Kinyili & 3 others v Nzatu (Environment and Land Appeal E031 of 2024) [2025] KEELC 3645 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3645 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND APPEAL E031 OF 2024

A KANIARU, J

MAY 8, 2025

BETWEEN

PETER MWENDWA KINYILI ..... 1ST APPELLANT

STELLA NDUKU MWENDWA ..... 2ND APPELLANT

CATHERINE MUENI MWENDWA ..... 3RD APPELLANT

ERIC MUIMI MWENDWA ..... 4TH APPELLANT

AND

MUTEMI NZATU ..... RESPONDENT

RULING

1. I am called upon to determine the Notice of Motion dated 11/11/2024 filed in court on even date and expressed to be brought under Order 42 Rules (1) (2) and (6) of Civil Procedure Rules. The applicants – Peter Mwendwa Kinyiri, Stella Nduku Mwendwa, Catherine Mueni Mwendwa And Erick Muimi Mwendwa – were the defendants in the lower court and are the appellants in this appeal. The respondent in this application – Mutemi Nzatu – was the plaintiff in the lower court and he is also the respondent in this appeal.

2. The application came with seven (7) prayers, three (3) of which – prayers 1, 2 and 3 – were meant for consideration at the exparte stage while four (4) others – prayers 4, 5, 6, and 7 – are for consideration now. The prayers for consideration are as follows:

> Prayer 4: That this honourable court be pleased to order a stay of execution of the judgement and decree issued in Chief Magistrate's Court MCELC No. 6 of 2023, Mwingi Law Courts, pending the hearing and determination of the appeal herein.
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> Prayer 5: That this honourable court be pleased to issue an injunction order restraining the respondent from executing the decree issued in Chief Magistrates court MCELC No. 6 of

2023, Mwingi Law Courts, or otherwise entering, occupying, remaining, transferring the suit property pending the hearing and determination of the appeal herein.

Prayer 6: That the applicant be at liberty to apply for any other or further orders and/or directions as the honourable court may deem fit and just to grant.

Prayer 7: That the costs of this application be in the cause.

3. The application is premised on the grounds, inter alia, that the respondent has commenced the process of execution by demanding delivery of completion documents; that he has also filed an application for contempt of court against the applicants; that the applicants have the actual occupation of the disputed property; that the appeal herein is arguable; that the applicants stand to loose the property if it is transferred to the respondent as he might dispose of it to third parties; that the applicants will suffer substantial loss; that it is in the interest of justice that the disputed property be preserved during the pendency of the appeal; and finally that the appeal will be rendered nugatory if it succeeds.

4. The applicants explained themselves further in the supporting affidavit that came with the application. In it, they deposed, inter alia, that they are joint owners of the disputed property; that they were selling it to the respondent vide an agreement entered into on 4/1.2014 which stipulated that the entire purchase price needed to be paid by 30/5/2015; that the respondent frustrated the agreement; that the respondent did not take possession of the property; and that as a result of this, the transaction aborted.

5. Further, the respondent was said to have filed the lower court suit; that the suit proceeded and the lower court rendered a judgement that was unsatisfactory to the applicants; that they decided to appeal and their appeal has high chances of success; that the applicants are the ones in occupation; that the property should be preserved as failing to do so will expose the applicants to substantial loss; and that the appeal may be rendered nugatory.

6. The respondent responded via a replying affidavit dated 25/11/2024 and filed on 26/11/2024. In the response, he said, inter alia, that the application is frivolous and without merit. He stated that the applicants sold the disputed land to him for Kshs. 10,360,000/= and he made a down payment of Kshs. 4,500,000/=. The applicants were supposed to sub-divide the land and get transfer documents ready by 30/5/2015. The respondent was supposed to clear the balance by the same date. But the sub-division was done in May 2015. The respondent then paid some more money – Kshs. 4,250,000/= - expecting to be given transfer documents. He was not given the documents and after waiting for about one year, he asked for them through his counsel. Further engagements with the appellants didn't bear fruit. The respondent also realized that the appellants intended to give him less land than he was paying for. He decided to come to court.

7. The land the respondent was buying was said to be unoccupied. The applicants are said to have failed to give sufficient reasons for not honoring the lower court decision.

8. The response by the respondent elicited a supplemental response by the applicant in form of a supplementary affidavit. In the response, it was reiterated that the respondent has commenced execution proceedings; that contrary to respondent's desire to have more money deposited as security, the decree of the lower court shows Kshs. 1,522,225/= as the decretal amount; that the applicants would be willing to deposit that amount as security; that the respondent's depositions in his replying affidavit can only get full canvassing at the hearing of the appeal; and that it is in the interests of justice that the disputed property be preserved.

9. The application was canvassed by way of written submissions. The applicants' submissions are dated 27/1/2025. The submissions generally reiterates the substance of the application and specifically emphasized that the respondent has commenced execution and contempt of court proceedings; that

the respondent might transfer the land to himself and possibly to third parties and thus render the appeal nugatory if successful; that the applicants' will suffer irreparable loss; and that they are willing to deposit security.

10. For further persuasion, reference was made to Order 42 Rule 6 (2) of Civil Procedure Rules. Additionally several decided cases, notably those of Mukuma –vs- Abuoga [1988] eKLR, Butt –vs- Rent Restriction Tribunal [1979] eKLR, Consolidated Marine –vs- Nampijja & Another: Civil App No. 93 of 1989, Benisa Limited –vs- John Ngotho Maina [2022] eKLR, RWW –vs- ERW [2019] eKLR and Amal Hauliers Limited –vs- Abdulnasir Abukar Hassan [2017] eKLR, among others, were cited, quoted, and/or paraphrased as deemed appropriate. The emphasis in citing and quoting the cases was to give legal succor, validation, and the necessary weight to concepts of substantial loss, preservation of the subject matter, use of discretion, and need to provide security, among other legal requirements, all of which are necessary for proof in an application for stay.

11. Ultimately, the court was asked to allow the application in order to preserve the substratum of the appeal and also ensure that the appeal is not rendered nugatory.

12. The respondent's submissions are dated 5/2/2025. According to the respondents, the applicants failed to comply with the lower court decree on time and decided to file an appeal when they realized that contempt of court proceedings were instituted against them. The respondent expressed his fear that if the applicants get the orders they are seeking, they will resell the land and that will occasion him loss. He submitted also that he stands to lose the entire purchase price, which is in excess of 10 million shillings, that he has already paid for the land. According to the respondent, the lower court judgement is sound in law and the applicants' appeal has no chances of success.

13. The respondent further submitted that it is him, and not the applicants, who will suffer substantial loss if the order of stay is granted. According to him, if the order of stay is to be granted, then the applicants should also be ordered to deposit as security the entire purchase price – amounting to Kshs. 10,272,225/= - in court or in a joint interest earning account in joint names of both advocates on record.

14. But the major thrust of the respondent's submissions is that the merits of the application have not been demonstrated. Several cases were cited including King'angi *& 2 Others –vs- King'angi & 3 others ELA E012 OF 2023*, Francis K. Chabari –vs- Mwarania Gaichura Kairubi: ELC Appeal E10 of 2011 and Amboga –vs- Ndeithi & 2 Others ELC Appeal E016 of 2023.

15. I have considered the application, the response made to it, the applicants' supplementary affidavit provoked by the respondent's response, and the rival submissions. The issue to decide is whether the merits of the application have been demonstrated. Both sides have stated well the conditions usually considered in order to allow or disallow an application of the kind now before court. Briefly stated, a party desiring to get an order for stay of execution has to show:

    a. That substantial loss is likely to result if such order is not made.

    b. That the application has been made or brought without unreasonable delay.

    c. That he is ready to furnish such security as the court may order for due performance of the decree or order as may be binding on the applicant.

16. These conditions are culled out from Order 42 Rule 6 (2) (a) and (b) of Civil Procedure Rules, 2010, which states as follows:

    "(2) 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 application has been made without unreasonable delay; and

b. Such security as the court orders for due performance as may ultimately be binding on him has been given by the applicant."

17. The applicants came to this court for reasons, inter alia, that they are dissatisfied with the lower court judgment and that the respondent has already commenced execution. They believe they have a good appeal that is likely to succeed. The respondent on the other hand believes that the lower court judgement is sound in law and the appeal therefore has no chance of success. It is not a strict legal requirement that the judgement or ruling giving rise to an appeal should be attached to an application for stay. But sometimes, the court's work becomes a bit difficult where such ruling or judgement is not made available. It is easy to see why our courts do not always insist on making the decision appealed from available. One reason is that the application is made in court proceedings where such decision is already available. That would be the case for instance where the application is made in the very court that rendered the decision. Sometimes also, - and this is the second reason - though the application is not made in the court that rendered the decision, it might be made when the record of appeal containing the decision is already filed. In both instances, the court can easily make reference to the decision if it so desires. But where, as here, and when, as now, the application is made in a court that did not render the decision, it becomes very necessary to make available the decision if the record of appeal containing the decision has not first been filed.

18. In the matter at hand, the lower court judgement has not been made available and the record of appeal has not yet been filed. What this means is that this court is making this determination without the benefit that would come from reading the lower court judgement. The applicants finds that judgement completely wanting. The respondent on the other hand finds the same judgement to be full of merits. Now who is talking the truth here? Be that as it may, the court has to work with the materials laid before it.

19. I have no doubt in mind that the respondent is eager to enjoy the fruits of the lower court judgement. Lack of co-operation from the applicants in this regard seems to have impelled him to file contempt of court proceedings. But the applicants would wish that their appeal is heard first. They fear substantial loss. They feel they have a good appeal.

20. The fact that execution process has been commenced by the winning party does not automatically entitle a losing party who is appealing to an automatic order of stay. In James Wangalwa & Another – vs- Agnes Naliaka Cheseto [2012] eKL, the court aptly observed thus:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when the execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what is to be prevented by preserving the status quo because such loss would render the appeal nugatory."

21. The applicants fear they might go to jail if they are successfully prosecuted for contempt. I think they have a valid point here. If this happens when their appeal is pending, what would recompense their loss of liberty if their appeal eventually turns out to be successful. Additionally, they say they are in occupation of the property. They say they have improved it and planted exotic trees and vegetation. They also talk of sentimental attachment to the land. Granted! But they were selling the land and would have parted with it anyway. What is this sentimental attachment that has suddenly arisen long after committing themselves to sell the land? This second point is not very appealing. I think the applicants are being a bit shifty here.

22. I also note that the respondent has expressed his view that it is him, not the applicants, who will suffer irreparable loss. I think he makes a good point here also. The material before me shows he has paid a substantial sum for the property. Ten (10) million shillings is not small change. When you add this to the fact that the applicants seem not to take this seriously – see for instance their insistence that they are only willing to deposit Kshs. 1,522,225/= as security – then it's easy to understand the respondent's frustration.

23. In a scenario like this, what then should the court do? In all this, I choose to be guided by the sapient observation of the court in RWW –vs- EKW [2019] eKLR which I reproduce here ipsissisma verba:

> " 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 judgement. 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."

24. This same wisdom runs through the pronouncement of the court in Absalom Dova –vs- Tarbo Transporters [2013] eKLR which went thus:

> " The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administer the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court, in balancing these two competing rights focus on their reconciliation..."

25. I have made these observations because having regard to what both sides have presented before me, I am persuaded that the applicants deserve an order of stay. But I am also equally persuaded that the respondent can easily suffer substantial loss if his concerns are not seriously considered. The applicants offer of security is not commensurate with what the material before me show as the likely payment made by the respondent. The amount of Kshs. 1,522,225/= stated in the decree and which the applicants ingeniously call "decretal amount" is actually not such amount. It is actually the balance that remained to be paid by the respondent to complete payment for the land. Evidently, a much larger amount had already been paid earlier.

26. Doing the best in the circumstances, I allow the application here in terms of prayer 4 only. An order of stay is granted in terms of that prayer only. But that prayer is conditional upon payment or deposit as security by the applicants of Kshs. 10,272,225/= (Kenya shillings ten million, two hundred and seventy-two thousand, two hundred and twenty-five only) in court or, if both sides agree, in a joint interest earning account in the names of counsel on both sides. For the avoidance of doubt this court does not grant the restraining order sought. The merits of such order were not proved to it. Only prayer four (4) is granted. The deposit for security has to be made in the next sixty (60) days failing which the order of stay will automatically lapse. Costs of the application to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 8TH DAY OF MAY, 2025.

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI

08/05/2025

In the presence of,

Musyoki C. K. for appellants

Munyoki Peter for Respondent

No party present

Court Assistant - Musyoki