



REPUBLIC OF KENYA



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Githua v Estate of Kimani & 5 others (Environment and Land Appeal E030 of 2024) [2025] KEELC 910 (KLR) (11 February 2025) (Ruling)

Neutral citation: [2025] KEELC 910 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E030 OF 2024
LN GACHERU, J
FEBRUARY 11, 2025

BETWEEN

CHARLES GAKURU GITHUA APPELLANT

AND

ESTATE OF JOSEPH GAITHO KIMANI 1ST RESPONDENT

JOSPHAT KINYANJUI GAITHO 2ND RESPONDENT

SOLOMON NJOROGE GAITHO 3RD RESPONDENT

DAVID GAKUNGA GAITHO 4TH RESPONDENT

JOYCE NJERI GAITHO 5TH RESPONDENT

STANLEY CHEGE GAITHO 6TH RESPONDENT

RULING

1. The Application for determination is the one dated 12th July 2024, by the Appellant/Applicant vide a Notice of Motion Application which is premised under Order 40 Rule (1) (a) & (b) of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, wherein the Applicant has sought for the following Orders:
 1. That this Honourable Court be pleased to issue an Order restraining the 2nd-6th Respondents by themselves, their agents and/or their servants from trespassing, entering and/or encroaching and cutting down trees and destroying food crops in the 0.4 acres in Land parcel No. LOC1./Kiunyu/192, which the appellant/applicant purchased and utilizes until the hearing and determination of this Application.
 2. THAT this Honourable Court be pleased to issue an Order restraining the 2nd-6th Respondents by themselves, their agents and/or their servants from trespassing, entering and/or encroaching



and cutting down trees and destroying food crops in the 0.4 acres in Land parcel No. LOC1/Kiunyu/192, which the appellant /applicant purchased and utilizes until the hearing and determination of this Appeal.

3. That, the OCS Kihumbuini Police Station do supervise compliance of this Court Order.
4. That, the costs of this application be borne by the Respondents.
2. The Application is supported by the grounds set out on the face thereof and the Supporting Affidavit of Charles Gakuru Githua (the Appellant/Applicant) sworn on 12th July, 2024. The deponent averred that he purchased land parcel No. LOC1/Kiunyu/192 (the suit property), measuring 0.4 Acres through a Sale Agreement dated 5th April, 2012, executed with the administratrix of the Estate of the late Joseph Gaitho Kimani in Succession Cause No. 359 of 2011, for the entire purchase price of Kshs.300,000/=. He further averred that out of the purchase price, he rendered Kshs.205,000/= to the Vendor upon execution of the Agreement, and immediately assumed occupation and started utilizing the said land.
3. Further, that he made a another payment of Ksh.45,000/= to the administratrix of the Deceased's estate, and a further payment of Kshs.50,000/= thereby, rendering the full consideration in respect of the suit property as attested to by his annexure "CGG4" being a copy of the acknowledgment of receipt issued by the said administratrix. That the Agreement in issue of disposing the suit land was witnessed by some of the Respondents herein.
4. The Applicant further averred that he was registered as a co-beneficiary of the Estate of the Joseph Gaitho Kimani (Deceased) together with 2nd to 6th Respondents in the Summons for Confirmation of grant which was confirmed on 6th June 2012, and Certificate of Confirmation of Grant issued dated 20th September 2012, which appears as the Applicant's annexure "CGG2".
5. That upon confirmation of the said Grant, the suit land was sub-divided and all beneficiaries of the deceased's estate shown their respective portions as set out in the Applicant's annexure marked CGG3 being copies of the Subdivision Scheme and transfer Forms for distinct/individual titles. Thereafter, the necessary transfer forms were executed, however, the administratrix passed away on 14th February, 2019, before the deceased's estate was distributed. Thereafter, the 2nd to 6th Defendants trespassed and invaded the suit land and occasioned the destruction captured in the photographs attached to his Affidavit and marked as "CGG5".
6. The Applicant further averred that sometimes in year 2018, he planted 30 grafted--Avocado trees, Grevilia trees and maize on the suit land. That the 2nd to 6th Respondents invaded the suit land, cutting down the trees and destroyed the crops growing thereon and threatened to evict the Applicant from the property.
7. Further, that he commenced legal proceedings against the 2nd to 6th Respondents for trespass in MC ELC No. E010 of 2022, wherein he obtained Orders of injunction restraining the 2nd to 6th Respondents from interfering with his occupation of the suit land enclosed, as his annexure "CGG6"; which Orders the 2nd to 6th Respondents disregarded resulting in criminal charges against them resulting in a Judgment dated 3rd August 2023, wherein, the Respondents were found guilty, and on 17th August 2023, they were sentenced to imprisonment for term of eight months with the option of a fine, as attested to his annexure "CGG7".
8. The Court in MC ELC No. E010 of 2022, dismissed the Applicant's suit vide a Judgment dated 28th June 2024, which the Applicant has since appealed against. It was the Applicant's contention that in



the said decision, the Court did not issue any Orders of eviction as against himself; thereby, rendering the 2nd to 6th Defendants' acts of interference with his occupation of the suit land illegal.

9. He also averred that on 4th July 2019, following the demise of the Administratrix of the estate of the Deceased on 14th February 2019, the Applicant through his Advocate filed Summons for Substitution and Amendment of Grant, and the Confirmed Grant with a view to substituting the aforementioned Administratrix, which application was opposed by the 2nd to 6th Defendants, and a Ruling issued by the Court as indicated by the Applicant's annexure "CGG8".
10. The Applicant urged the Court to grant Injunctive Orders restraining the 2nd to 6th Defendants from interfering with his occupation of the suit property pending the hearing and determination of his appeal.

The 2nd Defendant's Response

11. The 2nd Respondent opposed the suit through the Replying Affidavit Sworn by Josphat Kinyanjui Gaitho sworn on 23rd July 2024, on his own behalf and on behalf of the 3rd, 4th, 5th and 6th Respondents. He alleged that the instant Application is fatally defective for non-compliance with mandatory provisions of the law. Further, that the 1st Respondent is an unknown entity in the law, and that the Application before the Court is a replica of the Applicant's Application dated 1st April, 2022, which had been filed before the trial Court. In particular, that the photographs appearing as the Applicant's annexures "CGG5" and "CGG6" in the current suit are the exact photographs appearing on paragraphs 10 and 11 of the Applicant's Affidavit filed in support of his Application dated 1st April, 2022 at the trial Court.
12. Further, that the Applicant has failed to indicate the actual date on which the 2nd to 6th Defendants allegedly destroyed his food crops, and cut down and ferried away his mature trees from the property as alluded to in the present suit. That in his Memorandum of Appeal on record, the Applicant deliberately omitted mentioning the applicability and relevance of the provisions of Sections 45, 55 and 82 of the Law of Succession Act to the subject proceedings.
13. The instant Application was canvassed by way of written submissions, wherein the parties filed their respective submissions and submitted as below: -

The Appellant/Applicant's Submissions

14. The Appellant/Applicant's written submissions are dated 20th November, 2024 filed by Ndungu Mwaura & Co Advocates, who submitted that the Applicant purchased and utilized the suit property measuring 0.04 Acres since year 2012, and through the instant application, he seeks an injunction order to restrain the Respondents from interfering with the said parcel of land, pending the hearing and determination of the instant application as well as his appeal.
15. It was submitted that the 2nd to 6th Respondents denied him entry into the suit land to harvest the mature crop growing thereon, which was planted by the Applicant. He described the suit property as the primary source of food for his family, hence he stands to suffer substantial loss unless this Court grants him the Injunctive Orders sought. Reliance was placed in the holding of the Court in the cases of Kenya shell Ltd V Benjamin Karuga Kibiru & Another [1986] KLR 410; Absalom Dova V Tarbo Transporters [2013] eKLR; and, Silverstein v Chesoni [2002] 1 KLR 867, on the issue of substantial loss.
16. Further, that the instant application was lodged timeously as the Decree sought to be stayed was issued on 28th June 2024, while the current application was filed on 12th July 2024, which demonstrates the



- Applicant's diligence in protecting his rights. Reliance was sought in the decision of the Court in the cases of: Stanley Kinyanjui Kangethe Vs Tony Ketter & 5 Others [2013] eKLR; and, Francis Kabaa V Nancy Wambui & Another [1996] eKLR.
17. The Applicant expressed willingness to provide security as required by the Court pending determination of the Appeal and for this, he relied on the Judgment of the Court in the cases of: Kothari Vs Qureshi & Another [1967] EA 564; Wambugu V Njuguna [1983] eKLR; and, Nguruman Ltd V Jan Bonde Nielsen & 2 Others [2014] eKLR.
 18. Further, he submitted that the balance of convenience weighs in favour of the Applicant because the Respondents will not be unduly prejudiced by a temporary delay in execution. Reliance was sought in the reasoning of the Court in the case of Butt Vs Rent Restriction Tribunal [1982] KLR 417, to anchor the above submission.
 19. On the issue of costs, reliance was sought in the provisions of Section 27 (1) of the [Civil Procedure Act](#) and the holding of the Court in the following cases: Supermarine Handling Services Ltd Vs Kenya Revenue Authority [2010] eKLR; Devraj Manji Daltani Vs Danda [1949] EACA 35; Party of Independent Candidates Vs mutual Kilonzo & 2 others [2013] eKLR; and, Farah Awad Gule Vs CMC Motors Group Ltd {2018} eKLR.

The 2nd to 6th Respondents' Submissions

20. The 2nd - 6th Respondents filed their written submissions dated 25th November, 2024 through Waithira Mwangi & Co Advocates, and submitted that the instant Application ought to have been premised under the provisions of Order 42 of the Civil Procedure Rules and Rule 5 (2) (b) of the Court of Appeal Rules rather than on Order 40 of the Civil Procedure Rules as presently crafted.
21. On the question of the elements which a Court of law ought to consider in a suit seeking for a stay of execution, reference was made to the decision of the Court in the cases of [Butt Vs Rent Restriction Tribunal CACA No.6 of 1979](#); Madhupaper International Ltd V Padey Kerr (1985) KLR 840; and, Patricia Njeri & 3 Others V National Museums of Kenya (2004) eKLR.
22. Further, that the Applicant did not crave an Order restraining the 2nd to 6th Respondents from disposing the suit land by way of sale, but only prayed for Orders restraining them from trespassing onto the suit property, and cutting down the food crops and trees thereon, which acts are capable of being compensated by way of damages.
23. Further, they submitted that the Applicant has failed to demonstrate what loss or prejudice he stands to suffer in the event the injunction sought herein is not granted, and also failed to establish the chances of success with regard to his appeal. That the Applicant deliberately avoided mentioning the provisions of Sections 45, 55 (1), 71 and 82 of the [Law of Succession Act](#) which statutory provisions were relied upon by the trial Court in the Judgment dated 28th June 2024, and forming the subject of the Appellant/ Applicant's appeal.
24. Reliance was sought in the holding of the Court in the cases of Western College of Arts and Applied Sciences Vs Oranga & Others (1976-1980) KLR; Hamisi Saidi Ranzunga Vs Mlongi Kuto [CANo. E006 of 2021](#) MOMBASA; Cooperative Bank of Kenya Limited Vs Banking Insurance & Finance Union (K) 2015 eKLR; and, Kanwal Srajit Singh Dhiman Vs Keshavji Jivraji Shah (2008) eKLR, to anchor the argument that an application for stay of execution pending appeal requires that there be in a positive order capable of being stayed.
25. The court has carefully considered the instant Application, the response thereto and the rival written submissions and finds the issues for determination are; -



- i. Whether the instant Application is fatally defective and ought to be dismissed for want of the signature of the Commissioning Officer in the Applicant's Supporting Affidavit.
- ii. Whether the instant application is merited.
- iii. Who shall bear the costs of the application.

i). Whether the instant Application is fatally defective and ought to be dismissed for want of the signature of the Commissioning Officer in the Applicant's Supporting Affidavit.

26. The 2nd to 6th Respondents submitted that the Affidavit filed by the Appellant/Applicant in support of this Application does not bear the signature of the Commissioner for Oaths who authenticated the same; therefore, it cannot amount to an Affidavit as it is not a document taken under Oath and ought to be dismissed. Further, the Appellant/Applicant filed a Further Affidavit sworn on 20th November, 2024, without first obtaining leave of the Court and the same ought to be expunged or struck out from the record. Reliance was placed in the holding of the court in the case of *Mary Muthoni & Another Vs Frisa Arriri Otolu & Another (CA No.66 of 2019 Kakamega)* in support of the preceding submission.
27. This court has considered the above submissions and upon a perusal of Supporting Affidavit of Charles Gakuru Githua dated 12th July, 2024, the Court is satisfied from the contents of the third (3) page thereof that the signature of the Commissioning Officer is not indicated. For the avoidance of doubt, only the Deponent's signature appears on the relevant portion of the page. There is no signature accompanying the Commissioning Stamp of one Jesse Kariuki, Advocate.
28. Section 5 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya stipulates as follows:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”
29. Further, Section 8 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya provides as follows: -

“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.
30. In the case of *In re MWO (Minor) [2021] eKLR*, the Court considered the effect of an Affidavit which had not been commissioned in the following terms:

“It is a legal requirement that an Affidavit be commissioned by either a Magistrate, a Commissioner of Oaths or by a Notary Public. An Affidavit is a sworn statement which contains matters of evidence deponed on oath and as such legal consequences such as perjury would attend if one is found to have sworn a false affidavit. Therefore, an Affidavit must be executed on oath by the deponent. An Affidavit which has not been properly commissioned is at best a mere signed statement of facts.

It is the commissioning of the Affidavit by an authorized officer which elevates the signed statement to the status of an Affidavit. Therefore, commissioning of the document is a crucial step without which the statement cannot be deemed to be an Affidavit. Failure to commission an Affidavit cannot be dismissed as a mere technicality and is an omission which cannot be ignored and/or overlooked by the court.”



31. The Court in the case of Pius Njogu Kathuri vs Joseph Kiragu Muthura & 3 others [2018] eKLR, held as follows:
- “The law requires that only practicing advocates may be appointed as commissioners for oaths.”
32. Section 2 of the Oaths and Statutory Declaration Act provides as follows:
- “The Chief Justice may by commission signed by him, appoint persons being practicing advocates to be commissioners for oaths and may revoke any such appointment.”
33. Section 4 of the Oaths and Statutory Declaration Act provides:
- “A commissioner for oaths may, by virtue of his commission in any part of Kenya administer any oath or take any affidavit for the purpose of any court or matter in Kenya for the purpose including any matter ecclesiastical and matters relating to the registration of any instrument whether under an Act or otherwise and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any sub-ordinate court.”
34. Pursuant to the provisions of Section 9 of the *Advocates Act* a person cannot be a practicing advocate unless:
- a. He has been admitted as an advocate.
 - b. His name is for the time being on the Roll.
 - c. He has in force a practicing certificate.
35. The Court in the case of Microsoft Corporation vs Mitsumi Computer Garage Ltd & another [2001] eKLR reasoned as follows:
- “Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”
36. In the instant Application, the Stamp of the Commissioning Officer who authenticated the Applicant’s Supporting Affidavit is clearly displayed, but is not accompanied by the signature of the aforesaid officer. The question is whether the lack of signature warrants the striking out of the Appellant/Applicant’s Application.
37. In the absence of a signature which is something specific to each individual and amenable to testing through the evidence of a hand writing expert, it is open to doubt whether the Commissioning Stamp appearing in the Applicant’s Supporting Affidavit belongs to the aforementioned officer. The



Court holds and finds that where an Affidavit bears the stamp only without the signature of the Commissioning Officer, such Affidavit is to be considered as not having been commissioned.

38. Having analyzed the provisions as above, and noting that the Affidavit was not signed, this Court arrives at the unavoidable conclusion that the Supporting Affidavit sworn by the Appellant/Applicant's is not a legal document on account of lacking the signature of the Commissioning Officer, which is a fatal defect. Therefore, the said Affidavit is hereby struck off.

ii). Whether the instant application is merited

39. The 2nd to 6th Respondents in their written submissions conceded that with respect to disputes over land, the trend is that the Courts have elected to grant an injunction during the pendency of an Appeal so that the appeal, if successful, is not defeated.

40. The principles guiding the grant of a stay of execution pending appeal are well settled and are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which stipulates as follows:

“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 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.

41. In the case of Antoine Ndiaye vs African Virtual University [2015] eKLR, the Court ruled that an applicant for stay of execution of a decree pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules namely: -

- a. That 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.

42. The Court of Appeal in *RWW vs. EKW* (2019) eKLR, declared as follows: -

“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.”

43. In the case *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the Court referred to Order 42 Rule 6(2) of the Civil Procedure Rules and ruled as follows:

“... stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions.



The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.”

44. Further, in the case of *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, the court held as follows:

“The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”

45. The Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court reasoned as follows:

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.”

46. In the instant Application, the trial Court determination which forms the subject of the Appellant’s appeal, the Plaintiff (now Applicant) craved an Order for the transfer of the suit property to himself and a permanent injunction restraining the Respondents from interfering with his occupation and utilization of the property. The trial Court determined that the administratrix of the deceased’s estate who conveyed the suit land to the Applicant lacked good title to pass to the Applicant on grounds that the deceased had previously sold the same property to PCEA Church through an Agreement dated 15th December, 2000.

47. Further, the trial Court found and held that the said administratrix intermeddled with the deceased’s estate contrary to the provisions of Sections 45(1), 55 (1) and 82 of the *Law of Succession Act*. In essence the impugned holding is a negative order and is incapable of execution.

48. Having found that the decision of the trial court was negative and the same is incapable of execution, then there can be no order of stay of execution. Further, in light of the fact that the trial court held that there intermeddling of the deceased estate, this court finds and holds that the balance of convenience tilt in not issuing any injunctive orders, but in directing that this Appeal should be prepared for hearing expeditiously and be determined at once so that the underlying issues in dispute are determined once and for all.

49. Consequently, this court finds and holds that the instant Application is not merited, and the same is dismissed entirely with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY 2025

L. GACHERU

JUDGE

11/02/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant.



M/s Kiarie holding brief for Ndungu Mwaura for the Appellant/Applicant

N/a for the Respondents

L. GACHERU

JUDGE

11/02/2025

