



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mudachi & others v Pwani Jezozhum Company Limited; Njiru & 6 others (Interested Parties) (Civil Suit 383 of 2009) [2022] KEELC 2922 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2922 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 383 OF 2009**

**M SILA, J  
JUNE 16, 2022**

**BETWEEN**

**KABU MUMBA MUDACHI & OTHERS ..... APPLICANT**

**AND**

**PWANI JEZOZHUM COMPANY LIMITED ..... RESPONDENT**

**AND**

**OBED ELIPHAS NJIRU & 6 OTHERS ..... INTERESTED PARTY**

**RULING**

(Application for stay of execution pending appeal ; applicants having filed suit for adverse possession for a title which the court found does not exist and the suit was dismissed; applicants filing a notice of appeal and now seeking stay of execution; Court not persuaded that there is anything to stay as all the court did was to dismiss the suit; application dismissed)

1. The application before me is that dated 22 November 2021 filed by the plaintiffs. The principal order sought is stay of execution of the judgment delivered on 10 November 2021 pending appeal to the Court of Appeal. The application is opposed.
2. To put matters into context, the applicants commenced this suit through an Originating Summons vide which they claimed to have acquired title by way of adverse possession to the land described as Subdivision No. 830/II/MN (Original No. 155/II/MN) measuring 350 acres or thereabouts. The suit was opposed by the respondent who inter alia contended that the land as described no longer exists as it has been subdivided. I heard the case and I dismissed the suit of the applicants. The core reason why I dismissed the suit is that I was persuaded that the land claimed, that is Subdivision No. 830/II/MN, no longer exists, as it has been subdivided into the titles Kisauni/Kisauni Block 1 -159. Aggrieved, the applicants have filed a Notice of Appeal and now seek stay pending appeal.



3. The supporting affidavit is sworn by Kabu Mumba Mudachi. He avers that they have an arguable appeal with a high probability of success. He deposes that the applicants are reasonably apprehensive that if the respondent proceeds with execution, the intended appeal will be rendered nugatory and they will suffer loss and damage. He believes that no prejudice will be caused to the respondent if the orders sought are granted.
4. The application is opposed by the respondent who filed Grounds of Opposition and an affidavit sworn by Joseph Mwaniki Gitau who is counsel on record for the respondent. The interested parties have also opposed the application through an affidavit sworn by Abdalla Ashur Abeid. In the grounds of opposition, it is claimed inter alia that a negative order is incapable of execution which cannot be stayed save for costs. It is also averred that the applicants have not demonstrated substantial loss and have offered no security. It is also stated that the title was subdivided into several plots and that one cannot be declared owner of a title that does not exist. It is added that the subdivided portions belong to numerous other parties who are not subject to the suit or the intended appeal. There are also grounds that the notice of appeal was served late and that the applicants are guilty of laches. In his affidavit, Mr. Gitau has deposed that it was on 7 December 2021 that he received via email, the notice of appeal which was sent together with the subject application.
5. In the replying affidavit of Mr. Ashur, he has deposed inter alia that the applicants have no arguable appeal and they only intend to delay the fruits of the judgment to the necessary parties. It is stated that from the judgment there is nothing to execute against the applicants. It is added that the applicants have not demonstrated any loss that they will suffer and have offered no security.
6. I directed that the application be canvassed by way of written submissions and I have taken into consideration the submissions filed together with the authorities tendered.
7. I am aware that there is an issue raised that the notice of appeal was filed and served late. I opt not to dwell on those procedural technicalities because I think that this application fails on substantial grounds.
8. The applicants presented a claim for the land parcel Subdivision No. 830/II/MN (Original No. 155/II/MN) measuring 350 acres. My finding was that this title does not exist as it was subdivided into several smaller plots with titles. I held that one cannot claim adverse possession to a title that does not exist. I proceeded to dismiss the applicants' case on that basis. There was no counterclaim or countersuit filed by the respondent or necessary parties that was ever presented. It follows that all that this court did was to dismiss the applicants' suit and made no order in favour of the respondent or interested parties that they can proceed to execute, save probably for costs. If there is nothing to execute, then there is no basis upon which one can ask for a stay of execution, because you are asking the court to stop what does not exist in the first place. The applicants have not demonstrated to me what it is that requires to be stayed. The dismissal is a negative order that cannot be stayed. This position was upheld in the case of *Western College of Arts & Applied Sciences vs Oranga & Others* (1976) KLR 63 which was one of the authorities referred to me by Mr. Gitau, learned counsel for the respondent. I have pored through the submissions of Mr. Hayanga, learned counsel for the applicants, and I am afraid that he has not managed to upstage the authorities on this point presented by Mr. Gitau. I think where a court has simply made an order dismissing suit, an applicant seeking stay, in such circumstance, needs to be very specific on what exactly he wants stayed, otherwise such application will be dismissed for seeking to stay a negative order.
9. In the subject case, I reiterate that all this court did was dismiss the applicants' case. I am not told what action it is that is sought to be stayed. In fact, there is no order that can be executed that I need to stay. If it is costs, I am not persuaded to stay the order for costs.



10. I therefore find no merit in this application and it is hereby dismissed with costs.

11. Orders accordingly.

**DATED AND DELIVERED THIS 16 DAY OF JUNE 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

