



Wachira & another (Suing as Administrators and Legal Representatives of the Estate of Philip Wachira Koigu - Deceased) v Kanja Wachira Koigu alias Thomas Kanja Wachira (Environment & Land Case 237 of 2014) [2022] KEELC 3537 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 237 OF 2014**

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

BETWEEN

SAMUEL KIMARU WACHIRA 1ST PLAINTIFF

RONALD KAHARU WACHIRA 2ND PLAINTIFF

**SUING AS ADMINISTRATORS AND LEGAL REPRESENTIVES OF THE
ESTATE OF PHILIP WACHIRA KOIGU - DECEASED**

AND

**KANJA WACHIRA KOIGU ALIAS THOMAS KANJA
WACHIRA DEFENDANT**

RULING

1. By the notice of motion dated and filed herein on November 2, 2021 Kanja Wachira Koigu alias Thomas Kanja Wachira (the Defendant) prays for orders:
2. That this Honourable Court be pleased to grant leave to the firm of M/S Raydon Mwangi & Associates Advocates to come on record for the Defendant in place of M/S H. K. Ndirangu Advocates after Judgment and decree have been passed;
3. ...
4. That there be a stay of execution of the Judgment/Decree issued herein on October 14, 2021 and any consequential orders therein pending the hearing and determination of the intended Appeal herein lodged; and
5. That the costs of this application do abide the outcome of the intended Appeal.



2. The application which is supported by an Affidavit sworn by the Defendant is premised on the grounds that:
 - (a) Judgment has already been entered in the matter;
 - (b) The Defendant has appointed M/S Raydon Mwangi & Associates Advocates to act for him in place of H. K. Ndirangu Advocates;
 - (c) The said Law Firm requires leave to come on record for Defendant herein post-Judgment;
 - (d) The Defendant has lodged an Appeal in the Court of Appeal against the Judgment and decree of this Court issued on October 14, 2021;
 - (e) The said Appeal has very high chances of success;
 - (f) The Appeal will be rendered nugatory if the Judgment and decree are not stayed;
 - (g) The Defendant will suffer substantial loss, damage, prejudice and injustice if the orders sought are not granted and his family shall be evicted from the suit land;
 - (h) The Defendant is ready to abide by any conditions as the Court may order;
 - (i) The Plaintiff will suffer no prejudice if the orders are granted;
 - (j) It is in the interest of justice that the application is allowed as prayed; and
 - (k) The application has been made without any delay whatsoever.
3. The application is opposed. In his Replying Affidavit sworn on November 12, 2021 and filed herein on November 16, 2021, Ronald Kaharu Wachira sued as the Administrator and Legal Representative of the Estate of the late Philip Wachira Koigu (the Plaintiff) denies that the Defendant's Appeal has high chances of success as the Defendant was unable to prove his nomination and ownership of the suit property.
4. The Plaintiff further denies that the Defendant has been disinherited and asserts that the Defendant is the intended owner of land parcel No. Mweiga/Gakanga/203 measuring approximately 3.2 acres which land was given to him by the deceased during his lifetime.
5. The Plaintiff avers that it is the Defendant who wants to fraudulently disinherit his 12 other siblings by trying to acquire 33 acres of land all to himself. He further avers that the Defendant will not be evicted from the suit land but shall instead be given his share of the unadministered suit property.
6. I have perused and considered the application as well as the response thereto. I have similarly perused and considered the rival submissions both written and oral as placed before me by the Learned Advocates representing the parties herein.
7. The Defendant herein in the first instance sought leave for his new Advocates to come on record in place of the Law Firm that represented him before Judgment was passed herein. That prayer was not opposed by either the previous Law Firm and/or the Plaintiff herein.
8. The substantive prayer then that remains for determination is whether or not the Defendant's application has met the threshold to warrant the grant of orders of stay of execution of the decree arising from the Judgment delivered herein on October 14, 2021.



9. The mandate to grant an order of stay of execution is given to this court under the provisions of order 42 rule 6 of the Civil Procedure Rules. The said order provides under Sub-rule (2) thereof as follows:

- “(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 has been given by the applicant.”

10. 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 so doing, the Court should weigh this right against that of the successful 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 appeal is discretionary. The Court when granting the stay however, must balance the interest of the Appellant with those of the Respondent.”

11. That being the case, this court is hereby called upon to balance the interests of both parties. From the material placed before me it was clear that Judgment was delivered herein on October 14, 2021 and that the Notice of Appeal was lodged some 10 days later on October 25, 2021. One week after lodging the Notice of Appeal, the Defendant filed the application before me and I had no doubt in my mind that the same had been brought without undue delay.

12. Again from the material placed before me it was not disputed that the Defendant has lived on and utilized the suit property for a period in excess of 30 years as at the time the Judgment herein was delivered. The Plaintiff as the Administrator of their deceased father’s estate has sought to have the suit land sub-divided amongst all the beneficiaries of the estate. The list of the said beneficiaries however does not include the Defendant/Applicant as it is contended that their father had given him a share of land elsewhere.

13. In the circumstances herein it was apparent to me that unless the orders of stay are granted, the Defendant’s title shall not only be cancelled but the suit property shall be sub-divided and issued to different individuals. In my view considerable time has lapsed whilst the property was in the hands of the Defendant and it is only fair that the property be preserved in its current status pending the hearing and determination of his appeal.

14. It follows that I am persuaded that there is merit in the Motion dated November 2, 2021. I allow the same in terms of Prayers 2 and 4 thereof.

15. The costs of the application shall abide the outcome of the Appeal.

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



In the presence of:

Mr. Mwangi for the Defendant/Applicant

No appearance for the Respondent

Court assistant - Kendi

J. O. OLOLA

JUDGE

