



M'ikiburu v Kareia; Ikiburu & 3 others (Interested Parties) (Environment and Land Appeal E027 of 2022) [2022] KEELC 13737 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13737 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E027 OF 2022
CK YANO, J
OCTOBER 26, 2022**

BETWEEN

CHARLES KALIUNG M'IKIBURU APPELLANT

AND

MARY KAREA RESPONDENT

AND

TABITHA KAREMA IKIBURU INTERESTED PARTY

JOEL GITONGA IKUBURU INTERESTED PARTY

JAMES MUTURIA IKUBURU INTERESTED PARTY

CAREN KAGWIRIA INTERESTED PARTY

RULING

1. This ruling is in respect of the Notice of Motion dated June 13, 2022 in which the appellant/applicant is seeking for orders of stay of execution of a ruling in Maua Chief Magistrate Environment and Land Case No. E126 of 2021 pending the hearing and determination of the intended appeal.
2. The application is brought under Order 42 Rule 6 and Order 51 of the *Civil Procedure Rules*, Section 1, 1A, 3 and 3A of the [Civil Procedure Act](#) and is based on the following grounds:-
 - i. That the applicant is aggrieved by the trial court ruling delivered on May 18, 2022 in Maua Chief Magistrate ELC case No. E126 of 2021 by Hon. Principal Magistrate A.G Munene that allowed the consolidation of this matter and Maua Chief Magistrate ELC case No. E 082 of 2021 and has preferred an appeal against the whole ruling.
 - ii. That it is imperative that there is a stay issued against the execution of the orders and proceedings in the matter following the ruling so as not to render this appeal nugatory.



- iii. That the applicant's appeal has a very high chances of success owing to the issues of Law and facts raised challenging the ruling therein.
- iv. That there has been no delay in filing this appeal and application.
3. The application is supported by the affidavit of Charles Kaliunga M'Ikiburu, the applicant in which he has annexed copies of the plaint in Maua CM ELC case No. E 126 of 2021, Maua CM ELC case No. E 082 of 2021, a copy of the ruling delivered on May 18, 2021 in case No. E 126 of 2021 and a copy of the memorandum of appeal.
4. The applicant has deponed that he instituted Maua ELC case no. E 126 of 2021 against Mary Karema seeking for eviction and permanent injunction orders in respect of Land Parcel No. Amwathi/Maua/147"B" while in Maua CM ELC case no. E082 of 2021, Tabitha Karema Ikiburu and Joel Gitonga had sued the applicant seeking for a declaration order and a permanent injunction in regard to parcel No. AMWATHI/MAUA/147 "A". The applicant's contention is that the two matters are separate and distinct as they refer to very different suit properties and that the parties and their legal representatives are totally separate negating the need for consolidation. The applicant has also contended that the trial Magistrate allowed the consolidation without giving the legal reasoning behind the ruling nor giving directions as to which of the two matters would be the lead file, and failing to consider the applicant's submissions and the authorities relied on.
5. In opposing the application, Mary Karema Ikuburu, the respondent, filed replying affidavit sworn on July 4, 2022 and wherein she has deponed inter alia, that the application is frivolous, vexatious, scandalous and riddled with half-truths that are intended to mislead the court. She faulted the applicant for not being candid enough to inform this court that the application for consolidation was allowed because all the parties to the suit are children of the late M'Ikiburu M'Mwambia and that the dispute in both cases was whether the applicant and the 3rd interested party were allocated a share of Plot No. 147 Amwathi/Maua that initially belonged to their father to the exclusion of all other family members. That the ruling annexed to the applicant's affidavit in support of the application herein does not have page 2 in which the learned Magistrate outlines his reasoning on why he allowed the application for consolidation. The respondent has annexed a copy of the said complete ruling.
6. The respondent avers that their deceased father was the owner of plot No. 147 Maua/Amwathi which he subdivided amongst his children, the parties to this appeal. That the respondent together with the 1st and 2nd interested parties intend to call the same witnesses, their mother and siblings. That the applicant is opposed to the consolidation of the suits because he knows he will be exposed.
7. The respondent further contends that the appeal was filed out of time on June 6, 2022 and without leave of court, adding that the applicant stands to suffer no loss in the event the application is not allowed. The respondent concluded by stating that the application is fatally defective, does not satisfy the conditions set under Order 42 of the *Civil Procedure Rules*, and urged the court to dismiss it with costs.
8. The application is also opposed by Tabitha Karema Ikiburu, the 1st interested party herein by way of replying affidavit sworn by herself on July 5, 2022 in which she echoed the averments made by the respondent, adding that the appeal shall not be rendered nugatory if the stay sought is declined.
9. Pursuant to directions given by the courts and with the consent of the parties, the application was canvassed by way of written submissions. The applicant filed his submissions on July 15, 2022 through the firm of Mutembei and Kimathi advocates while the 1st interested party filed hers on August 16, 2022 through the firm of M.D Maranya & Co Advocates.



10. I have considered the application, the responses and the submissions filed by the parties to buttress their assertions as well as the authorities relied on. What calls for determination is whether the court should grant the order for stay of the ruling in Maua CMC Environment and Land case no. E 126 of 2021 pending the hearing and determination of the intended appeal.
11. Stay of execution pending appeal is a discretionary power bestowed upon the court by the law. In *Butt V Rent Restriction Tribunal* (1982) KLR 417, the Court of Appeal gave guidance on how a court should exercise the said discretion and held that-;
- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A 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.
 4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements...
 5. The court in exercising its powers under Order XLI Rule 4 (2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
12. Stay of execution is provided for under Order 42 Rule 6 of the *Civil Procedure Rules*. Sub Rule 1 gives the court discretionary power to stay execution and provides as follows-;
- “ 6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or Order appealed from except in so far as the court appealed from may order, but, the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may appeal to the appellate court to have such order set aside.
 - (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 undue 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”
13. As such for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.
14. As for the applicant having to suffer substantial loss, in the case of *Kenya Shell Limited V Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1958) KAR 108 the court of appeal pronounced itself thus-;
- “It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”
15. The applicant has a burden to show that he has met the three pre-requisites provided for under Order 42 Rule 6.
16. From the record, the ruling appealed against was made on May 18, 2022 and the application herein was filed on June 14, 2022. This was a period less than one month. In my opinion, the application was made without undue delay.
17. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the applicant, the court has already referred to the consideration to be made in the case of *Kenya Shell Limited (Supra)*
18. In this case, the applicant does not deny that the dispute arises from family property inherited from their father. The applicant’s desire is to pursue his claim separately, and thus the opposition to the consolidation of the two matters before the subordinate court. The applicant has however, not shown what substantial loss he would suffer and which would render the appeal nugatory unless stay is granted. In my view, I do not see how a mere consolidation can result in substantial loss as the trial court will still make a determination on each case.
19. In this case, I am not persuaded that the applicant has demonstrated that the appeal is arguable. He has also failed to demonstrate that the appeal would be rendered nugatory if the stay order is declined.
20. By reason of the foregoing, it is my finding and I so hold that the notice of motion dated June 13, 2022 has no merit. The same has failed to meet the threshold laid down in Order 42 Rule 6 of the *Civil Procedure Rules* and is hereby dismissed.
21. Considering that the parties herein are siblings, I order that each party bears their own costs.
22. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF OCTOBER 2022

In presence of

C.A Mwenda

Ms Asuma Holding brief for Mutembei for applicant



Njindo for respondent

No appearance for interested parties.

C.K YANO

ELC JUDGE

