



Muthwii & another ((suing in her capacity as the personal representative of the estate of the late Muithwii Wele)) v Shelamin (sued in her capacity as the personal representative of the estate of the late Mulaki Wele)) (Environment and Land Appeal 39 of 2021) [2022] KEELC 15297 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 39 OF 2021**

LG KIMANI, J

DECEMBER 8, 2022

BETWEEN

KANINI MUTHWII 1ST APPELLANT

LUCIA MUMO 2ND APPELLANT

(SUING IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE MUTHWII WELE)

AND

(MWANAIDI MAGDALENA TATU SHELAMIN RESPONDENT

SUED IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE MULAKI WELE)

RULING

1. The Application subject matter of this ruling is the Notice of Motion dated November 10, 2020 brought under Certificate of Urgency under Section 1A, 1B and 3A of the Civil Procedure Rules Order 42 Rule 6 (6) of the *Civil Procedure Rules* and Section 13 (7) of the *Environment and Land Act* seeking for Orders:
 1. Spent
 2. That this Honourable Court be pleased to issue an order for stay of execution of the Judgment in the Senior Principal Magistrate's Court at Mutomo Land Case no 10 of 2018, delivered on January 24, 2020, together with the Decree and any other consequential orders pending the hearing of this application and the Appeal.



3. That this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent, whether by herself her agents, servants, families or relatives, from wasting, constructing on, excavating, fencing, subdividing, disposing, selling, transferring, alienating or otherwise interfering or dealing with or by any other way howsoever interfering with Land Parcel number Kitui/Mwala/861 together with the suit property located at Kyambusya, pending the hearing and determination of this application and the Appeal.
4. That the cost of this application be provided for.
2. The Application is supported by the affidavits of the Applicants and on the grounds on the face of the application that:
 1. That the Respondent filed suit against the Appellants vide SPMCC Land Case No 10 of 2018, seeking orders declaring that Land Parcel Number Kitui/Mwala/861 belongs to the estate of the late Mulaki Wele and to have the title issued in the name of Muthwii Mulaki (deceased) cancelled. By a judgement of January 24, 2020, the trial court declared that Land Parcel Number Kitui/Mwala/861 was part of the estate of the late Mulaki Wele and the title deed issued to Muthwii Mulaki be cancelled and that new titles deed to issue to all siblings in equal proportions.
 2. That aggrieved by the decision of the court, the Applicants have filed an appeal, which they claim is arguable and has a high chance of success. The appeal raises pertinent issues for determination and if prayers sought in this application are not granted, the appeal will be rendered nugatory and a mere academic exercise.
 3. The applicants claim that this Court has the jurisdiction to grant an applicant an injunction pending appeal which position was taken by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645, where the court held that where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard.
 4. That the Respondent has now moved the court and is pursuing the execution of the Judgment of the trial court and the Applicants/Appellants are highly apprehensive that if the Respondent is allowed to continue in the pursuit of the enforcement of the judgment, the status quo of the subject matter will change thus putting the suit property beyond their reach.
 5. The Applicants/Appellants claim to have constructed their matrimonial homes on Land Parcel Number Kitui/Mwala/861, where they have lived for more than 30 years. Their husband is also buried on the land and they have lived and developed the parcel of land for over 30 years, monetary compensation will not be sufficient in case the land is put beyond their reach by subdividing and giving new titles to new people.
 6. They claim that the Respondent will not suffer any substantial loss if this application is allowed and as the application has been brought without unreasonable delay and in good faith and it is in the best interest of justice that the orders sought be issued. The applicants are willing to abide by the orders and directions of this Honourable Court.
3. The Applicant further state that the Trial Court failed to consider pertinent issues raised in their Defence that the Land Parcel Number Kitui/Mwala/861 was subdivided during the lifetimes of both the late Muthwii Mulaki and Mulaki Mutwii and some of the resulting portions sold to bona fide purchasers for value.



The Respondent's Case

4. The Respondent filed a Replying Affidavit sworn on June 8, 2021, stating that the Applicants have not met the requirement that the appeal must have overwhelming chances of success. The respondent states that there has been delay in filing the application herein since the judgment was delivered on January 24, 2020 whereas the Applicants filed the current Application on November 11, 2020, a period of ten months.
5. She stated that the delay in filing the application for stay is intended at denying her an opportunity to enjoy the fruits of her judgment and that due to the delay, part of the suit property Kitui/mwala/861 has already been sold and the new purchasers have already started developing their plots. However, according to the Respondent, the part that the Appellants are in possession and use of is not at risk of being interfered with. She contends that the orders sought have been overtaken by events and that the Appellant/Applicant has not demonstrated in the Application that substantial loss may result to them unless the order is made.

The Applicants' submissions

6. In their submissions, the Applicants' Counsel stated that the Application is unopposed, which is not the case as the Respondent has filed a Replying Affidavit.
7. They relied heavily on the grounds set out in the Application and Affidavit in support thereto. They stated that the Applicant's Appeal has a high chance of success since it raises pertinent issues for determination and if the temporary injunction is not granted, the Appeal will be rendered nugatory in the event that the Appeal is successful. They relied on the case of *Mukuna v Abuoga* [1988] KLR 645 where the court held that where a party is exercising its undoubted Right of Appeal, the Court ought to see that the Appeal is not rendered nugatory by preserving the *status quo* until the Appeal is heard.
8. The Applicants submitted that they are highly apprehensive that if the Respondent is allowed to continue in the pursuit of enforcement of the Judgment in the Trial Court, the status quo of the subject matter will change thus putting the suit property beyond their reach.
9. The Respondent did not file her written submissions to the Application.

Analysis and Determination

10. The trial court entered judgement in favour of the Plaintiff/Respondent in this appeal declaring that the suit land LR Kitui/Mwala/861 was part of the Estate of Mulaki Wele (Deceased) and was registered in the name of Muthwii Mulaki by misrepresentation and that new titles be issued in equal proportions in the names, Muthwi Mulaki, Celestina Kamana Mutunga, Selestina Lelo Ngutu, Mirriam Mulaki and Mwanaidi Magdalena Tatu Shelamin. Being aggrieved with the decision of the Trial Court, the Defendant/Appellants filed this Appeal through their Memorandum of Appeal dated February 24, 2020. They subsequently filed the current application.
11. I have considered the application herein, supporting affidavit and attached documents and the written submission. The Application is brought pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* 2010 which deals with stay of execution pending Appeal. It provides that, "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”

12. Order 42(6)(3) provides that, “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
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

13. Section 13(7) of the *Environment and Land Court Act* No 19 of 2011 which the Applicants have also brought their Application under provides as follows:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including— (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs.”

14. The purpose of stay of execution orders pending appeal is to preserve the subject matter of the appeal so as to not render the appeal nugatory. This position was restated by the court in *RWW v EKW* [2019] eKLR, where the court stated; “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

15. In weighing and balancing the rights of the Appellant with those of the Respondent’s, I have considered what the Respondent has stated that part of the suit land Kitui/Mwala/861 has already been sold to third parties who have already commenced developments on their suit property. She has however not attached any proof of this and thus it is difficult for the court to determine the extent to which the decree has been executed. It would have been useful for the Applicants on whom the burden of proving their case lies, to fully disclose the extent to which execution has been carried out to enable the court reach a verdict. In my opinion there was substantial delay in bringing the current application to court. Had the Applicants not delayed sale of part of the land would have been arrested. The Respondent has argued that the Application for stay has been overtaken by events. In dismissing the Application for stay before it in the case of *Teresiah Wairimu v Wanjiku Mwangi* [2018] eKLR, the Honourable Judge had this to say:

“The Applicant must satisfy the Court that the application was made without unreasonable delay. The Court noted that the Memorandum of Appeal was filed on August 27, 2015, and an application for stay was filed on September 3, 2015. However, the said application was withdrawn and the instant application was filed on October 4, 2016. By then, the



Respondent had already applied for execution of the same. The execution sought to be stayed was initiated by the Respondent before the instant application was filed. Therefore the Court finds that there was unreasonable delay in filing this application and the stay of execution has been overtaken by events. See the case of *Jane Jeptoo Sawe v Estate of Sylvester Kimagut Sang Represented by Jennifer Chebet Sang*, Civil App No 49 of 2015, where the Court of Appeal held that: -

“The order of stay of execution that the Applicant seeks has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose”.

16. I do note that the trial court ordered that titles be issued to five people who included Muthwi Mulaki the deceased husband of the Applicants and the Respondent has confirmed that the portions where the Applicants occupy has not and will not be interfered with. The Applicants will thus not lose possession and occupation of the homes they claim to have lived in for 30 years. I also note that they have raised arguable issues in their Memorandum of Appeal dated February 24, 2020 that can only be determined through the hearing of the appeal. In keeping with the provisions of Article 159 of the [Constitution](#) and in order to balance the rights of the parties, in my view it would be prudent to issue an order of status quo instead. In [Kenya Airline Pilots Association \(KALPA\) v Co-operative Bank of Kenya Limited & another](#) [2020] eKLR, the purpose of a status quo order was explained as follows:

“..... By maintaining the *status quo*, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the *status quo ante* cannot be restored thereby rendering nugatory its proposed decision.”

17. While the Applicants have sought orders of injunction in addition to the stay of execution of the decree in the lower court, the injunction application pending appeal is in my view not supported by any legal provisions and in submissions the Applicant only urged the court on issues of stay of execution. In any event I do find that the prayer for injunction seeks to prevent the Respondent from dealing in any way in the suit property which would be quite unjust seeing as she is a beneficiary to the Decree. It also seeks to prevent the Respondent from subdividing, disposing, selling or transferring the suit land which the Respondent states has already been done. It would therefore not prevent any of this if injunction orders are granted at this particular stage. In Murithi J in [Boabab Beach Resort](#) as quoted by F Tuiyot [Saifudeen Abdullahi & 4 Others](#) in Mombasa High Court Misc Civil Cause No 11 of 2012, described the nature of a status quo order as follows:

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a *prima facie* case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or *prima facie* case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

18. From the foregoing, I find that a part of the decree has already been executed and part of the suit land sold and possession thereof taken by third parties. This means that the Applicants fear that the substratum of the appeal may be lost rendering the appeal nugatory is well founded. In my view, the



orders sought for stay and injunction will not preserve the subject matter of the appeal as they seek to return the status back to what it was before the trial court Judgment, which is not possible as execution had already begun. In line with the above precedents I am persuaded that an order of status quo would accomplish preservation of the suit property which is to stop any further dealings with the suit property pending hearing and determination of the Appeal. Such an order will ensure that the appeal is not rendered nugatory and will balance the interests of the decree holder pending hearing and determination of the appeal and is the more efficacious order to grant in the circumstances of this case.

19. The court in *Mukuma v Abuoga* [1988] KLR 645 quoted M *Butt v The Rent Restriction Tribunal*, Civil Application No Nai 6 of 1979, (following *Wilson v Church* (No 2) [1879] 12 Ch 454 at p 488) where it was held that, “that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.
20. In *Classic Building Works Limited v Pansons Construction Co Limited* [2021] eKLR, a suit where the court granted an Order of *status quo* pending appeal, the court found that

‘In the case of *Siegfried Busch v MCSK* [2013] eKLR, “...A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the *status quo* so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his Judgment...” I find that the Applicant having been condemned to pay a decree to a suit that it claims it was not a party to, amounts to substantial loss and it is necessary that the *status quo* be maintained so as to preserve the Appeal..... In the interest of justice, the application dated 22nd March, 2021 is allowed, *status quo* be maintained and there be a stay of execution on the Proclamation Notice dated November 6, 2019 pending the hearing and determination of the Appeal herein.

21. On the issue of security for costs, since the subject matter is ownership of land and not payment of a particular sum of money, I am of the view that such order is unnecessary in the particular circumstances of this case and the court exercises its discretion to waive the condition and instead seek to expedite the hearing of the appeal at the earliest possible time.
22. The final orders of the court are as follows;
 - 1) The *status quo* pertaining to land parcel number Kitui/Mwala/861 or any of its subdivisions be maintained pending hearing and final determination of this appeal.
 - 2) The current *status quo* being that the Applicants are in occupation of a portion of the initial suit land while some portions are occupied by the beneficiaries of the trial court judgement and third parties. The parties are directed not to sell any other part of the suit property.
 - 3) The Appellant to prosecute this appeal within six months from the date hereof in default of which the orders herein will automatically lapse.
 - 4) Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT KITUI THIS 8TH DAY OF DECEMBER, 2022.

L G KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Ruling read in open Court and virtually in the presence of-



Musyoki – Court Assistant

Maingi holding brief for Kimuli for Appellants

Mwatine holding brief for Nzilu Nzioka for Respondents

