



**Mulei & another ((Suing in her capacity as the administrator of the Estate of the late Lilian Wanjiru Magira)) v Maina & 2 others (Environment and Land Appeal 36 of 2021) [2022] KEELC 2395 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2395 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND APPEAL 36 OF 2021**

**CA OCHIENG, J**  
**MAY 31, 2022**

**BETWEEN**

**MARY NYAMBURA MULEI ..... 1<sup>ST</sup> APPLICANT**

**PETER KIMANI MAINA ..... 2<sup>ND</sup> APPLICANT**

**(SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE LILIAN WANJIRU MAGIRA)**

**AND**

**LUCY MUTHONI MAINA ..... 1<sup>ST</sup> RESPONDENT**

**GILBERT NTARANGWI M'IMIRONGO ..... 2<sup>ND</sup> RESPONDENT**

**MAVOKO LAND DEVELOPMENT COMPANY LIMITED .... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. What is before Court for determination is the Appellants' Notice of Motion Application dated the 16<sup>th</sup> August, 2021 brought pursuant to Section 1A, 1B, 3A, 3B, 6, 63(e) of the *Civil Procedure Act*, Order 9 Rules 9,10, Order 42 Rule 6(6) and Order 51 Rule 1 of the Civil Procedure Rules where Applicant is seeking for Orders:
  - a) That there be a stay of Judgment, Decree and order given by Hon. B. H Onkwani PM on 05/08/2021 in Chief Magistrate Mavoko ELC 8/2019 pending the hearing and determination of the lodged Appeal.
  - b) That pending the hearing and determination of this application, this Honourable Court do and hereby restrain the Respondents from entering remaining, leasing, charging, pledging, disposing off in any way, transferring, constructing any structures on and dealing with and/



or interfering with the Appellant's quiet possession of the suit property herein known as land parcel No. 48 phase 11B situate at Mlolongo, Machakos County.

- c) That pending the hearing and determination of this Application, this Honourable Court do and hereby restrain the Respondents from entering remaining, leasing, charging, pledging, disposing off in any way, transferring, constructing any structures on and dealing with and/or interfering with the Appellant's quiet possession of the suit property herein known as land parcel No. 48 phase 11B situate at Mlolongo, Machakos County.
  - d) That an order as to costs for this Application be provided for.
2. The Application is premised on the grounds on the face of it and supported by the affidavit of Mary Nyambura Mulei the 1<sup>st</sup> Appellant herein where she confirms being an administrator of the estate of the late Lilian Wanjiru Magira (deceased) who is the registered owner of land parcel No. 48 phase 11B situate at Mlolongo, Machakos County hereinafter "the suit property." She explains that she obtained an injunction via a court order dated 13<sup>th</sup> March, 2019 and although the ownership certificate issued by the 3<sup>rd</sup> Respondent got lost, there exists a letter by the 3<sup>rd</sup> Respondent showing that the suit property moved from the deceased to the 1<sup>st</sup> Respondent. She states that vide a judgment dated 5<sup>th</sup> August, 2021 the learned magistrate wrongfully dismissed their suit and they proceeded to file their Memorandum of Appeal dated the 16<sup>th</sup> August, 2021. Further, that if the stay of execution and injunctive orders are not granted the appeal would be rendered nugatory. She reiterates that they are ready to furnish the court with reasonable security. Further, that the instant application has been made without delay.
  3. The 1<sup>st</sup> Respondent Lucy Muthoni Maina opposed the application by filing Grounds of Opposition and a replying affidavit where she confirms having been the registered proprietor of the suit property before she sold it to the 2<sup>nd</sup> Respondent. She explains that she acquired the suit property as a gift from the then Chairman of Ngwata Self Help Group in the year 2001 and got a Letter of Allotment issued by the Mavoko Municipal Council dated the 17<sup>th</sup> August, 2001 since the said Self Help Group did not issue certificates of ownership. Further, that she was issued with a Certificate of Ownership dated the 20<sup>th</sup> February, 2007 by the 3<sup>rd</sup> Respondent herein upon taking over management of the said plots. She insists the 3<sup>rd</sup> Respondent's records indicate she was the owner of the suit property. She contends that she offered her sister Mary Nyambura Mulei the 1<sup>st</sup> Appellant herein, to stay as well as put up structures on the suit property so as to let her generate income for the benefit of her children including herself as she was thrown out of their brother's property where she resided. Further, that sometime she also allowed their deceased mother Lillian Wanjiru Magira to temporarily possess the suit property as she intended to travel abroad. She avers that she later transferred the suit property to the 2<sup>nd</sup> Respondent herein vide a Sale Agreement dated the 7<sup>th</sup> November, 2018 and he is now its registered proprietor. Further, that she executed the requisite transfer forms in favour of the 2<sup>nd</sup> Respondent. She reaffirms that she informed the Appellants about the sale of the suit property and her desire to have them, issue vacant possession to the 2<sup>nd</sup> Respondent. She reiterates that she was later served with suit papers for ELC No. 8 of 2019 filed in the Principal Magistrates Court at Mavoko Law Courts with allegations that the suit property belonged to their late mother and together with the 2<sup>nd</sup> Respondent, they colluded to defraud her of the said property. Further, that the said suit was heard and determined in her favour vide a Judgement dated the 5<sup>th</sup> August, 2021. She further avers that the judgement was merited as the Appellants failed to prove their case. She reaffirms that the Appellants have no prima facie case as alleged.
  4. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the application by filing Grounds of Opposition and Replying Affidavits sworn by the 2<sup>nd</sup> Respondent as well as the 3<sup>rd</sup> Respondent's Director one Jackson Makali Kalolwe. In the affidavit sworn by Gilbert Ntarangwi M'Mirongo the 2<sup>nd</sup> Respondent herein, he



confirms being a purchaser of the suit property which he bought from the 1<sup>st</sup> Respondent that was its original owner. Further, that the records with the 3<sup>rd</sup> Respondent confirm this position. He avers that he indulged the Appellants who had admitted the suit property belonged to the 1<sup>st</sup> Respondent and were willing to move out the tenants to allow him take possession thereof. He insists at the time of purchasing the suit property, no issue of succession was brought to his attention until the Appellants filed a suit at Mavoko attempting to stop him from occupying his property. Further, during the hearing, the issue of succession did not arise as the suit property was owned by the 1<sup>st</sup> Respondent prior to their mother's demise. He reaffirms that from the records, the suit property was first registered in the name of the 1<sup>st</sup> Respondent in the year 2001 while the late Lillian Wanjiru was alive. Further, the 1<sup>st</sup> Respondent was issued with an allotment dated the 17<sup>th</sup> August, 2001 by Mavoko Municipal Council (defunct) to prove ownership of the said property. He explains that the 1<sup>st</sup> Respondent in the year 2007 was issued with the 3<sup>rd</sup> Respondent's Certificate of Ownership as further proof of ownership. He reiterates that the entire Memorandum of Appeal does not disclose any point of law and has no chances of success. Further, that the instant application has no merit as the Judgment delivered on 15<sup>th</sup> July, 2021 was meritorious.

5. In the 3<sup>rd</sup> Respondent's affidavit sworn by the Director one Jackson Makali Kalolwe he avers that their records as regards the suit property are intact and confirms the said property belongs to the 1<sup>st</sup> Respondent who later sold the same to the 2<sup>nd</sup> Respondent. He insists the suit property had never had a history of dispute and sought for the court to dismiss the application with costs as it lacked merit.
6. The Appellants filed a further affidavit disputing the responses in the Replying Affidavits and reiterating their averments herein.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

7. Upon consideration of the Notice of Motion Application dated the 16<sup>th</sup> August, 2021 including the parties' respective affidavits and rivaling submissions, the only issue for determination is whether the Court should grant a stay of execution of the Judgement delivered on 5<sup>th</sup> August, 2021 in Mavoko CM ELC 8 of 2010 pending the outcome of the Appeal.
8. The Appellants in their submissions contend that unless an order of injunction is issued, the Respondents have threatened and persist with their unlawful activities which may cause them irreparable loss and damage were they to succeed in their Appeal. They proceed to highlight the anomalies in the Judgement and aver that if the stay is not granted, the appeal will be rendered nugatory. Further, that they are willing to furnish such reasonable security as the court deems fit.
9. The 1<sup>st</sup> Respondent in her submissions insists the Appellants do not have an arguable appeal and rely on the facts as presented in her supporting affidavit. Further, that the Appellants will not suffer any substantial loss if the orders sought are not granted. To buttress her averments, she relied on the following decisions: *Canvass Manufacturers Ltd v Stephen Reuben Karunditu*, Civil Application No. 158 of 1994 (1994) LLR 4854; *RWW vs EKW* (2019) eKLR and *James Wangalwa & Another Vs Agnes Naliaka Cheseto* (2012) eKLR.
10. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents insist the issue of ownership of suit property was determined by the court. Further, that the Appellants will not suffer any damages if the orders sought are not granted. They reiterate that the Application for stay is a delaying tactic. To support their arguments, they relied on the following decisions: *Public Trustee Vs Mary Achiza Liluwa*, Civil Appeal No. 8 of 2003 and Nairobi Civil Appeal No. 192 of 2003 *Mary Kerubo Nyanumba vs Norah Moraa*.



11. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides direction on stay of execution pending appeal and stipulates thus:

“No order for stay of execution shall be made under sub rule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

12. In this instance, Judgment in the lower court was delivered on 5<sup>th</sup> August, 2021 where the Court dismissed the Appellants’ suit and entered judgement as per the Counter claim. The Appellants who were the Plaintiffs in the lower court case being aggrieved by the said judgement, proceeded to file their memorandum of appeal dated 16<sup>th</sup> August 2021. In the impugned Judgment the trial Court upheld the 2<sup>nd</sup> Respondent’s title to the suit property. The Appellants claim they will suffer irreparable harm if the orders of injunction including stay of execution are not granted. They are ready to provide for security for costs. A cursory look at the proceedings including exhibits as well as the judgement in the lower court, I note the Appellants failed to furnish court with documents of title to prove ownership of suit property as opposed to the 2<sup>nd</sup> Respondent who did so. Further, the 3<sup>rd</sup> Respondent that kept records for the suit property confirmed it is the 2<sup>nd</sup> Respondent who currently owns it. The trial court proceeded to uphold the 2<sup>nd</sup> Respondent’s title. The Respondents insist the Appellants have failed to demonstrate how they will be prejudiced if the orders sought are not granted.

13. In respect to stay of execution pending appeal, the Court of Appeal in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR held that:

“An Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party.”

14. With regard to granting of injunctions pending appeal, the Court of Appeal held in the case of [Charterhouse Bank Limited v Central Bank of Kenya & others](#) [2007] eKLR held that:

“The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory. (see also *Madhu Paper International Limited v Merr* [1985] KLR 840.”

15. Based on the facts before me while associating myself with the decisions I have cited, and the legal provision I have cited, it is my considered view that the Appellants have failed to demonstrate what substantial loss they stand to suffer if the orders sought are not granted. Further, I note it is the 2<sup>nd</sup> Respondent who is the owner of the suit property and the Appellants have not controverted his averments that they were aware he was the said owner and even promised to grant him vacant possession but reneged on the agreement and instead proceeded to file the lower court suit. From the averments in the respective affidavits, I opine that since the Appellants have sought for a stay or injunction pending appeal, equity demands that they must have clean hands which in this instance I find they are devoid of. It is against the foregoing, that I find the Appellants have failed to meet the threshold set for granting stay of execution or injunction pending appeal and will decline to grant the orders as sought.

16. In the circumstance, I find the Appellants’ Notice of Motion application dated the 16<sup>th</sup> August, 2021 unmerited and will dismiss it.



Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31<sup>ST</sup> DAY OF MAY,  
2022**

**CHRISTINE OCHIENG**

**JUDGE**

