully concur with the Learned Counsel for the 1<sup>st</sup> Respondent that from the nature of the Judgement there is nothing to execute. From the time of the a judgment on 1<sup>st</sup> February, 2019 by the Trial Court, there have never been any decree extracted for execution to be effected by the Respondents.

25. It is no wonder no execution has taken place todate apart from the allegations that on 17<sup>th</sup> August, 2021 the 1<sup>st</sup> Respondent had invaded the land and was fencing it off and cutting trees. I fully concur with the authority of “*Catherine Njeri Maraga –Versus- Serah Chege & Another (2017) eKLR* cited by the 1<sup>st</sup> Respondent to wit:-

**“But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs – the High Court has not orders any parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in and application for stay, it is so ordered. Under this sub-heading again the application fails as the Appellants/Applicants are not entitled to any of the relief sought hereof.**

#### **ISSUE No. c). Who will bear the Costs of the application**

26. The Black Law Dictionary defines cost to means, “*the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other*”

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The events in this case are the result of the case whereby the 1<sup>st</sup> Respondent has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to be borne by the 1<sup>st</sup> & 2<sup>nd</sup> Appellants/Applicants herein.

#### **V. DETERMINATION**

27. Ultimately, and based on the detailed analysis hereof, the honorable court finds the Notice of Motion application dated 27<sup>th</sup> September, 2021 unmeritorious and hence it is hereby dismissed with costs. For avoidance of doubt these are the orders.

**a. THAT the Notice of Motion application dated 27<sup>th</sup> September, 2021 is hereby dismissed.**

**b. THAT for expediency sake the Appeal to be heard and finally disposed off within the next ninety (90) days from the day of this ruling.**

**c. THAT the matter to be mention on 5<sup>th</sup> April, 2022 for purposes of taking directions of the filed appeal under the Provisions of Section 79B of the Civil Procedure Act Cap. 21 and Order 42 Rules 11 of the Civil Procedure Rules 2010**

**d. THAT the costs of the Notice of Motion application to be borne by the Appellants /Applicants to the 1<sup>st</sup> Respondent.**

**DATED, SIGNED AND DELIVERED THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2022**

**HON. JUSTICE L.L NAIKUNI (JUDGE)**

**ENVIRONMENT & LAND COURT**

**MOMBASA**

**In the presence of:**

a. M/s. Yumna, Court Assistant.

b. Mr. Billy Kongere Advocate for the Appellant/Applicant.

c. Non appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents