



Gitonga & another v District Land Adjudication and Settlement Officer Igamba Ng’ombe Sub-County & 3 others; Riungu (Interested Party) (Environment and Land Miscellaneous Application E013 of 2022) [2022] KEELC 14660 (KLR) (9 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14660 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2022
CK YANO, J
NOVEMBER 9, 2022**

BETWEEN

FREDRICK GITONGA 1ST APPLICANT

M’NGERENI MATHAIYA 2ND APPLICANT

AND

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER IGAMBA
NG’OMBE SUB-COUNTY 1ST RESPONDENT**

DEPUTY COUNTY COMMISSIONER 2ND RESPONDENT

LAND REGISTRAR-MERU SOUTH 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

M’NYIRI RIUNGU INTERESTED PARTY

RULING

1. This is a ruling in respect of an application dated May 5, 2022 wherein the applicants seek for orders that the leave granted herein do operate as a stay of proceedings of Appeal to the minister case No 124 of 2018 delivered on April 1, 2022 and certified on April 13, 2022 by the Director of Land Adjudication.
2. The Applicants approached the court via Judicial Review against the decision of the minister delivered on April 1, 2022 and certified on April 13, 2022 seeking among other prayers an order for stay of proceedings in the above decision. Leave to apply for order of judicial review in the nature of certiorari and prohibition were granted on May 9, 2022, but the court directed that the issue for the leave granted to operate as stay be canvassed inter-partes.



3. The application is supported by the affidavit of Fredrick Gitonga, the Applicant sworn on May 5, 2022.
4. The application is opposed by the Respondent by way of grounds of opposition dated 2nd of June 2022 wherein they averred that the application is fatally defective, misconceived, and mischievous or otherwise an abuse of the court process and therefore are unsustainable in the obtaining circumstances. The respondents further averred that the application has failed to meet the threshold for grant of the orders of stay for the reasons that the Applicants have not established that they will suffer substantial loss unless an order for stay is granted, that the application has not been brought without unreasonable delay, and that the Applicants have not provided for costs.
5. The application was canvassed by way of written submissions. The Applicant submissions are dated the 12th of July, 2022 while the Respondent's submissions are dated July 8, 2022.

Applicants Submissions.

6. The Applicants submitted inter alia that it is trite law that before grant of orders for stay of execution of a decree or order, the Applicants are supposed to satisfy the requirement set under order 42 rule 6 (2). That generally, stay of execution is provided for under Order 42 Rule 6 of the [*Civil Procedure Rules*](#) and Sub-rule 1 gives the court discretionary powers to stay execution and provides as follows:
 - “ 6. 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 apply 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.
7. The Applicants submitted that the above provision states that the applicant must satisfy court that (a) substantial loss may result to the applicant unless the order is made (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
8. The Applicants relied on [*RWW v EKW \(2019\) eKLR*](#) to demonstrate the purpose of a stay of execution order pending hearing and determination of a suit.
9. The applicant relied further on the case of [*Butt v Rent Restriction Tribunal \(1982\)KLR 417*](#) wherein the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution.



10. The Applicants contend that the power of the court is discretionary and the discretion should be exercised in such a way as not to prevent justice. Secondly that 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 application may not be rendered nugatory should the court reverse the Judge's discretion. Thirdly, that 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.
11. The applicants submitted that for the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements. As for the applicants having to suffer substantial loss, the Applicants relied on the case of Kenya Shell Limited –v- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018 where the Court of Appeal pronounced itself to the effect that:

“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.”
12. The Applicants relied on the case of *Machira t/a Machira & Co Advocates v East African Standard (No2) (2002) eKLR 63* where the court decided that for an application for stay of proceedings, the Applicant must demonstrate in specific details and particulars, that:

“in this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars...where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay....”
13. The applicants submitted further that they have already demonstrated the substantial loss they are likely to suffer if no stay is ordered. They submitted that the Interested party has gone ahead to cut down trees, remove beehives as well as burn charcoal using the trees that he is clearing from parcel of land.
14. The Applicants submitted that if a stay of execution is not granted, the Judicial Review suit will be rendered nugatory and the loss suffered by the applicants will be irreversible. The applicants state that they seek to preserve the parcels of land 985 which includes parcels of land they have already acquired title deeds to and which they said they have attached copies of the same, that they have also planted trees, practiced bee keeping, farming as well as settled in the parcels of land since time immemorial.
15. The Applicants submitted that if the stay of execution is not granted, they will suffer substantial loss and if the execution of the minister's decision is carried out, it will render the suit nugatory.
16. The Applicants submitted that they filed the Judicial Review application as soon as they got the decision and that the Respondents ground of opposition that there was unreasonable delay is misconceived and a tactic to mislead the court.
17. The Applicants contend that the court has the power and discretion to allow stay of execution without requiring deposit of security for the due performance of the orders as set out in RWW V EKW.
18. The Applicants further contend that the issue of security is discretionary and it is upon the court to determine whether the same is necessary. They further submitted that it would be in the interest of justice for the Honorable court to hold that security under the circumstances should not be imposed.



19. The Applicants submitted that they have persuaded the court to find that the Applicants have met the required standards to be granted a stay of execution of the minister’s decision pending the hearing and determination of the Judicial Review suit, that the application was brought without unreasonable delay since the miscellaneous application for judicial review was brought under certificate of urgency in an attempt to persuade the court to grant a stay before the decision of the minister is implemented by the Interested Party and prayed for stay of execution be granted pending the hearing and determination of the Judicial Review suit.

Respondents’ Submissions

20. The respondents relied on the case of *Taib A. Taib v The Minister of Local Government & others* Mombasa, HCMISCA 158 OF 2006 where the court held that:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction...In judicial review applications the Court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

21. The respondent also relied on the case of *R v Capital Markets Authority ex parte Joseph Mumo Kivai & Another* (2012) eKLR where the court held that judicial review proceedings are public law proceedings for vindication of private rights and for this reason public interest is a relevant consideration in granting of stay orders. The respondents urged that courts should be cautious in granting leave to operate as stay where such an order is likely to interfere with internal business and competence of an arm of government in the delivery of service in the public good.
22. The respondents contend that from the statement of the Applicant the decision of the minister, which is not attached to the chamber summons Application, was delivered on 1st April 2022 and as such it is impossible to stay proceedings which have already been concluded. That such an order would interfere with the competence of the minister in conduct of his statutory duty to hear and determine appeals.
23. The respondents further contends that the Applicants have not demonstrated what substantial loss they will suffer unless stay is ordered. The Respondents relied on the case of *David Kipkoskei Kimeli v Titus Barmasai* [2019] eKLR where the Court stated that, “But I also find that the applicant has not established what kind of substantial loss he will suffer if the stay order is not granted. The court should also not sanction continued trespass. The fact that a party is in occupation and such occupation has been found to be illegal does not mean that is a ground to claim that there will be substantial loss suffered. A party must go a step further and establish the loss that they will suffer.



24. The respondents also cited the case of *Machira t/a Machira & Co. Advocates v. East African Standard (No 2) (2002) KLR 63*, in which it was held as follows;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

25. Similarly, the respondents relied on the case of *Peter Rugu Gikanga & another v Weston Gitonga & 10 others [2014] eKLR*, where the learned Judge Enyara Emukule reiterated as follows;

“It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority does not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In Charles Wahome Geth/ v. Angela WA/R/MU GETH/ (Court of Appeal Civil Application No NAI 302 of 2007 UR 205/2007), the Court of Appeal held -

... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them. “I find that the applicant has not met the threshold for grant of the orders of stay of execution.....”

26. The respondents submitted that the Applicants have not established with specific details and particulars what substantial loss they are likely to suffer in the event that stay of execution is not granted and therefore have not met the threshold for grant of the orders of stay of execution.

27. The respondents further submitted that it is trite law that courts do not act in vain as was held in the case of *Kalya Soi Farmers' Cooperative Society v Paul Kirui & another [2013] eKLR* that;

“...the maxim that equity would not grant its remedy if such order will be in vain. As is said, “Equity, like nature, will do nothing in vain”. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes.”

28. It is the Respondents submission that the court should not give Orders in vain. That the proceedings were concluded and a Decision made thus an order staying the proceedings is an order in vain. In the premises the Respondents submit that the application is fatally defective, misconceived, and mischievous or otherwise an abuse of the court process and therefore, is unsustainable in the obtaining circumstances.

29. The respondents prayed that the Application be dismissed and costs awarded to the Respondents.

Analysis and Determination

30. I have considered the application and the submissions filed by the parties to buttress their assertions. What calls for determination in this matter is the issue whether the leave granted herein should operate as stay of proceedings of Appeal to the minister No 124 of 2018 delivered on 1st April, 2022 and certified on 13th April, 2022 by the Director of Land Adjudication.



31. Order 53 Rule 1(4) of the Civil Procedure Rules gives this court the power to grant leave to operate as stay. The said order provides as follows:-

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

32. In the case of Taib A. Taib –v- The minister of Local Government & Others (supra) it was held that:

“The granting of leave to operate as an order for stay is discretionary and should be exercised judiciously. The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and the implementation of the decision that has been made and it is not limited to judicial or quasi – judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken.”

33. The principles that guide courts before the granting of a stay order were discussed by Odunga J (as he then was) in James Opiyo Wandayi –v- Kenya National Assembly & 2 Others [2016] eKLR where he held that:

“The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. Where the decision sought to be quashed has been implemented, leave ought not to operate as a stay since where a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation and its implementation has not come to an end that stay may be granted. See George Philip M. Wekulo –v The Law Society of Kenya & Another Kakamega HCMISCA No 29 of 2005. In this case, the period of suspension of the applicant is still running. In other words, the act complained of is not complete and has not come to an end...

...However, whereas this court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove such exceptional circumstances exist.”

34. The court has noted that the impugned decision was delivered on 1st April, 2022 while this application was filed in court on 6th May, 2022 as per the payments made (and not 6th April, 2022 as indicated in the stamp). This was after a period of about 34 days. I find that the application was filed timeously as a 34 day period is not inordinate delay.

35. The most important limb of the application for stay of execution is proof of substantial loss. The applicants have submitted that the interested party has gone ahead to cut down trees, remove beehives as well as burn charcoal. I note however that these allegations have only been raised in submissions. There is no evidence attached to the application dated 5th May, 2022 to support those allegations. It should also be noted that the mere mention or alleging that an applicant will suffer substantial loss is not enough. In any case, submissions are not the same as evidence. I therefore find that that the applicants have not established what kind of substantial loss they will suffer if the stay order is not



granted. In this kind of applications for stay, it is not enough for the applicants to merely submit that substantial loss will result. They must prove specific details and particulars of the alleged loss to the satisfaction of the court. Where no tangible loss is shown to the satisfaction of the court, the court will not grant a stay.

36. In the result, this court finds that the applicants have not met the threshold for grant of stay. The application is without merit and the same is hereby dismissed with costs to the Respondents.

37. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF NOVEMBER, 2022 IN THE PRESENCE OF:

C/A: Martha

Ms. Musyimi for Ex-parte Applicants

Ms. Kendi for Respondents

N/A for Interested Party

C. K. YANO,

JUDGE.

