



**Ndereba v Mbiwiwe & 5 others (Environment & Land Case 73 of 2011)
[2022] KEELC 15048 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15048 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 73 OF 2011
CK NZILI, J
NOVEMBER 23, 2022**

BETWEEN

FRANCIS MBAE NDEREBA PLAINTIFF

AND

STEPHEN MURITHI MBIJIWE 1ST DEFENDANT

FRANCIS KIRIMI MBIJIWE 2ND DEFENDANT

KIMATHI MBIJIWE 3RD DEFENDANT

JULIUS KIAMBI MBIJIWE 4TH DEFENDANT

MWITI MBIJIWE 5TH DEFENDANT

KINYUA MBIJIWE 6TH DEFENDANT

RULING

1. The defendants/applicants by an application dated August 23, 2022 pray for stay of execution of the judgment delivered on July 20, 2022 for 60 days pending hearing of the appeal.
2. The application is supported by an affidavit sworn by Stephen Muirithi Mbiwiwe on August 23, 2022.
3. The decree holder, the plaintiff/respondent opposed the application through his affidavit sworn on September 17, 2022 on the basis that the same was misconceived, an abuse of the court process given a stay of 30 days was initially granted and the applicants filed a similar application in the Court of Appeal at Nyeri now pending determination hence this was a delaying tactic to keep him away from the suit premises more than 14 years despite being a registered owner.
4. For a party to be entitled to stay of execution pending an appeal he has to demonstrate substantial loss, offer security for due realization of the decree, file the application timeously and demonstrate that it is in the interest of justice to be granted the orders.



5. In *Mucheru & 2 others vs Katiba Institute & 2 others* (Civil Appeal E373 of 2021) (2022) KECA 3 & 6 (KLR) (4th March 2022) Ruling, the Court of Appeal declined to grant a stay since the orders sought would have been in vain for what had already happened could not be arrested or undone and for the application having been brought too late in the day.
6. The applicants averred that the appeal would be rendered nugatory and or an academic exercise if the stay was not granted. The legal burden is on the applicants to prove the allegations of the appeal being rendered nugatory.
7. In *Butt vs Rent Restriction Tribunal* (1982) KLR 417, the court gave guidance on how to exercise discretion to stay a decree especially if there are special circumstances of the case and unique requirements of the situation have been demonstrated to the satisfaction of the court. It is not enough to merely state substantial loss without a demonstration of it. See *Kinyanjuri Muguta vs Wotaka Muguta* (2018) eKLR.
8. In *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR, the court held that an execution was a legal process and which by itself does not amount to substantial loss and an applicant has to establish other factors which show that the execution would 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.
9. The court has to balance the two competing rights of a successful party as opposed to that of an aggrieved party with a right of appeal. In *Gitahi & another vs Warugongo* (1988) eKLR, the court said it has the duty to preserve the rights of both parties pending the appeal and should not disadvantage the applicant while advantaging the respondent and therefore has to ring even handedly without prejudicing the pending appeal.
10. In this application, the applicant has not denied that there is a pending application for stay at the Court of Appeal filed on August 5, 2022 and which has been replied to by the respondents. The applicants did not disclose the said facts while filing this application on August 23, 2022. Faced with a similar scenario the Supreme Court in *George Boniface Mbugua vs Mohamed Jawayd Iqbal (Personal Representative of the Estate of the late Gbulam Rasool Jammohamed)* (2021) eKLR held that any remarks by the court would amount to premature comments on issues yet to be adjudicated by the other court.
11. In the premises, I find that having granted for stay of execution for 30 days on July 20, 2022 and which orders expired on August 20, 2022, without an extension of time, the court became *functus officio*. Therefore, the court would be prematurely determining on issues validly pending before the appellate court.
12. The application is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 23RD DAY OF NOVEMBER, 2022

In presence of:

C/A: Zamzam

No appearance

HON CK NZILI

ELC JUDGE

