



REPUBLIC OF KENYA



**Mutiso & another v Gathuri & 5 others (Environment & Land Case 694 of 2013) [2022] KEELC 3036 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3036 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 694 OF 2013**

**EC CHERONO, J**

**MAY 27, 2022**

**BETWEEN**

**NATHAN MUNYAO MUTISO ..... 1<sup>ST</sup> PLAINTIFF**

**WAYUWA NGETI GACANGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SABAN SAID GATHURI ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS KARIUKI MARIRA ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KIRINYAGA ..... 3<sup>RD</sup> DEFENDANT**

**COUNTY COUNCIL OF KIRINYAGA ..... 4<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**MORRIS KARIUKI- ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

- 1 By a notice of motion dated December 14, 2021, the 2<sup>nd</sup> & 6<sup>th</sup> defendants/applicants moved this court seeking the following orders;
  - A. That the Honourable court be pleased to issue orders of stay of execution of its judgment and subsequent Decree given on December 3, 2021 pending the hearing and determination of an intended Appeal at the court of appeal at Nyeri against the entire judgment.
  - B. That the costs of this Application be provided for.
- 2 The application is supported by grounds apparent on the face of the said application and the affidavit of Morris Kariuki sworn the same date. The application is opposed with a replying affidavit by Nathan Munyao Mutio sworn on 10/01/2022. The plaintiffs in addition to the replying affidavit filed grounds



of opposition in to the application. When the said application came up for hearing 31/12/2021, the parties agreed to canvass the same by written submissions.

### **2<sup>nd</sup> and 6<sup>th</sup> Defendants/applicants Case & Submissions**

- 3 The 6<sup>th</sup> defendant/ applicant through his affidavit in support of the application deposed that they were aggrieved by the judgment of this court delivered on 3/12/2021 and have preferred an appeal to the Court of Appeal at Nyeri. He stated that his Lawyers have lodged a Notice of Appeal and applied for certified copies of proceedings. He stated that the suit land parcel No. Kirinyaga/Gathigiriri/303 is the only land he intended to settle with his family and the only inheritance he has received from his aged Father, the 2<sup>nd</sup> defendant herein.
- 4 The Applicant further deposed that unless the application is allowed, he will suffer substantial loss in that his entire proprietary rights over the suit land will be extinguished
- 5 He argued that his intended appeal has high chances of success and that he is ready and willing to deposit the logbook for his vehicle Registration No. KBA O93 Q Toyota Rav4 as security and to comply with any other reasonable conditions this honourable court may deem fit and just in granting the orders sought.
- 6 He stated that the plaintiffs/respondents shall not suffer any prejudice if the orders sought are granted and that the application has been made without undue delay.
- 7 Through the firm of Kiguru Kahigah & Company advocates, the 2<sup>nd</sup> & 6<sup>th</sup> defendants/applicants submitted that this honourable court has the requisite original and appellate jurisdiction to entertain the current application under order 42 rule 6(1) and 6(4) [CPR](#)
- 8 The applicants also submitted that the application before court is merited as the same meets the legal threshold required for stay pending appeal. On the first issue of substantial loss, the applicants submitted that they have demonstrated in their supporting affidavit that that unless the application is allowed, the 6<sup>th</sup> defendant will suffer substantial loss in that his entire suit land and proprietary interests over land parcel No. KirinyagalGathigiriri/303 which is the only parcel of land registered in his name shall be extinguished.

### **The Plaintiff's/respondent's Case and Submissions**

- 9 The plaintiff in his replying affidavit stated that the application is an afterthought meant to delay this case further and to deny him enjoyment of the fruits of his judgment.
- 10 The plaintiff/respondent further deposed that the applicant has not met the threshold for the grant of stay orders and that the application should be dismissed with costs.
- 11 The plaintiff through the firm of Osoro Juma & Company Advocates submitted that the application is a non-starter as nothing has been placed before the court to show that the proposed appeal is arguable with high chances of success. He submitted that the court is functus officio having already determined the suit. He argued that the applicants are better of filing the application before the appellate court

### **Analysis and Decision**

- 12 I have considered the affidavit evidence, both in support and in opposition to the application. I have also considered the rival submissions by counsels for both parties as well as the applicable law. Order 42 rule 6(2) [CPR](#) which is the applicable law provides as follows-;



- (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”.

13 The law sets out three conditions that an applicant must satisfy before an application for stay pending appeal can be granted as follows-; that the application has been brought without unreasonable delay, that he will suffer substantial loss and finally provide security for the due performance of such decree as may ultimately be binding on him.

14 On the first ground, the applicant has stated that the suit land is his only parcel of land where he intended to settle together with his family and the only inheritance he has received from his aged father. Substantial loss in its various forms has to do with the essentials of something, real and tangible rather than imaginary. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) e KLR Gikonyo J. held as follows

“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 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 *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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstain v Chesoni* (2002) 1 KLR 867.----- the issue of substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15 I agree with the observation by the learned judge in the above decision. It is trite that an applicant seeking stay of execution must establish that his appeal will be rendered nugatory unless the stay orders are granted.

16 In this application before me, the applicant has simply stated that the suit land which is the subject of the intended appeal is his only parcel of land where he intended to settle together with his family and the only inheritance he received from his father. Those reasons in my view cannot be sufficient grounds to prevent the respondent who has been declared and decreed as the owner from enjoying the fruits of his judgment. The applicant has not alleged that the respondent will sell or alienate the suit property if the orders sought are not granted. That is the only loss that would render the appeal nugatory. It is the only reason the courts must prevent so that an applicant/appellant who ultimately succeeds in appeal may not reap an empty judgment

17 It is also important to note that while considering the applicant’s undoubted right of appeal which is yet to crystallize, the court should not turn a blind eye to the rights of the respondent who is a



successful litigant from enjoying the fruits of his judgment which has crystallized. In this case, I find that the applicant has failed to show any substantial loss he will suffer if the application is not allowed. I therefore find no reason to deny the plaintiff/respondent the fruits of his judgment.

19 The upshot of my finding is that the notice of motion dated December 14, 2021 lacks merit and the same is dismissed with costs. It is so ordered.

**RULING READ AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 27<sup>TH</sup> MAY, 2022.**

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of -;

Mr Macharia Wambui H/B for C.S Macharia fo the I/P

M/S Wambui H/B for Osoro Juma for plaintiff

Mr Makura H/B for Kahigah for the 2<sup>nd</sup> and 6<sup>th</sup> defendants.

Kabuta – Court clerk.

