



REPUBLIC OF KENYA



**Mbithi & 3 others v Wambua (Environment and Land Appeal
E005 of 2022) [2022] KEELC 12707 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E005 OF 2022
CA OCHIENG, J
SEPTEMBER 29, 2022**

BETWEEN

**MERCY WAWIRA MBITHI 1ST APPELLANT
MARTIN KILONZO 2ND APPELLANT
MAKUNDI MBITHI 3RD APPELLANT
LAWRENCE MUSANGI 4TH APPELLANT**

AND

JOSPHAT WAMBUA RESPONDENT

(Being an Appeal from the Ruling of Kithimani Principal Magistrate's Court in Civil Case No. 293 of 2015 delivered on 16th February, 2022 by Hon. B.S. Khapoya -(PM))

RULING

1. What is before Court for determination is the Appellants' Notice of Motion Application dated the 14th March, 2022 brought pursuant to Sections 1A, 1B and 63 (c) and (e) of the [Civil Procedure Act](#) as well as Order 22 Rule 22 and Order 46 Rule 6 of the [Civil Procedure Rules](#). The Appellants' seek the following orders:
 - i) There be a temporary stay of execution of the Judgment, decree herein in Kithimani Pmcc Case No. 293 of 2015 pending the hearing of this Application.
 - ii) There be a temporary stay of execution of the Judgment, decree herein in Kithimani Pmcc Case No. 293 of 2015 pending the hearing and final determination of the Appeal.
 - iii) Costs be provided for.



2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 4th Appellant Lawrence Musangi who deposes that sometime in December 2015, they sued the Respondent for a permanent injunction over the suit land. He avers that thereafter in the month of January, the lower court dismissed their suit for want of prosecution causing them to instruct their advocates on record, to file an Application to set aside the dismissal order. He explains that the Application was heard before the subordinate court and Ruling was delivered on the 16th February, 2022 which Application was subsequently dismissed allowing execution to proceed. Further, upon being dissatisfied with the said decision, he initiated the Appeal. He avers that the Respondent had since descended upon the suit land and is committing wanton destruction of the vegetation thereon as well as harassing the Applicants and unless this Honourable Court orders an interim stay of the court's Decree including Ruling they stand to suffer irreparably as the Appeal will be rendered nugatory.
3. The Respondent opposed the Application by filing a Replying Affidavit where he deposes that the Appellants' Application is unmerited and the orders sought in the Application are untenable and cannot be sustained. Further, that the Appellants' Application herein appears as an unorthodox Application for a temporary injunction upon dismissal of a suit. He contends that the Applicants' personally attended court when the Application for dismissal of the suit for want of prosecution came up and were afforded time to respond to the said Application. He insists that he is the bona fide owner of the suit property and prayed that the Application dated the 4th March, 2022 be dismissed with costs. The Application was canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the instant notice of motion Application including the respective Affidavits and the Respondent's submissions, the only issue for determination is whether there should be a temporary stay of execution of the decree in Kithimani Pmcc Case No. 293 of 2015 pending the hearing and final determination of the Appeal.
The Appellants did not file written submissions.
5. The Respondent submitted that there existed no threat of execution and there was no Decree capable of being executed. He argued that the Appeal was frivolous and had very low chances of success and no substantial loss would be occasioned to the Applicants should the orders sought not be granted. Further, that it is in the interest of justice that litigation has to come to an end. He urged the court to dismiss the instant Application with costs and fix the Appeal for hearing on merit. To buttress his averments, he relied on the Ugandan Court of Appeal decision of Kyambogo University v Prof Isiaah Omolo Ndiege Civil Application No. 341 of 2013.
6. The legal provisions governing stay of execution pending Appeal are contained in Order 42 Rule 6(2) of the Civil Procedure Rules which stipulates thus:

“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.”
7. In the current scenario, the Appellants' suit was dismissed for want of prosecution on January 5, 2022 as they had failed to file a response to oppose the Respondent's Application seeking to dismiss the said suit. The Appellants filed an Application for stay of execution in the lower court which was again



dismissed on February 16, 2022. The Appellant being dissatisfied with the whole of the said Ruling filed a Memorandum of Appeal on the March 16, 2022. The Appellants' claim the learned Magistrate erred in dismissing their suit for want of prosecution as he misapplied the law. They contended that they stand to suffer irreparably as the Appeal will be rendered nugatory. The Respondent insists he is the bona fide owner of suit land.

8. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an Application for stay of execution pending Appeal held that the Court has discretionary power to grant it. Further, a stay must be granted so that an Appeal may not be rendered nugatory and Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
9. From a perusal of the proceedings in the lower court culminating in the dismissal of the suit for want of prosecution, I note the Appellants who are lay persons were acting in person and actually informed court that they did not know what to do. I note the Court simply proceeded to dismiss their suit for want of prosecution instead of providing guidance. Based on the facts before me while associating myself with the decisions I have cited, I am of the view that the Appellants have demonstrated what substantial loss they stand to suffer if the stay order was declined since they have been on the suit land. Further, it emerged in the Application where they sought for stay pending Appeal that the Respondent had commenced destroying vegetation on the suit land. It is my considered view that the Appellants' have a Constitutional right to be heard before a court or Tribunal in accordance with Article 50 of the *Constitution*.
10. In the circumstance, while relying on the legal provisions cited above and associating myself with the decisions quoted, I opine that since the Appellants' suit in the lower court had sought for an injunction to restrain the Respondent from interfering with the suit land, which suit was dismissed for want of prosecution, insofar as there is no positive order to be stayed pending Appeal, in order to protect the substratum of the Appeal, I will direct that the obtaining status quo be maintained where no party is allowed to interfere with another parties' occupation of the suit land.
11. It is against the foregoing that I find the Appellants' Notice of Motion Application dated the March 14, 2022 compromised.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

