



Nyamai (Suing as the Administrator of the Estate of Onesmus Nyamai Kyengo) v Mwanganda & 6 others (Environment & Land Case 183 of 2013) [2025] KEELC 326 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEELC 326 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 183 OF 2013
FM NJOROGE, J
FEBRUARY 4, 2025

BETWEEN

DANIEL KATUMO NYAMAI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ONESMUS NYAMAI KYENGO) PLAINTIFF

AND

GILBERT KANUNGU MWAGANDA 1ST DEFENDANT
JOANNES CHARO KATANA 2ND DEFENDANT
JUMWA KARISA MRYANI 3RD DEFENDANT
ZAWADI KIBETU KIERIA 4TH DEFENDANT
PAUL KATANA MWANZA 5TH DEFENDANT
JOSEPHAT NGALA MUNYAKI 6TH DEFENDANT
JONATHAN KENGA KATANA ALIAS GONA 7TH DEFENDANT

RULING

1. In the ruling on an application dated 27/7/2023, this court issued the following orders:
 - a. All the Respondents Gilbert Kanungu Mwanganda, Joannes Charo Katana, Jumwa Karisa Mryani, Zawadi Kibetu Kieria, Paul Katana Mwanza, Josephat Ngala Munyaki and Jonathan Kenga Katana alias GONA are hereby found guilty of contempt by way of disobedience of the court order dated 18/9/2020;
 - b. All the respondents Gilbert Kanungu Mwanganda, Joannes Charo Katana, Jumwa Karisa Mryani, Zawadi Kibetu Kieria, Paul Katana Mwanza, Josephat Ngala Munyaki And Jonathan



Kenga Katana Alias Gona are hereby directed to appear in court in person on 19/11/2024 for purposes of sentencing;

- c. However, the Respondents are also hereby ordered to purge their contempt of court by forthwith vacating the suit property known as CR 27920 Subdivision No. 176 (Original No. 163/1/) Section IV MN and the OCS Mtwapa and Kijipwa shall provide security to facilitate the enforcement of the orders herein;
 - d. The Applicant shall have the costs of this application.
2. The persons convicted of contempt have now filed the present application dated 4/11/24 seeking the following orders:
- a. Spent
 - b. Spent
 - c. A stay of execution of the orders in the ruling delivered on 24/10/24 pending the hearing and determination of the civil appeal application filed in Malindi being COACAPPL NO E005 OF 2024 which is coming up for hearing on 13th November 2024 and further pending the hearing and determination of the civil appeal filed in Malindi being Civil Appeal No E13 of 2020.
 - d. Costs be provided for.
3. The grounds for the application, which are on its face and in the supporting affidavit sworn jointly by the contemnors are that: there is a pending application in the Court Of Appeal seeking orders to stay execution and stay proceedings; it is scheduled for hearing on 13/11/2024, an earlier application COACAPPL NO E17 of 2020 having been earlier withdrawn for the reason that the ruling therein has been pending since 2021, and the contemnors were urged to pursue the substantive appeal by the appellate court. They filed the next application in the Court of Appeal, which is now pending, only to secure their interests by staying the proceedings herein. A memorandum of appeal is also said to have been filed.
4. In response, the Respondents filed a replying affidavit dated 22/11/2024. He deponed that the application is an abuse of the court process. He admits that the appeal and the motions for stay of execution before the Court of Appeal were indeed filed. The first application, COACAPPL NO E17 was supposed to be withdrawn vide a notice dated 23/2/24 but the application to withdraw has never come up before the Court of Appeal as required by Rule 54 of the Court of Appeal Rules 2022; thus the motion is still pending. The second motion before the Appellate Court Being COACAPPL NO E005 of 2024 was filed later while that first application was still pending. The latter application was however withdrawn on 13/11/24. The present application, states the respondent, is the third application for execution in this dispute, and the applicants' efforts in this regard appear to be tantamount to forum shopping. That notwithstanding, it is stated that the principles for the grant of a stay have not been satisfied by the present application, in that they have not established substantial loss for the reason that they lack beneficial interest in the property, that they have come to court after unreasonable and unexplained delay of four years after judgment was delivered, and they have not given any undertaking as to security.
5. The application was canvassed by way of written submissions which I have read, understood and considered.



Analysis And Determination

6. The main issue for determination in the present application is whether the stay of execution should be granted.
7. From what has been stated by the parties herein above it may be safely presumed that both applications before the court of appeal have been withdrawn. The application before this court.
8. The application has been brought under Order 42 Rule 6 which states:
 - “(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.”
9. The exercise of the power of the court in applications for stay of execution is discretionary. In exercising that discretion of the court in his favour, an applicant seeking stay of execution must satisfy the court that there is an appeal in place, that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
10. The applicants in the present case have indicated that there is an appeal in place which has not been denied by the respondent. I have also noted that a notice of appeal was filed on 24th September 2024. There is therefore an appeal in place.
11. The next step is to assess whether substantial loss may occur if the orders of stay of execution are not granted. The Court of Appeal in the case of Kenya Shell Ltd V Kibiru & Another (1986) KLR 410, held that:

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay”.
12. Regarding evidence of substantial loss, the contents of the affidavit of the applicants are crucial. The only statement that seems a bit relevant is that in paragraph 9 of the supporting affidavit. That statement is to the effect that the ground report compiled by the Ministry of Lands Housing and Urban Development shows the applicants to be among residents listed. However, the respondent refutes the contents of that statement and avers that what is referred to as a “ground report” is rather a letter from one of the applicants addressed to the Ministry of Lands, Housing and Urban Development. Be that as it may, this court fails to see any proof of substantial loss or damage in such a document, whether a letter to or from the Ministry. The conclusion is that no proof of substantial loss or damage has been availed by the applicant.
13. Lastly and regarding delay, this court notes that the judgment was delivered on 18/9/2020. Between that date and the date of the filing of the present application (5/11/2024) is a gap of about four years and two months. The provisions of Order 42 Rule 6 expressly bar applications filed after unreasonable delay. It is for the court having the circumstances of the case before it in mind, to determine what



amounts to unreasonable delay. Long delay, when explained, may cease being regarded as unreasonable; it all depends on the reasons given for the delay, which the court assesses against the backdrop of the general circumstances of the case. If delay is quite lengthy and is not explained, as in this case, the delay is unreasonable. This court finds that the delay herein is so inordinate delay or so severe that the court cannot not condone it in an application for stay of execution in the face of the provisions Order 42 rule 6. Consequently, I find that the application dated 4/11/2024 lacks merit and the same is hereby dismissed with costs.

14. There being nothing to bar the sentencing of the applicants, they shall purge the contempt and appear in court personally without fail on 11/3/2025 at 10.30 a.m. for mitigation and sentencing.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 4TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI

