



REPUBLIC OF KENYA



**Mwari & 3 others v Mangi & another (Environment and Land Appeal  
E5 of 2020) [2022] KEELC 2797 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2797 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E5 OF 2020**

**JO OLOLA, J  
JUNE 30, 2022**

**BETWEEN**

**JACKSON MANGI MWERI ..... 1<sup>ST</sup> APPELLANT  
ALFRED BAYA YAA (SUING AS ADMINISTRATORS OF THE ESTATE OF  
MWERI MANGI KITUNGA) ..... 2<sup>ND</sup> APPELLANT  
EDWARD KAINGU BAYA ..... 3<sup>RD</sup> APPELLANT  
ELIJAH BAYA MWARO (SUING AS ADMINISTRATORS OF THE ESTATE OF  
CHARO YAA BAYA) ..... 4<sup>TH</sup> APPELLANT**

**AND**

**DICKSON MANGI ..... 1<sup>ST</sup> RESPONDENT  
KAINGU BAYA KITUNGA ..... 2<sup>ND</sup> RESPONDENT**

***(Originating from ruling of the honourable JM Kituku Senior Principal Magistrate  
as delivered on November 25, 2020 in Kilifi SPM ELC Case No 70 of 2020)***

**RULING**

1. By the notice of motion dated January 28, 2021, the appellants pray for orders:
  1. That pending the hearing and determination of this appeal, this honourable court be pleased to stay execution of the ruling delivered on November 25, 2020 together with all consequential orders;
  2. That pending the hearing and determination of this appeal, this honourable court be pleased to restore the *status quo ante* prior to orders given by honourable Senior Principal Magistrate - Kituku on the August 24, 2020 at Kilifi in Civil Case No 70 of 2020; and



3. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn by the 1<sup>st</sup> appellant – Jackson Mangi Mweri and is based on the grounds *inter alia*:
  - (i) That this court’s ruling of November 25, 2020 allowed the respondents to continue with the mining activities on the suit property hence rendering the property and the suit nugatory;
  - (ii) That the appellants being aggrieved with the said ruling have preferred an appeal against the same;
  - (iii) That the intended appeal is arguable and has high chances of success and the appellants consider that the preservation of the suit property is vital so as to protect the shares of the deceased proprietors;
  - (iv) That the appellants stand to suffer great loss and damage as the respondents are continuing with mining activities;
  - (v) That article 50(2) read in *pari pasu* with article 159 of the Constitution vest the kenyan courts with administrative powers to hear parties on merit without applying technicalities; and
  - (vi) That it is in the interest of justice that the prayers sought be granted *ex debito justitiae* as the appellants will suffer great loss and damage and their right to a fair trial shall stand infringed if the same are denied.
3. The application is opposed. In a replying affidavit sworn by Dickson Mangi (the 1<sup>st</sup> respondent) on April 15, 2021, the respondents aver that the prayer for stay of execution has no basis as the lower court did not by the ruling delivered on November 25, 2020 confer on the respondents any rights that did not exist prior to the suit but merely upheld what existed at the time by declining to grant an injunction.
4. The respondents assert that the activities being carried out on the subject parcel of land are lawful and carried on with the blessings of the owners of the land which land is family and ancestral land. Tens of family members and their dependents rely on the suit property for their subsistence and any interference with the current use would have far reaching ramifications on the family members.
5. The respondents further aver that the trial court correctly and properly exercised its discretion in declining to grant the injunctive orders that had been sought by the appellants and the appeal now filed before this court has minimal prospects of success.
6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the learned Advocates representing the parties herein.
7. The appellants have urged this court to stay execution of the ruling of the honourable JM Kituku Senior Principal Magistrate as delivered on November 25, 2020 in Kilifi SPM ELC Case No 70 of 2020. They have also urged the court to restore the *status quo* as it existed prior to the issuance of the said orders. The appellants contend that unless the orders sought are granted, they stand to suffer irreparable loss and damage as the respondents continued to carry out quarrying and other activities on the parcel of land known as Kilifi/Sokoke/Magogo/1237.



8. From the material placed before me, it is apparent that *vide* an application dated August 21, 2020, the appellants had moved the lower court seeking *inter alia* an order of injunction to restrain the respondents from entering, cultivating, carrying out any quarrying works and/or in any other way dealing with the suit property.
9. In this ruling dated November 25, 2020, the learned trial Magistrate did find *inter alia* that the activities sought to be restrained started a long time back during the lifetime of the two proprietors of the land who are both now deceased and that the said proprietors had indeed authorized the activities that the appellants complained about. On that account the court dismissed the appellant's application.
10. In that respect, I cannot but agree with the respondent that the orders sought by the appellants herein are rather perplexing. I say so because under section 2 of the *Civil Procedure Act*, the definition of a decree holder alludes to an order that was capable of being executed. The refusal to grant an order of injunction did not in my view result in an order that was capable of being executed by the respondents. For a court of law to grant an order of stay of execution, it must be satisfied that there was sufficient cause to warrant the same.
11. For an order of stay of execution to lie, there must be a positive requirement therein which would or could be affected or tampered by the stay. Faced with a similar situation in *Western College of Arts and Applied Sciences v Oranga & Others* (1976 – 80) 1 KLR, the Court of Appeal for East African remarked as follows:
 

“But what is there to be executed under the judgment, the subject matter of the intended appeals? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a Church to make a payment out of that fund. In the instant case the High Court has not ordered 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 to stay.”
12. Similarly in the matter before me, there was nothing that the learned Magistrate has ordered anyone to do or to refrain from doing. All that the court did was to decline the appellant's request to issue orders of injunction against the respondents. The court's order was thus a negative one and was incapable of execution as even the costs awarded would have to abide the conclusion of the case.
13. Accordingly, it was clear to me that the application before me is misconceived and without any basis. The same is dismissed with costs to the respondents.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 30TH JUNE, 2022.**

**In the presence of:**

No appearance for the Appellants

No appearance for the Respondents

**Court assistant - Kendi**

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**J. O. Olola**

**JUDGE**

