



**Mbui & another v Mbui (Environment & Land Case
154 of 2017) [2022] KEELC 2203 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2203 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 154 OF 2017**

EC CHERONO, J

MAY 27, 2022

BETWEEN

ALICE WARUGURU MBUI 1ST APPLICANT

MARY MUTHONI MBUI 2ND APPLICANT

AND

ELIJAH MITHAMO MBUI RESPONDENT

RULING

1. The applicants herein filed a Notice of Motion dated 22nd December, 2021 seeking the following orders: -
 - a. That this Honourable Court be pleased to order the personal Arrest and Committal to Civil Jail for a period of six (6) months of Elijah Mithamo Mbui (Defendant/Respondent) for contempt of the court order issued on 16th January, 2019.
 - b. That Warrant of Arrest be executed by the Court Bailiff and or OCS Wang'uru Police Station.
 - c. That the cost of this application and costs of implementing the orders herein be borne by the Defendant/Respondent.
2. The application is opposed through a Replying Affidavit by Elijah Mithamo Mbui, the Respondent herein sworn on 26th January, 2022.
3. Prior to filing the said application dated 22nd December, 2021, the Defendant/Respondent herein had filed a Notice of Motion dated 1st December, 2021 in which he was seeking the following orders: -
 - a. Spent
 - b. Spent



- c. The court be pleased to order for stay of execution of the orders of this court issued on 12th November, 2021 pending hearing and determination of the intended appeal.
 - d. Costs of the application be provided for.
4. When the matter came up for hearing on 18th January 2022, the parties through their advocates on record agreed that both applications be heard contemporaneously by way of written submissions.
 5. The Defendant filed his submissions on 3rd February, 2022 and the Plaintiffs filed theirs on 3rd March, 2022.

Defendant's Case and Submissions: -

6. The defendant's case is that he was dissatisfied with the judgment delivered by this Honourable Court on 12th November 2021, and on 16th November 2021, he lodged a Notice of Appeal.
7. He stated that the orders issued have far reaching implications in that the purchasers who are on the land and who were not heard during trial stand to lose their properties with a spiral effect of having him sued by those purchasers for compensation.
8. He stated that the plaintiffs have never been on the suit land and will therefore suffer no prejudice by an order of maintenance of status quo and that he is ready to abide by any reasonable conditions that may issue at the time of granting the orders of stay.
9. On the issue of contempt, he stated that the plaintiffs have not indicated the last time they were on the suit land and what they did and on what portion of the resultant sub-division. He stated that the truth of the matter is that it is the purchasers who are on the resultant portions of the sub divisions and that the plaintiffs have never been on any of the portions of the resultant sub divisions since 2012.
10. He submitted that he has demonstrated that the plaintiffs have totally failed the test of establishing contempt of court as it is clear from the green card that on 6/7/2010, land parcel number Kabare/Nyangati/1061 was not in existence. He relied in the case of *Gatharia K. Muthike v Baharini Farm Limited* (1985) ELR 227, *Peter K. Yego & others v Pauline Wekesa Kode* Acc No. 194 of 2014, *Sheila Cassat Issenberg & another vs Antony Machatha Kinyanjui* (2021) e KLR amongst others.
11. He submitted that he cannot be held accountable for occupation by the purchasers and urged that the Plaintiffs' application be dismissed.
12. He submitted that there is need to preserve the said properties by maintaining status quo since the court in the impugned judgment had directed that the register be rectified by reverting the suit land in the name of the original proprietor which means cancellation of the resultant portions which are in the names of purchasers.
13. He submitted that he has demonstrated the substantial loss he will suffer if the orders of stay are not granted. He further stated that the application has been brought without undue delay and that he is ready to deposit such reasonable security for costs as may ultimately be binding on him. He relied in the cases of *Stanely Kiplagat Rono & Another v William Kiprotich Cherus* (2021) e KLR and *Butt v Rent Restriction Tribunal* (1979).
14. He urged the court to allow the application as allowed as prayed.



Plaintiffs' Case: -

15. The Plaintiff's case is that on 16th January 2019, this Honourable Court issued orders restraining the Defendant through himself, his agents and/or servants from transferring, alienating, cultivating and/or otherwise interfering with the Plaintiffs/Applicants rights in any way over Land Parcel No. Kabare/Nyangati/1061 or in any other part thereof pending the hearing and determination of this suit.
16. They stated that despite that express order, the Defendant/Respondent continued and continues to utilize the land in question and that it is clear therefore that the Defendant/Respondent is in contempt of this Honourable Court.
17. He stated that the defendant should be punished unless he fully complies with the orders and asks for apology from this Honourable Court.
18. On the issue of stay of execution, they stated that the court was clear in its judgment that the registration of the Defendant as proprietor of Land Parcel No. Kabare/Nyangati/440 on 26th February, 1972 was fraudulent, illegal, null and void.
19. They stated that the intended appeal is an exercise in futility and only meant to deny the Respondents the fruits of their hard earned judgment.
20. They stated that the order sought is an equitable relief which can only be granted to a party with clean hands and not the defendant who is in contempt of the orders issued by this Honourable Court on 16th January, 2019.
21. They submitted that by seeking orders of stay in this Court, the Defendant is asking the Court to sit on its own appeal as this Court has already pronounced itself on whether or not the applicant had a good title(s) to pass to third parties.
22. They submitted that the intended appeal shall be a waste of time and an academic exercise and urged the court to find that the Defendant is in contempt of the orders of this court issued on 16th January, 2019 and have him punished for the same

Analysis: -

23. I have considered the two applications, the rival affidavits and submissions as well as the applicable law.
24. I will first consider the application for stay of execution. The application has been brought under Section 42 Rule 6 of the [Civil Procedure Rules](#), 2010 which provides as follows-;

“ 42

- 6(1). No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.

(2) No order for stay of execution shall be made under subrule (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....”

25. From the above provision, the conditions an Applicant must prove for the grant of the orders sought are: -

- a. Substantial loss will result to applicant if stay is not granted; and
- b. Security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and
- c. The application has been brought without unreasonable delay.

26. On the issue of substantial loss, the Court in the case of [James Wangalwa & Another vs. Agnes Naliaka Cheseto](#) [2012] e KLR held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other 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 the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

27. From the foregoing, it is clear that substantial loss is loss that renders the appeal nugatory if the orders sought are not granted.

28. In this case, the Defendant stated that the orders issued by this court in the impugned judgment have far reaching implications in that the purchasers who are on the land and who were not heard during trial stand to lose their properties with a spiral effect of having him sued by those purchasers for compensation.

29. From his explanation, the defendant’s substantial loss is one based on likely claims by purchasers who were not heard and who occupy the suit land and who might sue him for compensation. The defendant has not provided names of the alleged purchasers occupying the suit land and why they did not seek to be joined as parties in this suit. In any case, the defendant has not been sued for now and his loss, if any, is speculative in nature. It is my considered view that the Defendant has not demonstrated that his appeal would be rendered nugatory if the orders of stay are not granted. I also find the defendant’s concern that there are third parties who will be affected by the execution of the decree is not prove



of substantial loss as their claim will be in monetary terms and nobody has said that the plaintiff is incapable of paying the same.

30. In any event, if the Defendant was aware all along that there were third parties in occupation of the suit land who were likely to be affected by the orders sought by the plaintiffs in this suit, he should have applied to have them on board.
31. He cannot now cry foul that purchasers in occupation of the suit land are likely to sue him which may cause him substantial loss. The loss referred by the defendant in my view is a loss that is not contemplated under order 42 Rule 6(2) of the *Civil Procedure Rules*.
32. It is trite that execution is the enforcement of a lawful decree or order of a court of competent jurisdiction. It seeks to give effect to a decree or order so that the party in whose favour the decree or order has been made can enjoy the fruits of such order and/or decree. They are not issued in futility. I find that the defendant has not established that he will suffer any substantial loss unless the orders sought are granted. Several decisions have been made by the superior courts putting into perspective this principle of substantial loss. In the case of *Kenya Shell Limited v Kibiru & Another* (1986) 410, Platt, Ag J.A 9as he then was) held-;

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Appellant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”.
33. In the same decision, Gachuhi Ag J.A (as he then was) also expressed himself at page 417 as follows-;

“It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the appellant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment”.
34. I agree with the principles for stay pending appeal set out in the above case. Applying these principles to this case, it is clear in my mind that the applicant/Appellant has not demonstrated how his intended appeal would be rendered nugatory unless the application is allowed. He has not even alleged that the respondents will not be in a position to refund him any monies he might pay to the alleged purchasers who are likely to take him to court, even though that is not a consideration for stay pending appeal. As the judge stated in the above decision, substantial loss is the cornerstone of both jurisdictions for granting a stay pending appeal.
35. As regards the other two ingredients, I have looked at the date the impugned judgment was delivered and when the current application was filed and find that the same was brought without unreasonable delay. I have also looked at paragraph 13 of the affidavit in support of this application and find that the appellant/applicant has deposed that is willing to provide security or meet any condition this court may require for the due performance of the decree as may ultimately be binding on him. However, I find that the two conditions are not sufficient to sustain an order for stay of execution unless the cornerstone test of substantial loss is met.



36. On the second application for contempt by the plaintiffs/respondents, the applicable law as regards contempt of court existing before the enactment of the *Contempt of Court Act*, 2016 which was subsequently declared unconstitutional was restated by the court of Appeal in the case of *Christine Wangari Evans & 11 Others* (2014) e KLR where the court observed that the English law on committal for contempt of court under Rule 81.4 of the *English Civil Procedure Rules*, which deals with breach of judgment, order or undertakings was applied by virtue of Section 5(1) of the *Judicature Act* which provided as follows-;

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts”

37. This Section 5(1) of the *Judicature Act* was repealed by section 38 of the *Contempt of Court Act*, 2016 and since the same has been declared invalid, the consequential effect in law is that it reverts to the original position before the purported enactment.

38. In order to succeed in in civil contempt proceedings, the Applicant must prove certain conditions as was held in numerous court decisions and writings. In the book titled “*Contempt in Modern Newzealand*” the learned Authors observed as follows-;

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that-;

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendants;
- b. The defendants had knowledge of or proper notice of the terms of the order;
- c. The defendant has acted in breach of the terms of the order; and
- d. The defendant’s conduct was deliberate”.

39. From the observation by the learned Authors which has been adopted in numerous decisions by the courts, it is clear that contempt of court proceedings are criminal in nature which has the effect of taking away the liberty of a person and the standard of proof required is therefore beyond reasonable doubt. Coming closer home, our courts have also rendered themselves on the threshold for contempt of court proceedings. In the case of *Stephen K Sang & another v Chebii Boiyo & another* [2021] e KLR, the court held: -

“A claimant must establish two things: one, knowledge and understanding of the existence and content of orders preventing certain conduct by the alleged contemnors; and two, that such contemnors wilfully acted contrary to these express Court instructions.”

40. Turning to the facts in this case, there is no prove that the defendant/contemnor was aware of the terms of the impugned order and/or was he served with the same as required in law. The Applicant has not filed an affidavit of service indicating that He actually served.

41. The Applicant has annexed copies of photographs stating that the defendant continued and continues to utilize the land in question. It has not been shown when, where and the person who took the said photographs. It is not also shown that the defendant is the one utilizing the land.



42. As to whether the Defendant wilfully acted contrary to the conditions in the Court order, my answer is in the negative. There is no iota of evidence showing that the defendant was served with the impugned judgment and that he wilfully and deliberately failed to comply with the same.
43. In view of my analysis and findings herein above, the conclusion becomes irresistible that the two applications for the defendant and the respondent dated 1st December, 2021 and 22nd December, 2021 respectively lack merit and both are hereby dismissed with each party to bear their own costs. It is so ordered.

RULING READ AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 27TH MAY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of;

1. Makura holding brief for Nduku Njuki for plaintiff
2. Wambui holding brief for Maina Kagio for Defendant
3. Kabuta - C/A.

