



**Mwania & 3 others v Kitenye (Environment and Land Appeal
E005 of 2021) [2022] KEELC 2408 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E005 OF 2021**

A NYUKURI, J

MAY 11, 2022

BETWEEN

NZIOKA MWANIA 1ST APPLICANT

MASIKA MWANIA 2ND APPLICANT

MUSYOKI NGUI 3RD APPLICANT

SIMON NGUI NDAMBUKI 4TH APPLICANT

AND

BENSON MUTUKU KITENYE RESPONDENT

RULING

Introduction

1. Vide an application dated July 7, 2021, the appellants/applicants sought the following orders;
 - a. Spent
 - b. Spent
 - c. An order of stay of execution and all consequential proceedings do issue with regard to the judgment and decree of this trial court rendered on February 3, 2021 at the ELC Court at Machakos.
 - d. Costs be provided for.
2. The application is supported by the annexed affidavit of the 1st applicant sworn on July 7, 2021, where he deposed that the appellants were aggrieved with the decision of the trial court made on February 3, 2021 which prompted this appeal; that he applied for a stay in the trial court which application was dismissed; that this court has power to stay execution of judgment pending appeal; that he is ready



to furnish security for costs as the court may deem fit; that the respondents have begun the execution process by causing the applicants' assets to be proclaimed; that unless the orders sought are granted, the application may be overtaken by events and that the appeal raises arguable grounds.

3. The application is opposed. The respondent filed a replying affidavit sworn on September 21, 2021 and filed on September 27, 2021. He averred that the applicants had filed a similar application in the lower court which was dismissed for being unmeritorious; that the execution process had commenced; that the appeal herein does not raise triable issues; that the appellants have refused to comply with the lower court decision; that the applicants have not met the threshold for grant of stay pending appeal; that the applicants have not demonstrated that they will suffer substantial loss; that the respondent is entitled to fruits of the judgment; that the application is meant to delay justice and that the application is an abuse of the court process.
4. The application was canvassed by written submissions. The applicants filed their submissions on November 11, 2021 while the respondent filed his submissions on November 18, 2021. I have had opportunity to read the submissions and have taken into consideration the respective parties' positions on the issues addressed therein.

Analysis and Determination

5. I have considered the application, the replying affidavit and submissions filed by both parties. The sole issue that arise for determination is whether the Applicants have met the threshold for grant of stay pending appeal.
6. Order 42 Rule 6 of the *Civil procedure Rules* provide as follows;
 1. 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 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 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.
7. It is therefore clear that under Order 42 Rule 6 of the *Civil Procedure Rules*, even where the trial court has rejected to grant an order of stay, this court has discretion to grant the stay orders where the Applicant demonstrates sufficient cause. It is upon the applicants to show that they stand to suffer substantial loss unless stay pending appeal is granted. This was reiterated in the case of *Halai & another v Thornton & Turpin (1963) Ltd* [1999] eKLR where the Court of Appeal held that;

Before the Superior Court can exercise its discretion in favour of an applicant for a stay of execution, the applicant must first establish a sufficient cause....

Thus, the Superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a



refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.

8. In the instant application, the 1st applicant deposed that the execution process had begun and that his property has been proclaimed. He also contended that this court has discretion to grant the orders of stay. The Applicants have however neither stated that they stand to suffer substantial loss, nor have they demonstrated by way of evidence that they stand to suffer substantial loss if stay is declined. To show the existence of substantial loss, the court in the case of *Halai & another v Thornton & Turpin* (*supra*) stated as follows;

Firstly, that substantial loss may result to the applicant unless the application is granted, which prima facie means that if the appeal succeeds, the Respondent would not be in a position to make full restitution.

9. In my view, the commencement of the execution process alone is not sufficient proof that the applicants shall suffer substantial loss, that they cannot be restituted in the event their appeal succeeds. I am not satisfied that the applicants stand to suffer substantial loss if stay is not granted in the circumstances of this case and I therefore agree with the plaintiff's submissions that the applicants have not met the threshold for grant of stay pending appeal.

10. In the premises, the application dated July 7, 2021 lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Wayua holding brief for Mr. Uvyu for the Respondent

No appearance for the Applicants

Ms Josephine Misigo – Court Assistant

