



REPUBLIC OF KENYA



KENYA LAW
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**Muthoni & 3 others v Wagatwe (Environment and Land Appeal
14 of 2018) [2022] KEELC 15709 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 15709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 14 OF 2018
EC CHERONO, J
SEPTEMBER 23, 2022**

BETWEEN

**NAOMI MUTHONI 1ST APPELLANT
JANE WANJIRA MURIITHI 2ND APPELLANT
JAMES MURIITHI WANJIRA 3RD APPELLANT
DORCAS KARIMI WANJIRA 4TH APPELLANT**

AND

BEATRICE WAGATWE RESPONDENT

RULING

- 1 By a Notice of Motion dated June 9, 2022 the Applicants/Appellants are seeking the following orders:-
 - 1 (SPENT)
 2. That the Honourable Court do stay the Judgment/Decree of July 13, 2018 and any other orders issued thereafter in Senior Resident Magistrates' Court at Gichugu ELC 11 of 2018 pending the hearing and determination of this application.
 3. That the Honourable Court do stay the Judgment/Decree of July 13, 2018 and any other orders issued thereafter in Senior Resident Magistrates' Court at Gichugu ELC 11 of 2018 pending the hearing and determination of the appeal herein.
 4. That the costs of this application be provided.
- 2 The application is supported by the 2nd Applicant's affidavit sworn on even date and grounds shown on the face of the said application.



- 3 The said application is brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 1A, 1B and 3A of the *Civil Procedure Act* and all enabling provisions of the law. In her affidavit in support of the application, the 2nd Applicant stated that Judgment was entered in favour of the Respondents on July 3, 2018 and were dissatisfied with the whole Judgment and Decree of the learned trial Magistrate and preferred this appeal in exercise of their undoubted right of appeal.
- 4 The appellants further contend that the Respondent has threatened to execute the decree which may cause them substantial loss unless the orders sought are granted. The applicants further state that this appeal has been brought without unreasonable delay save for the closure of the courts during the Covid-19 pandemic and delay caused due to typing of proceedings. The applicants further argued that the intended appeal has high chances of success.
- 5 The applicants also stated that they had applied for stay of execution of the decree in the trial court but the same was rejected and that the respondent also made an application for execution of the decree which was allowed vide a ruling delivered on February 12, 2021 after which the respondent together with the area chief accompanied by police officers from Kianyaga Police Station and a surveyor visited the suit land on June 13, 2022 with the aim of executing the decree. In conclusion, the applicants stated that they are willing and ready to abide with any condition(s) that will be spelt out by this Honourable Court and that the respondent shall not be prejudiced in any way if the judgment and decree herein is stayed.
- 6 The application is opposed by the respondent who filed ground of opposition dated June 27, 2022 setting out four grounds as follows;
1. There has been inordinate and unexplained delay in filing of the application. Judgment was delivered on July 3, 2018. Appeal was filed on August 1, 2018. An application for stay of execution was dismissed by the trial court which court also issued orders for execution on February 12, 2021. Since then, the applicant took no further action, and the present application has been filed in court after over one year and four months from the date of issue of the orders of execution of the decree.
 2. The applicants seem to have been woken up from their deep slumber by the execution exercise on June 13, 2022.
 3. There can be no eviction since the appellants are among those to share the suit land.
 4. The application has no merits and should be dismissed with costs

Applicants Written Submissions

- 7 The applicants through the firm of Ngigi Gichoya & Co. Advocates submitted that the gravamen of the application is that the applicants are aggrieved with the judgment delivered on July 13, 2018 and have already filed the instant appeal being ELCA No 14 OF 2018. The appellants also submitted that the intended appeal is not frivolous and will be rendered nugatory if the decree is executed and that further proceedings should be stayed. The learned counsel submitted that the law governing the jurisdiction of this Court to grant a stay of execution pending appeal is found in Order 42 Rule 6(1) and (2) CPR which provides that this Court's jurisdiction to grant a stay of execution pending appeal is fettered by the following conditions;
- i. The applicant must establish sufficient cause
 - ii. The applicant must satisfy the court that substantial loss may result if stay is not granted



- iii. The applicant must give such security as the court may order for the due performance of such decree as may be binding on him.
 - iv. The application must be made without unreasonable delay.
- 8 The learned counsel cited the following cases in support of the application; *Ndege Kabibi Kimanga & Another V Karinga Gaciana & 12 Others* - Elc Case No. 220 Of 2013 (kerugoya), *Kenya Shell Ltd V Kibiru & Another* (1986) KLR.
- 9 In conclusion, the learned counsel argued that the applicants have satisfied the conditions for the grant of the application as set out under Order 42 Rule 6 CPR.

Respondent's Written Submissions

- 10 The Respondent through the firm of Maina Kagio & Co Advocates submitted that the applicants have failed to disclose that the land in question is a family and that the trial court directed that the 3 sisters being the 2nd appellant, the respondent and Jerusha Njoki Kinyua to share the suit land equally and that the 1st Appellant who was their mother who has since passed on while the 3rd and 4th Appellants are the 2nd Appellants children.
- 11 The respondents further submitted that the applicants have not stated how they will lose their livelihood yet they are entitled to get 1/3 share of the suit land.
- 12 On the issue of whether the application has been brought without undue delay, the respondent submitted that there is no justification why the applicants had to wait until execution process takes place to file this application. He cited the case of *Jaber Mobsea Ali & Another v Priscillah Boit & Another* ELC Case No 200 OF 2012 (2014) eKLR.
- 13 The respondent further submitted that the impugned judgment was delivered on July 3, 2018 and the applicant took no action until she filed an application for execution in the year 2020 that they filed the present application for stay. The respondent also submitted that the applicants' averment that the delay in filing the application was occasioned by the closure of the courts during the Covid-19 pandemic period cannot be true as the courts have never been closed, only that the operations were scaled and that nothing prevented the applicants from filing the present application.
- 14 The respondent also averred that on the issue that there was lack of finance to adequately pay the legal fees, the documents annexed to the applicants' supporting affidavit shows that all the court documents in the trial court and in this appellate court were filed through an advocate and that there is no evidence of lack of Finance such as a notice to Act in person or an application. In conclusion, the respondent submitted that a successful party should not be denied enjoyment of fruits of the judgment unless there are compelling reasons in compliance with Order 42 Rule 6 CPR. She submitted that the applicants have miserably failed the test to grant the application would mean that the respondent and her sister are kept out of their family land.

Legal Analysis And Decision

- 15 I have considered with anxious care the Notice of motion brought under certificate of urgency dated July 9, 2022, the supporting affidavit of Jane Wanjira Muriithi, the annexures thereto and the submissions by their counsel. I have also considered the grounds of opposition and rival submission by the firm of Maina Kagio & Co Advocates as well as the applicable law. Order 42 Rule 6 (2) CPR which is the applicable law provides as follows;

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.
- 16 The law sets out three conditions a court must be satisfied before granting an order for stay pending appeal. First, an application for stay must be made without unreasonable delay. Unreasonable delay depends on the circumstance of each case. In this case, the impugned judgment was delivered by the trial court on July 13, 2018 and this application for stay was filed on June 9, 2022. The applicants took more than three years from the delivery of judgment to make the application.
- 17 As to whether there are reasonable explanations for the delay, the applicants in their supporting affidavit averred that after judgment was delivered, they made an application for stay before the trial court which was dismissed. The said application annexed to the supporting affidavit is dated October 27, 2020 and filed in court on October 29, 2020. The ruling was delivered by the trial court on February 12, 2021. Since then, the applicants did not take any action until the respondent made an application to execute the judgment/decree. The applicants in their supporting affidavit have admitted there is a delay in filing the application which they attributed to the closure of the courts during the covid-19 pandemic. To set the record straight, there was no closure of our courts during the covid-19 pandemic but court operations only scaled and the Chief Justice gazetted court operations in line with the ministry of Health guidelines. It is therefore erroneous and misleading to say that courts were closed during Covid 19 pandemic. The applicants have not also provided any empirical evidence that they lacked finance to pay legal fees to their advocates to file the application for stay. There is no letter instructing the lawyers file the application and a reply that they will not do so unless they are paid fees. In the absence of any reasonable explanation, I find the delay inordinate and inexcusable.
- 18 The second ground is whether the applicants will suffer substantial loss unless the application is granted. This is the cornerstone for an application for stay pending appeal. Substantial loss has been defined by the superior courts in numerous decisions to mean an action done to the subject matter of an appeal such that it would not be reversed by the appellate court should the appellant ultimately succeed. That action does not include execution of a judgment/decree which is a lawful process, unless the applicant in case of a liquidated decree can demonstrate that the decree holder is a man of straw and therefore unlikely to refund the decretal sum or in the case of unliquidated decree, that the decree holder is likely to dispose/alienate the same. The applicants in this case have not demonstrated how they would suffer substantial loss if the application is not allowed. In the case of *James Wangalwa & Another V Agnes Naliaka Cheseto* (2012) e KLR Gikonyo J held as follows:-

No doubt in law the fact that the process of execution has been put in motion or is likely to be put in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is not to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 Rule 6 CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni* (2002) 1 KLR 867.the issue of substantial loss is what has to be prevented by preserving the *status-quo* because such loss would render the appeal nugatory”.



- 19 I agree with the above decision in its entirety suffice to add that, a judgment/decreed of a court is meant to be executed to enable the judgment creditor/Decree holder enjoy the fruits of his judgment. The remedy of an aggrieved party in an impugned judgment lies elsewhere unless he can establish to the satisfaction of the court that the execution would create a state of affairs that will negate the very essential core of the applicant as the successful party in the intended appeal. The applicants have miserably failed to show how the appeal would be rendered nugatory, should the application not be granted.
- 20 Since the applicants have failed to establish the two conditions namely substantial loss and unreasonable delay which are essential ingredients for the grant of stay pending appeal, the court need not inquire whether security for the due performance has been given. In short, the applicants have not satisfied the conditions for the grant of stay pending appeal under Order 42 Rule 6 CPR. Consequently, the Notice of Motion application dated June 9, 2022 lacks merit and the same is hereby dismissed with costs to the respondent. Orders accordingly.

RULING READ, SIGNED AND DELIVERED VIA E-MAIL THIS 23RD SEPTEMBER, 2022.

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HON E C CHERONO

ELC JUDGE

