



**Mutahi & 6 others (Environment & Land Case 74 of 2019)  
[2022] KEELC 15366 (KLR) (14 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15366 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 74 OF 2019  
CK NZILI, J  
DECEMBER 14, 2022  
CONSOLIDATED WITH KERUGOYA ELC NO 258 OF 2013  
AND ELC NO 809 OF 2013 (OS)**

**IN THE MATTER OF**  
**RAPHEL GICHOVI MUNENE KABUTU ..... DEFENDANT**  
**AND**  
**BENSON G MUTAHI ..... RESPONDENT**  
**AND**  
**NJAGO MUNENE KABUTU ..... 1<sup>ST</sup> DEFENDANT**  
**MUCHIRA MUNENE KABUTU ..... 2<sup>ND</sup> DEFENDANT**  
**NJOKI MUNENE KABUTU ..... 3<sup>RD</sup> DEFENDANT**  
**NJOKI MUNENE KABUTU ..... 4<sup>TH</sup> DEFENDANT**  
**MUSYOKI MUNENE KABUTU ..... 5<sup>TH</sup> DEFENDANT**

*(Formerly Embu Elc no 7 Of 2015) (Os)*

**RULING**

1. This ruling relates to two applications dated May 15, 2022 and October 21, 2022 hereinafter the 1<sup>st</sup> & 2<sup>nd</sup> application respectively. In the 1<sup>st</sup> application the court is asked to; authorize the deputy registrar to execute all documents in place of the 2<sup>nd</sup> respondent in the counterclaim to facilitate sub-divisions and the transfer of 28 acres out of L R no Mbeere/Kirima/3184 to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants/ applicants in accordance with the decree dated February 23, 2022, the original title deed be dispensed with and the OCS Kiritiri police station to provide security during the exercise of the sub division(s).



2. The application is supported by an affidavit of Raphael Gichovi Munene Kabutu. The grounds are that following the decree, the 1<sup>st</sup> & 2<sup>nd</sup> defendants who are the registered owners of LR no Mbeere/Kirima/3184 failed to appeal against the aforesaid decree hence the need to give effect to the court's judgment and that the 2<sup>nd</sup> defendant was not willing or likely to freely to effect the sub-division and transfer of the said portion.
3. The application is opposed by the 2<sup>nd</sup> respondent/defendant through grounds of opposition dated October 21, 2022 on account of incompetency, being bad in law, defectiveness, abusive of court process and on account for stay of a pending application for stay of execution dated October 21, 2022, the 2<sup>nd</sup> application herein.
4. In the 2<sup>nd</sup> application, the court is asked by the 2<sup>nd</sup> defendant/applicant to stay the execution of the judgment/decreed issued on February 23, 2022 pending hearing and determination of the intended appeal before the Court of Appeal. The application is supported by an affidavit sworn on October 21, 2022 by John Gichu Muraya. The grounds are that; a notice of appeal was filed, a request for certified copies of proceedings was lodged and that the intended appeal as per the draft memorandum of appeal was arguable.
5. Further, the applicants stated that if the stay was not granted, the intended appeal would be rendered nugatory and that should the threatened execution proceed, the applicant stood to suffer irreparable and substantial loss. That the delay in filing the application was because the directors of the applicant had not met to reach to a board's resolution due to illness of one of the directors and that there will be no prejudice to the respondents if the orders sought were granted.
6. With leave of court parties agreed to canvass the applications by way of written submissions whose deadline was November 11, 2022 as to the 1<sup>st</sup> application. As regard, the 2<sup>nd</sup> application the directions given on October 25, 2022 were that the same be served within 7 days and submission be filed within 21 days.
7. The applicant in the 1<sup>st</sup> application filed written submissions dated November 15, 2022. It is submitted that the applicant is entitled to enjoy the fruits of the judgment through a lawful execution process sought herein. Further, it is submitted that following directions to the 1<sup>st</sup> application, the 2<sup>nd</sup> respondent filed the 2<sup>nd</sup> application which falls short of satisfying the requirements of order 42 rule 6 of the *Civil Procedure Rules* since the delay of 8 months is inordinate and not explained at all; that no sufficient cause has been shown for the same; that no leave to file an appeal out of time was sought and obtained; that there was nothing pending to warrant a stay; that there is no guarantee that if stay is granted, that the applicant will take any steps to pursue the intended appeal; that the applicant has not demonstrated any substantial loss likely to be suffered if the application is disallowed, that the subject land was registered in favour of the 2<sup>nd</sup> defendant/applicant during the pendency of the suit; that the applicant has never occupied or utilized the said parcel of land; that the respondent is only seeking 28 acres out of 100 acres of the suitland; the application is an afterthought and no security has been offered for the due performance of the decree.
8. The effect of the judgment rendered on February 23, 2022, dismissed the plaintiff's suit and allowed the counterclaim by declaring that a portion of LR no Mbeere/Kirima/3184 was held by the registered owners pegged at 28 acres in trust for the 1<sup>st</sup> – 4<sup>th</sup> defendants. The court directed the said portions been hived from the land in favour of each of the 1 - 4 defendants getting 7 acres.
9. Following this, the 2<sup>nd</sup> defendant on March 7, 2022 filed a notice of appeal which was received by the deputy registrar on March 7, 2022. The four copies filed are yet to be collected from the court registry for service upon the respondents.



10. Another notice of appeal was also filed on March 10, 2022 by the plaintiff in primary suit who also requested for typed proceedings and paid for them on September 9, 2022.
11. The decree holders have urged this court to grant the orders sought in the 1<sup>st</sup> application so that execution of the decree can commence and to realize the fruits of their judgment while on the other hand, the judgment debtor, the applicant in the 2<sup>nd</sup> application has urged the court to stay the execution since it has undoubted right of appeal which it has set on motion by filing a notice of appeal and requesting for certified copies of the judgment and proceedings.
12. In a rejoinder, and through submissions the decree holders are of the contrary view that there is no pending appeal, there has been inordinate delay in seeking for stay and that the threshold of stay has not been attained.
13. Order 42 rule 6 of the Civil Procedure Rules is the entry point for anybody seeking to stay execution. The hurdles to be met are; demonstration of substantial loss and damage if the stay orders are not granted; timeous filing of the application for stay, offer of security for the due realization of the decree should the appeal not succeed and lastly, a demonstration that it was in the interest of justice that the stay be granted.
14. To stay or not stay an execution is under the discretion of court through which has to be exercised judiciously and not capriciously bearing in mind the ends of justice to both parties where one has a right to enjoy the fruits of the litigation whereas the other has an unfettered right to an appeal.
15. While discussing the aforesaid principles, the Court of Appeal in *Halai & Another V Thorton & Turpin* (1963) Ltd [1990] KLR 365 held that while the discretion was unfettered, an applicant must meet the conditions set by the law and in addition demonstrate that the appeal will be rendered nugatory if stay was not granted were the appeal to succeed. The court cited with approval *Hassan Guyo Wakao vs Straman E A Ltd* (2013) eKLR where it was held that the triple principles go hand in hand and failure to prove one dislodges the other.
16. The decree holders herein have taken the view that no appeal was pending and therefore, there was nothing to warrant for a stay.
17. As indicated above a notice of appeal was lodged by the 2<sup>nd</sup> defendant/applicant.
18. In *Otieno Ragot and Co Advocates vs NBK Ltd* (2021) eKLR the court held that an appeal is deemed to have been filed once a notice thereof has been lodged in the appropriate registry. Therefore I find this ground of objection unmeritorious.
19. Coming to substantial loss the Court of Appeal in *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR held that an applicant must establish other factors which show that the execution will create a state of affairs that would irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. It is not enough for a party to allege substantial loss by saying that execution is underway. Execution by itself is a lawful process. Therefore, a party must over and above alleged substantial loss to demonstrate how he was likely to suffer or be affected should the substratum of the appeal materially change.
20. In *Jeniffer Akinyi Osodo vs Boniface Okumu Osodo & 3 others* (2021) eKLR, the Court of Appeal cited with approval *Stanley Kangethe Kinyanjui vs Tony Ketter & others* (2013) eKLR where the court held that an arguable appeal was not one that must necessarily succeed but one which merits consideration by the court. on nugatory aspect, the applicant had contended that the subject property was his matrimonial and ancestral home and that if the orders of stay or injunction were not issued,



the subject property would likely be dealt with in a manner that he could not be compensated by way of money. The court in the circumstances of the case ordered for the preservation of the property to avoid it being dealt with in an adverse manner, leading to the substratum of the appeal being lost and appeal becoming academic.

21. Applying the foregoing principles, the applicant has filed the application for stay close to 8 months after the decree. The explanation for the delay is attributed to an alleged illness of one of the directors.
22. There were no medical reports attached to the affidavit in reply. When the resolution to appeal and to file the application was made has not been indicated and or why the resolution could not be procured through virtual meeting has not been explained. The deponent to the application has stated that he was a director of the applicant but has not attached the resolution authorizing him to do so. Further, the manner the status of occupation and use of the suit land has not been explained. The manner, the nature of loss, particulars of loss and damage to be occasioned if the decreed land was hived off out of a total of 100 acres has not been set out by way of material and cogent evidence.
23. Substantial loss is what has to be prevented by preserving the status quo. The applicant has not defined what the status quo was, unlike the respondent who have said that the applicant has never been in occupation of the suit land and only became a registered owner during the pendency of the suit.
24. In *RWW vs EKW* (2019) eKLR, the court held that the purpose of stay of execution pending appeal was to preserve the subject matter in dispute, so that the two rights of the parties can be safeguarded and the court must weigh the two rights to ensure no one suffers prejudice that cannot be compensated by way of costs.
25. In this application the applicant has not laid out a clear case why its rights of appeal should pend the rights of the decree holders to realize the fruits of the judgment.
26. In *Butt vs Rent Restrictions Tribunal* (1982) KLR 417 the court held that a party seeking stay must also demonstrate special circumstances of the case and unique requirements.
27. In *Thugi River Estates Ltd & another vs NBK and 2 others* (2008) eKLR the court based on material before it, especially the undertakings and commitments made on security granted stay or injunctions on terms so that the applicant did not just keep the land and also enjoy the benefits as a balancing act.
28. The applicant has also not addressed the court on the issue of security and or offered the same in the supporting affidavit. It is not for the court to suggest to a party but the other way round. See *Antoine Ndiaye vs African virtual University* (2015) eKLR.
29. The court must also consider if it is in the interest of justice to grant stay as per the overriding objectives under Sections 1A, 1B & 3A of the *Civil Procedure Act*.
30. Looking at the totality of circumstances in this matter and the delay in filing the application for stay even after the application for execution was filed in July 2022, my considered view is that it would not be in the interest of justice to stop the issuance of the orders sought in the 1<sup>st</sup> application. The 2<sup>nd</sup> defendant/applicant even after the application was made has not by way of a replying affidavit explained the manner in which it will be prejudiced should the subdivision and or transfer occur. Similarly, the 2<sup>nd</sup> defendant has not offered any security, by way of a surrender of the original title deeds to the property before court or any related commitment or assurances to safeguard the interests of the rights of the decree holders.
31. The upshot is that I find the 2<sup>nd</sup> application lacking merits. The same is dismissed with costs. Regarding the 1<sup>st</sup> application the same is allowed with costs.



32 Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14<sup>TH</sup> DAY OF  
DECEMBER, 2022**

**In presence of:**

**C/A: Kananu**

**No appearance**

**HON C K NZILI**

**ELC JUDGE**

