



**Wamaitha (Suing as the Legal Representative as Litem of the Estate of Esther Wamaitha Mbugua (Deceased) v Chutha & 2 others; Family Bank (Third party) (Environment & Land Case 537 of 2008) [2022] KEELC 2812 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2812 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 537 OF 2008**

**JA MOGENI, J  
JUNE 29, 2022**

**BETWEEN**

**CATHERIN WANJERI WAMAITHA ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE AS LITEM OF THE ESTATE OF  
ESTHER WAMAITHA MBUGUA (DECEASED**

**AND**

**JOHNSON NG'ANG'A CHUTHA ..... 1<sup>ST</sup> DEFENDANT  
LAND REGISTRAR KIAMBU ..... 2<sup>ND</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**FAMILY BANK ..... THIRD PARTY**

**RULING**

1. The present ruling is in regard to an application by a way of Notice of motion dated 18<sup>th</sup> August 2020 and filed in this court on even date pursuant to Order 42 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010, sections 1A, 1B and 3A of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya. The 1<sup>st</sup> defendants (the applicants) through M/s Kosgei, Muriuki and Koome Company Advocates, are seeking orders infra: -
  - a. Spent
  - b. Spent



- c. That there be an order issued an order of stay of execution of the judgment and decree of Hon. Justice Mogeni delivered on 25/05/2022 and all consequential orders arising therefrom pending the hearing and determination of this intended Appeal
  - d. Costs of this application to be provided for.
2. The application is supported by the applicant's twelve (12) paragraph affidavit of Johnson Ng'ang'a Chutha 1<sup>st</sup> defendant and is based on the grounds that being dissatisfied with the judgment and decree aforesaid, he has filed this appeal and since the subject matter is land which he states that he bought in a public auction having satisfied all the requirements, made payments and the property having been transferred to the name of the deceased previous owner. The applicant contends that he has invested heavily in the suit property and is likely to suffer irreparable loss if execution is not stayed.
3. The application was opposed by the plaintiff through her advocates Kale, Maina and Bundotich Advocates by filing grounds of opposition where she states that the application lacks merit and has not met the threshold for grant of a stay. Further that the application is meant to deny the plaintiff enjoyment of the fruit of the judgment. She therefore termed the application as frivolous and an abuse of the court process. When the parties appeared before me on 13/06/2022 Ms Apolot for the 3<sup>rd</sup> Party stated that they will not be taking part in the proceedings of the application. Ms Ikonge holding brief for Ms. Mathenge opposed the oral application made by Mr Kosgei seeking to be granted Prayer 1 of the Notice of Motion. The parties were directed to canvass the application by way of written submissions.
4. I have considered the application, the rival affidavits and other annexures as well as the submissions by both counsels. The genesis of this application is that it was the Plaintiff's contention that at all material times to this suit the estate of Esther Wamaitha Mbugua (hereinafter referred to as "plaintiff" ) was and is the legal owner and proprietor of all that parcel of land known as Title Number Githunguri/Kanjai/993.
5. The plaintiff avers that she purchased the said suit premises from Kenya Commercial Bank Limited in the year 1988 pursuant to the said Bank's exercise of their statutory power sale wherein the plaintiff was declared the highest bidder and a sale contract entered into.
6. The plaintiff states that upon her registration as the proprietor of the suit property the then former owner Mr. James Njuguna Mira (deceased) filed a suit namely HCCC 2867 of 1988 against the plaintiff and Kenya Commercial Bank Limited and which suit abated in the year 2005 upon the demise of the said James Njuguna Mira (deceased).
7. The Plaintiff states that upon the abatement of the suit filed by James Njuguna Mira (deceased) the plaintiff commenced measures to take possession of the suit premises but established that certain persons unknown to the plaintiff had unlawfully trespassed upon the suit premises and purported to lay claim of ownership thereof.
8. It is her contention that with a view to verifying the claims of ownership and the identities of trespassers the plaintiff undertook an official search at Kiambu Lands Registry on 7/08/2007 and noted to her shock that one Johnson Ng'ang'a Chutha, the 1<sup>st</sup> defendant, had been purportedly registered as the proprietor of the suit property on 18/11/2004 and a title deed issued in his favour on 14/09/2005. The plaintiff moved to court on 30/10/2008 in ELC No. 537 of 2008 seeking declaratory order as the sole lawful registered owner and proprietor of Title Number Githunguri/Kanjai/993, an order of eviction and an order for cancellation of entries in the proprietorship section of the register of title number Githunguri/Kanjai/993. The Court found in her favour in a judgment delivered on 25/05/2022 giving rise to this application.



Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows: -

“No order for stay of execution shall be made under sub-rule 11) 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 un-reasonable 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”.

9. It is clear therefore that the power donated to the Court to grant stay of execution pending an appeal is a discretionary power and the same is available to the applicant who satisfies the Court that:-
  - a. Substantial loss may result to him unless the stay order is made.
  - b. The application has been made without reasonable delay, and
  - c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given.
10. This rule in (c) above is therefore dependent on whether or not the Court has granted the orders of stay of execution sought. If no order of stay is granted, there would be no purpose to be served by making such an order. However, it is important that in the supporting affidavit the applicant should state that he is ready and willing to abide by such orders as the Court may make on security as that is a requirement under Order 42 Rule 6 (2) of the Civil Procedure Rules. At paragraph 10 of the supporting affidavit, the applicant has deponed that he is willing to comply with any directions that the court may give with respect of stay orders. Nonetheless, as stated the inclusion of this statement is dependent on the court granting the orders of stay of execution pending appeal.
11. Has the applicant moved the Court without un-reasonable delay? The judgment subject of this application was delivered on 25/05/2022. On 3/06/2022, this hardly one week after the delivery of judgment. I therefore find that the applicant moved this Court without un-reasonable delay.
12. Has the applicant demonstrated that unless the order of stay is granted, he may otherwise suffer substantial loss? To justify the grant of an order of stay, the applicant must show or establish facts to satisfy the Court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant’s case as the successful party in the appeal – see Silverstein Vs Chesoni 20002 1 K.L.R 867 and also Mukuma Vs Abuoga 1988 K.L.R 645. In the Mukuma case (supra) the Court emphasized the centrality of substantial loss by stating that it is the cornerstone of the jurisdiction for stay since that is what has to be prevented. It is important to observe that under Order 42 Rule 6 (2) of the Civil Procedure Rules, it is not a requirement that the Court considers the merits or otherwise of the appeal. This Court cannot therefore look at the strength or otherwise of the applicant’s appeal as the law does not require it to do so. This Court must therefore only confine itself to whether or not the applicant has established that he will suffer substantial loss.



13. The Applicant has not demonstrated in clear terms the nature of substantial loss he is likely to suffer should execution of the decree herein proceed. All he has done is to merely state at paragraph 8 of the Supporting Affidavit:-

“The Respondent will suffer no prejudice in the event that the orders sought for in this case are granted whereas the Applicant stands to suffer irreparable harm in the event the orders sought are not granted”

14. The Applicant has not discharged the evidential burden of proof to show what the irreparable harm to him shall be. In the case of *Kenya Shell Ltd -Vs- Kibiru* [1986] KLR 416 it was held that: -

“It is usually a good rule to see if order 44 Rule 4 of the Civil Procedure Rules can be substituted. If there is no evidence of substantial loss to the applicant, it would be rare case when the 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.”

15. The applicant ought to have placed before the Court facts to show to the satisfaction of the Court that if no stay is granted, he will suffer a loss that is substantial. Bare pleading which does not demonstrate what substantial loss, if any, he will suffer if no stay is granted is not enough. The mere fact that land is concerned does not make any loss substantial. In his supporting affidavit, the applicant has deponed that he is the registered proprietor of the suit land which he bought in an auction. He states that he has heavily invested in the suit property by way of property development. On the material placed before me, there is nothing to show what substantial loss the applicant will suffer if stay of execution is not granted. The applicant has therefore not satisfied the requirements of Order 42 Rule 6 (2) of the *Civil Procedure Rules* to warrant the grant of stay.

16. In the circumstances, the applicant’s Notice of Motion dated 3/06/2022 is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JUNE 2022**

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**MOGENI J**

**JUDGE**

**In the presence of**

Ms Ikonge holding brief for Ms Mathenge for Plaintiff Respondent

Ms Apolot for 3rd Defendant

No appearance for 1st and 2nd Defendants

Vincent Owuor Court Assistant

