



**M’Laikuru v Kibwaa (Environment and Land Appeal E50 of 2022)
[2022] KEELC 4818 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4818 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E50 OF 2022
CK NZILI, J
SEPTEMBER 21, 2022**

BETWEEN

STANLEY KATHIORI M’LAIKURU APPELLANT

AND

KANGORIA KIBURI KIBWAA RESPONDENT

RULING

1. By an application dated September 9, 2022, the appellant seeks for stay of execution of the ruling or order made on September 8, 2022 by the trial court.
2. The application is supported by an affidavit sworn on September 9, 2022 by Stanley Kathiori M’Laikuru.
3. The grounds are that; the respondent has been trespassing into LR No. Tigania/Kiguchwa/2200 after which the appellant filed a suit in the lower court currently pending formal proof.
4. That a daughter of the respondent has passed on and is likely to be buried on the suit premises.
5. That the trial court relying on the evidence of the area chief declined to stop the intended burial. That should the burial proceed the appellant shall stand to suffer the irreparable loss and damage and the appeal rendered nugatory. The applicant has attached a copy of a title deed for the suit land, certificate of official search, request for interlocutory judgment, copy of the order issued on June 10, 2022 and the chief’s letters dated November 13, 2020 and June 9, 2022 as annexures marked SKM 1-4(b) respectively.
6. As to what amounts to substantial loss, the court has held it is not enough to state there will be substantial loss without demonstrating it with tangible and cogent evidence.



7. In *Machira t/a Machira & Co Advocates vs East Africa Standard* (2003) KLR 63 the court held that a party must prove specific details and particulars and where no pecuniary or tangible loss is shown to the satisfaction of the court, an order of stay will not be granted.
8. In *Charles Wabome Geth vs Angela Wairimu Gathi* Court of Appeal Civil Application No. Nai 302 of 2007, the court held it was not enough to allege one lives or reside on the land and that the applicant must go further and show the substantial loss that the applicant stands to suffer if the execution was to take place.
9. A party seeking for stay of execution pending an appeal has to demonstrate substantial loss or damage if the stay is not granted; that he has filed the application timeously and lastly security for the due satisfaction of the decree is provided should the appeal not succeed. The court must over and above the three conditions establish if it is in the interest of justice to grant the stay guided by Sections 1A, 1B of the *Civil Procedure Act* and Article 159 of *the Constitution*.
10. In *Halal & another vs Thorton & Turpin* (1963) Ltd (1990) eKLR the court held the applicant must not only meet the three conditions but must also demonstrate that the appeal will be rendered nugatory if the stay orders are not granted and that the two principles go hand in hand such that the failure to prove one dislodges the other.
11. In *Jason Ngumba Kagu & 2 others vs Intra Africa Assurance Co. Ltd* (2014) eKLR, the court held in arriving at what amounts to substantial loss, it is in the process of balancing an act between the right of a respondent to the fruits of judgment and that of the applicant to appeal and the prospects of the appeal succeeding.
12. In *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR, the court held substantial loss is what has to be prevented by preserving the status quo because such a loss would render an appeal nugatory.
13. In *Norah Adongo Onyango & another vs Jane Awino Onyango* (2018) eKLR the Court of Appeal held that interment of the body of the deceased does not prevent the appellant from proceeding with the appeal.
14. The court was simply saying that the burial of a deceased does not render an appeal nugatory and that the right to bury or the place to bury does not in any way make the appeal nugatory. See *Betty Atieno Ndumo vs Elvis Ndumo* (2022) eKLR.
15. In this application, the appellant admits that the respondent has been on the land for many years. The parties are also relatives. The person who has died is the daughter of the respondent.
16. The respondent appears to have a residence on the disputed land. The lower court matter is yet to be determined for the appellant to be entitled to an order declaring the respondent a trespasser.
17. In my considered view the fact that the appellant can apply for exhumation of the remains of the deceased if successful in his suit, makes his claim for irreparable loss and damage unsustainable.
18. In the circumstances and looking at the interest of justice, the court finds the application lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 21ST DAY OF SEPTEMBER, 2022

In presence of:



C/A: Kananu

Omari for applicant

HON. C.K. NZILI

ELC JUDGE

