



Mania (Suing as the legal representatives of the estate of Kanoo Kamau (Deceased)) & 2 others v Muchori & 2 others (Environment & Land Case 338 of 2017) [2022] KEELC 15292 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 338 OF 2017
FM NJOROGE, J
DECEMBER 8, 2022**

BETWEEN

**ELIJAH KARIUKI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KANOO KAMAU (DECEASED)) 1ST PLAINTIFF
JOSEPH MAINA 2ND PLAINTIFF
KANOO KAMAU 3RD PLAINTIFF**

AND

**EDWARD MUCHORI 1ST DEFENDANT
JOHN GIKONYO GITAHU 2ND DEFENDANT
JOSEPH NG'ANG'A MBUGUA 3RD DEFENDANT**

RULING

1. This ruling is in respect of the defendants notice of motion application dated October 19, 2022. It has been brought under order 42 rule 6, order 51 rule 1 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#) and seeks the following prayers:
 - a. ...spent
 - b. ...spent
 - c. That this honorable court do order a stay of execution of the judgement and order made by this honorable court on August 17, 2022 pending the hearing and determination of the applicant's appeal to the Court of Appeal.
 - d. That the costs of this application be provided for.



2. The application is supported by the affidavit of John Gikonyo Gitahi sworn on October 19, 2022. The grounds on the face of the application and the supporting affidavit are that judgement in this matter was delivered on August 17, 2022; that the court declared that land parcel No Kijabe/Kijabe Block 1/2363 belonged to the estate of Kanoo Kamau (deceased) and a permanent injunction was granted restraining the defendants from interfering with the suit property; that the court also ordered the cancellation of land parcel No's Kijabe/Kijabe Block 1/22258, Kijabe/Kijabe Block 1/22259, Kijabe/Kijabe Block 1/22260 and Kijabe/Kijabe Block 1/22261 which resulted from the subdivision of land parcel No Kijabe/Kijabe Block 1/2363; the court also directed the Director of Surveys to rectify the registry index map to reinstate Kijabe/Kijabe Block 1/2363 as it was before the subdivision; that the court further ordered the Land Registrar Nakuru to rectify the register by cancelling the defendants' names from the register in respect of the suit property and register the estate of Kanoo Kamau (deceased); that the defendants were ordered to pay costs; that being dissatisfied with the said judgement, they filed the notice of appeal dated August 18, 2022; that they have a meritorious appeal with a high probability of success; that unless this court stays orders of execution of the judgement delivered on August 17, 2022, the plaintiff will execute the judgement and render their intended appeal nugatory; that they are willing to furnish such reasonable security as the honorable court may deem appropriate in the circumstances.
3. Joseph Maina Gathitu filed a replying affidavit sworn on November 4, 2022. He deposed that the applicants have not demonstrated how the intended appeal will be rendered nugatory; that they will not suffer any substantial loss if an order for stay of execution is not granted as the court can order the plaintiffs not to sale, lease out, part with and/or charge the suit land until the determination of the intended appeal; that allowing the application herein would deny the plaintiffs the fruits of their judgement and that the application has not satisfied all the conditions for grant of an order of stay pending appeal and should be dismissed.

Submissions

4. The applicants filed their submissions dated November 22, 2022 and filed on the same day while the respondents filed their submissions dated November 22, 2022 also on the same day.
5. The applicants in their submissions identified three issues for determination; whether there is sufficient evidence that substantial loss would ensue unless the order of stay is made, whether the application has been made without unreasonable delay and whether the applicants are willing to furnish security.
6. On the first issue the applicants submitted that they are intending to preserve the suit property pending the hearing and determination of the intended appeal and to ensure that their intended appeal is not rendered nugatory. They relied on the case of *Silverstein vs Chesoni* [2002] 1KLR 867 in support of their argument.
7. On the second issue, they submitted that judgement in this matter was delivered on August 17, 2022 and they lodged an appeal dated August 18, 2022 on August 19, 2022. They submitted further that therefore, the present application dated October 19, 2022 was filed timeously and without undue delay.
8. On the third issue, the applicants submitted that under the provisions of order 42 rule 6 (1) and (2) of the *Civil Procedure Act*, they are required to offer security for the due performance of the orders as may ultimately be binding on the appellant. They submitted that they are ready and willing to provide such reasonable security as this honorable court may order. They relied on the cases of *Mwaura Karuga t/ a Limit Enterprises vs Kenya Bus Services Ltd & 4 others* [2015] eKLR and *Gianfranco Manenthi & another vs Africa Merchant Assurance Company Limited* [2019] eKLR in support of their arguments.



9. The respondents submitted on the three conditions that are set out under order 42 rule (6) (2) of the [Civil Procedure Rules](#) which the applicants have to meet for stay of execution pending appeal to be granted.
10. On whether the application was filed without unreasonable delay, the respondents submitted that they concede that the application was filed without unreasonable delay as the judgement was delivered on August 17, 2022 and the application filed on October 19, 2022.
11. Regarding whether the applicants are likely to suffer substantial loss if the orders sought are not granted, it was submitted the applicants have not shown that they stand to suffer any substantial loss as no particulars or details of substantial loss have been given. They relied on the cases of [Kenya Shell Limited vs Benjamin Karuga Kibiru & another](#) [1986] eKLR and [Peter Ndung'u Ngae & 2 others vs John Mugane Karomo](#) [2015] eKLR in support of their arguments.
12. The respondents also submitted that no security for due performance of the decree has been offered and therefore the applicants have only met one condition out of the three that are provided for under the law. They relied on the cases of [Stephen M Ikunyua M'Imathiu vs Elijah Mwirigi & another](#) [2006] eKLR and [John Mwangi Ndiritu vs Joseph Ndiritu Wamathai](#) [2016] eKLR in support of their arguments.

Analysis and Determination

13. After considering the application, replying affidavit and submissions, the only issue that arises for determination is whether the court should grant stay of execution pending appeal.
14. Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) provides as follows:
 - "(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 apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (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 unreasonable 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."



15. The court in Civil Appeal No 107 of 2015, *Masisi Mwita -vs- Damaris Wanjiku Njeri* (2016) eKLR held as follows:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & amp; another vs Thornton & amp; Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag JA) held that:-

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.”

In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd (2013) as follows:-

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other.”

16. On whether the application was filed without unreasonable delay, judgement in this matter was delivered on August 17, 2022 while the application was filed on October 21, 2022 and I therefore concur with the respondents that there was no inordinate delay.
17. There is a notice of appeal on the court record dated August 18, 2022 and lodged on August 19, 2022. For purposes of this application, it is my view that there is an appeal in place and the application was filed without unreasonable delay.
18. On whether the applicants will suffer substantial loss if the orders sought are not granted, it was submitted that the orders granted by the court in its judgement delivered on August 17, 2022 require immediate compliance and that there is need to preserve the suit property pending the hearing and determination of the appeal.
19. The respondents on the other hand argue that the applicants have not demonstrated that they stand to suffer any substantial loss if the orders sought are not granted. The court in its judgement ordered for the cancellation of the various titles that were created as a result of the subdivision of land parcel No Kijabe/Kijabe Block 1/2363. The court also ordered the Land Registrar Nakuru to cancel the names of the defendants from the register of the suit land. Given the nature of the orders granted by the court in its judgement, it is my view that the applicants have demonstrated that they stand to suffer substantial loss in the event that the orders sought are not granted. I also am of the view that the land registration records ought to be preserved as they are pending the determination of the appeal.
20. In their application, the applicants have expressed willingness to comply with any orders as to depositing of security.
21. In conclusion, it is my view that the applicant’s application dated October 19, 2022 has merit. Consequently, I hereby grant a stay of execution of the judgement in this suit on condition that the applicants shall file and serve a record of appeal within 60 days of this order in default of which condition the stay of execution order herein granted shall lapse and be deemed automatically vacated.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8TH DAY OF DECEMBER, 2022.



MWANGI NJOROGE
JUDGE, ELC, NAKURU

