



**Gakuru & 4 others v Muhindi (Environment and Land Appeal
E042 of 2021) [2022] KEELC 3456 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E042 OF 2021**

**JO OLOLA, J
JULY 28, 2022**

BETWEEN

**ESTHER MUTHONI GAKURU 1ST APPLICANT
GERALD MWANGI GAKURU 2ND APPLICANT
BEATRICE WAIRIMU GAKURU 3RD APPLICANT
DANIEL MAINA GAKURU 4TH APPLICANT
MARY M KIOKO WERU 5TH APPLICANT**

AND

MARY WANJIKU MUHINDI RESPONDENT

*(Originating from Karatina Principal Magistrate's
Court ELC Case No 10 of 2018 dated 14th October, 2021)*

RULING

1. By the notice of motion dated October 27, 2021 as filed herein on November 4, 2021, the five (5) appellants herein pray for an order of stay of execution of the judgment and decree of the Karatina Principal Magistrate's Court ELC Case No 10 of 2018 dated October 14, 2021 pending the hearing and determination of the appeal.
2. The application is supported by an affidavit sworn by the 1st appellant – Esther Muthoni Gakuru and is premised on the grounds:
 - (a) That the appellants have a very good appeal with very high chances of success;
 - (b) That the appellants are likely to suffer irreparable loss which cannot be compensated by damages;



- (c) That the appellants are likely to be declared destitute/vagabond should execution proceed;
 - (d) That the court has ordered that the appellants vacate within 90 days of the judgment;
 - (e) That the 1st appellant's husband who is also the father of the 2nd to 5th appellants is buried in one of the suit properties;
 - (f) That the 5th appellant's husband is buried in one of the suit properties; and
 - (g) That it is in the interest of justice that the application be allowed as the respondent will suffer no prejudice.
3. The application is opposed. In her replying affidavit sworn on November 19, 2021 as filed herein on November 23, 2021, Mary Wanjiku Muhindi (the respondent) avers that the application has not met the threshold for the grant of the orders of stay of execution. The respondent avers that the 1st appellant illegally buried her husband on land parcel No Magutu/Gatei/1587 on April 22, 2016 when the matter was pending hearing and determination of the ownership of the land.
 4. The respondent asserts that she will be greatly prejudiced as she has been unable to utilize her parcels of land since 2015 as the appellants took illegal possession thereof after the death of the 1st defendant.
 5. The respondent further avers that the appeal has no chances of success as the same is based on facts that were well canvassed and considered in the judgment of the lower court. It is further her case that this is an old matter and that she should be allowed to enjoy the fruits of her judgment.
 6. I have perused and considered the appellants' application as well as the response thereto by the sole respondent. I have similarly perused and considered the rival submissions placed before me by the learned advocates acting for the parties.
 7. The appellants herein crave a stay of execution of the orders issued on October 14, 2021 by the Honourable A Mwangi, PM in Karatina PM ELC Case No 10 of 2018. By the Judgment delivered on the said date the learned magistrate did dismiss the appellants case against the respondent and ordered them to vacate the suit property. Aggrieved by the said orders, the appellants lodged a memorandum of appeal and instituted the application for stay of execution presently before me.
 8. In respect of an order for stay of execution, order 42 rule 6(2) of the [Civil Procedure Rules](#) provides thus:
 - “(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.”
 9. As was stated in [RWW vs EKW](#) (2019) eKLR:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.



Indeed to grant or refuse an application for stay of execution pending an appeal is discretionary. The court when granting the stay however, must balance the interest of the appellant with those of the respondent.”

10. Considering a similar situation in *Samvir Trustee Limited vs Guardian Bank Limited* (2007) eKLR, Warsame J (as he then was) expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be an overwhelming hindrance to the exercise of the discretionary powers of the court... The court in considering whether to grant or refuse an application for stay is empowered to see whether there exists any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss ...”

11. In the matter before me, the 1st appellant is the mother of the 2nd to the 5th appellants. Together they had by a plaint lodged herein sued one Patrick Gakuru Kinyua together with the present sole respondent seeking for an order that the Registrar of Titles Nyeri do cancel title deeds for Magutu/Gatei/1587 and Magutu/Gatei/1588 and that subsequently the same be partitioned into six equal portions for the family of the said Patrick Gakuru Kinyua who was sued as the 1st defendant. The plaintiffs also sought an order that the registration of the said 1st defendant as the owner of the two parcels of land was subject to an overriding interest of customary trust and that the plaintiffs had beneficial interest on the land.
12. The said 1st defendant Patrick Gakuru Kinyua was the husband to the 1st appellant herein and the father to the 2nd to 4th appellants. The 5th appellant was his daughter-in-law. The appellants had accused the 1st defendant of fraudulently selling the suit properties which were registered in his name to the 2nd defendant (the sole respondent herein) without their knowledge and or consent.
13. The respondent denied the allegations of fraud and asserted that she was an innocent purchaser for value and that she had followed due process in acquiring the suit properties from the registered owner. She accused the appellants of recently invading the land, taking over the same forcefully and proceeding to bury the 1st defendant who had since passed away on the suit properties. By way of counter-claim, the respondent sought the eviction of the appellants from the suit properties as well as a permanent injunction restraining them from claiming interest in the suit lands.
14. Having heard both sides of the dispute, the learned Trial Magistrate found no merits in the appellants claim and gave orders as sought in the respondent’s counter-claim. By the present application, the appellants now contend that they have a very good appeal and that if evicted from the suit properties



- they stand to suffer irreparable loss as they have buried their husband and father on the land and that they have occupied and lived on the suit properties all their lives.
15. While they do not state when the 1st appellant's husband was buried on the suit property, it was clear that the said husband who is also sued as the 1st defendant herein passed away some 11 days after this suit was filed on April 16, 2016. It was also clear from the material placed before me that the 1st defendant was buried on land parcel No Magutu/Gatei/1587 on April 22, 2016 without the respondent's knowledge. An application by the respondent to have the body exhumed was held in abeyance to enable the hearing of the matter to be expedited.
 16. Given that the appellants buried the deceased on the disputed property during the existence of this suit, I am unable to see how they can now turn around and purport that his exhumation following a Judgment of a competent court to which they had subjected themselves to would lead to irreparable loss on their part.
 17. And while the appellants claim that they have always lived on the suit land ever since they were born, it is clear from the testimony of the 1st appellant as rendered in the lower court that that was not the case. The record captures the 1st appellant stating in court on August 19, 2021 that her husband had purchased land in Laikipia and that they were not staying in the suit lands when the husband passed away in 2016. She also admitted the properties were solely registered in her husband's name as at the time he sold them to the sole respondent herein.
 18. Arising from the foregoing, I was not persuaded that the appellants stand to suffer substantial loss unless the orders of stay are granted. As was stated in *Machira T/A Machira & Company Advocates vs East African Standard* (No 2) of 2002 KLR 63:
"To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principles of the exercise of judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."
 19. In the matter herein it is apparent that the respondent had bought the suit properties from the registered proprietor in September, 2015. Since then she has been prevented from making use of her investment by the appellants who claim that they had some beneficial interest in the land. In the circumstances herein it is clear to me that it is the respondent who has suffered and continues to suffer substantial loss.
 20. It follows that I am not persuaded that there is any basis to grant a stay of execution herein. The motion dated October 27, 2021 is accordingly dismissed with costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF JULY, 2022.

In the presence of:

No appearance for the Applicant

No appearance for the Respondent



Court assistant - Kendi

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J. O. OLOLA

JUDGE

