Barngetuny & 3 others v Bett & another; Ruto (Interested Party) (Environment and Land Appeal E001 of 2025) [2025] KEELC 4282 (KLR) (5 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4282 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E001 OF 2025

LN GACHERU, J

JUNE 5, 2025

BETWEEN

KAURIA ARAP BARNGETUNY .... 1ST APPELLANT

JEREMIAL SITIENI .... 2ND APPELLANT

JOHANA KOROS .... 3RD APPELLANT

GEOFREY KOROS .... 4TH APPELLANT

AND

JOSEPH KIPKURI BETT .... 1ST RESPONDENT

LAND REGISTRAR, NAROK .... 2ND RESPONDENT

AND

GILBERT RUTO .... INTERESTED PARTY

(Being an Appeal from the Ruling of Narok Chief Magistrate's Case, CMELC No.E069 of 2024, Delivered by Hon. Phylis. L Shinyanda(PM) on 18th December 2024)

RULING

1. There are two Applications herein for consideration and determination by this court; which Applications have been brought by the Appellants/ Applicants herein who have sought various orders.
2. The first Application is dated 15th January 2025, wherein the Appellants/Applicants have sought for these orders;
   i. Pending the hearing and determination of this Appeal, the court be pleased to stay execution of the Ruling of the trial court that was delivered on 18th December 2024, and the subsequent orders thereto;

ii. That pending the hearing and determination of the Appeal, the court in order to balance interests of the parties to bar both the Appellants and the Respondent s from selling or disposing off the disputed property in any manner.

3. The Application is supported by the grounds set on the face of the said Application and on the Supporting Affidavit of Kauria Arap Barngetuny, the 1st Appellant/ Applicant herein; Among the grounds in support of the Application is that the trial court in its ruling of 18th December 2024, in favour of the Respondent granted the 1st Respondent access to the suit without any interference by the Appellants/ Applicants , their savants and/ or agents; the Applicants herein were also restrained by themselves, their agents and/ or servants from trespassing onto, selling, leasing , encroaching in any manner, and or embarking on agricultural activities or otherwise interfering with the Respondents title no Cis Mara/ Ilmotiok/169, pending the hearing and determination of the suit; that the Officer Commanding Mulot Police Station to ensure compliance with the above orders and for costs of the Application.

4. The Applicants herein were aggrieved by the said Ruling, and they filed a Memorandum Of Appeal dated 15th January 2024, and urged the court to allow the Appeal and set aside the said Ruling of the trial Court dated 18th December 2024, and costs be awarded to the Applicants. Simultaneously, the Appellants/ Applicants filed the instant Application.

5. Further, the Appellants/ Applicants alleged that the effect of the said Ruling is that the Appellants/ Applicants who are the owners of the suit land and are in actual occupation of the said land CIS Mara/ Ilmotiok/169, and have ben residing and farming thereon stand to be evicted, and will be left destitute and their crops have been destroyed, when the said Ruling and subsequent orders were executed.

6. The Appellants/ Applicants also averred that the said suit land is their ancestral land since 11th September 1980, and by their admission, the Respondents are seeking entry and access into the suit property.

7. In his Supporting Affidavit, Kauria Arap Barngetuny, reiterated the contents of the Supporting Affidavit and further averred that the original title of the suit land was issued on 7th March 2019, and was collected by the 2nd Respondent who is the step grand SON of their father. He denied ever having signed the sale agreement which is the genesis of the 1st Respondent's ownership of the suit land, as the said sale agreement was signed after the title to the suit land had been issued, and it left out one owner Kiptui Misinga Arap Parngetuny.

8. The deponent also denied having signed the transfer form , never attended the Land Control Board and did not give their identification cards for such transfer to occur. He contended that the title deed being relied upon by the 1st Respondent was a result of forgery and or fraud and was under investigation by DCIO.

9. The second Application is dated 20th January 2025, by the Appellants/Applicants where they sought;

   i. That the 1st Respondent be cited for contempt of court for disobeying and wilfully disregarding the order of the court issued on 17th January 2025;

   ii. That the 1st Respondent be denied the audience of the court until such a time as he will have purged the contempt;

   iii. The court be pleased to issue such other or further orders for contempt of the court as it may deem just and expedient;

iv. Costs occasioned by the contempt of this court proceedings be met by the Respondent and in default, execution to issue forthwith.

10. The Application is based on the grounds stated thereon and on the Supporting Affidavit of the 1st Appellant/Applicant Kauria Arap Barngetuny. Among the grounds in support of the Application are; the court issued orders of status quo on 17th January 2025, and stated status quo prevailing to be maintained pending interparties hearing.

11. Further that the status quo prevailing was that the Applicants were in occupation of the suit property and were carrying out their day to day activities, and the Respondents were served with the said status quo order through their advocates on Record; The Respondents upon learning of the status quo orders, and in company of goons and Police officers, they invaded the suit property, chased away the Applicants, razed down their houses and tilled the arable land using several tractors.

12. Further, on 18th January 2025, the 1st Respondent guarded by armed goons brought in construction materials and mobilised several workers to dig a pit latrine and erect iron sheet structures. That the 1st Respondent continued to propagate activities on the disputed parcel of land on 19th January 2025, and on 20th January 2025, despite having full knowledge of the particulars of the court order; and therefore he should not be allowed to continue with its blatant disregard of the court orders; that for the interest of justice, the orders sought should be granted.

13. The two Applications are vehemently opposed by the 1st Respondent herein Joseph Kipkurui Bett, through his two Replying Affidavits sworn on 20th January 2025. In opposition to the Notice of Motion Application dated 15th January 2025, the 1st Respondent averred that the Ruling of the trial court of 18th December 2024, was just, fair, considerate and abided by the principles of natural Justice and the rule of law, based on the circumstances.

14. Further, he averred that he is the registered owner of the suit land, being Cis Mara/ Ilmotiok/169, and the said land does not belong to the Appellants. He annexed a copy of the title thereon. It was his averments that he is the one in actual occupation of the said parcel of land since 2019, when the sale transaction was completed and the suit land was transferred to him, wherein he has put up a permanent and semi-permanent structures that have been constantly abused by the Appellants.

15. He denied that the Appellants/Applicants herein have been farming on the suit land for their daily survival, and that they had attempted to lease part of it, but upon learning that the suit land did not belong to the Appellants, the intended lessee backed off. Further that the Appellants have no crops on the suit land, and they should allow him to enjoy a quiet possession of the suit land as he has the original title deed of the suit after purchasing it from the Appellants.

16. He claimed that the Appellants have occasionally invaded the suit land, and he reported them to Mulot Police Station as was evident from the OB Records annexed as JKB2(a, b and c). He also alleged that after the Appellants sold the suit land, they purchased another parcel of land where they moved to, and therefore their allegations that they have school going children is false. Further, that the trial court had earlier issued temporally Orders of injunction to bar the Appellants/Applicants from dealing with the suit property on 11th July 2024, and the Appellants did not complain.

17. Ultimately, the 1st Respondent averred that since he is the owner of the suit land, and in occupation of the same, then the status quo to be maintained favours his occupation, and the instant Application must fail.

18. In response to the 2nd Application, the 1st Respondent admitted that indeed the court issued an order of status quo to be maintained, pending the hearing and determination of the Application inter-parties,

but since he was the one in occupation and that was the status quo to be maintained. He denied that the Appellants were in occupation, then of the suit land, and that their allegation in the Application dated 15th January 2025, was misleading.

19. It was his further allegations that the trial court had earlier issued an Order of temporary injunction on 11th July 2024, wherein the Appellants were barred from trespassing, encroaching and or embarking on agricultural activities or otherwise interfering or dealing with the suit property herein. That the Ruling of 18th December 2024, only affirmed those orders of injunction, and it is therefore clear that he is in occupation of the suit land.

20. It was his claim that in fact, the Appellants are the ones in contempt of court as they have admitted to have accessed some parts of the suit land and conducted agricultural activities, which is contrary to the earlier orders of 11th July 2024. He therefore denied being in contempt of any court orders, and that the Appellants have not come to court with clean hands, as his occupation of the suit land did not happen on 17th January 2025, but earlier. The deponent denied involvement of goons or ant arson incidences on the suit land.

21. Further, he claimed that the Appellants are the ones who breached the peace by trespassing on the suit land, causing malicious damage to property, as maintenance of status quo meant that the party/ies who was in occupation to continue with the said occupation. Since he was the one in occupation, then he is the one to continue with occupation and maintain status quo, and thus has not breached any court order.

22. The 1st Respondent further averred that his advocate on record has advised him that the Appellants did misinterpret the order of maintenance of status quo to mean restraining him from occupation of his parcel of land. He claimed that for the interest of justice, the instant application for contempt should be dismissed with costs.

23. The Appellants/ Applicants filed a Supplementary Affidavit through Kauria Arap Barngetuny and reiterated the contents of the earlier Affidavits dated 15th and 20th January 2025, and further averred that the ruling of the trial court of 18th December 2024, was not fair, just and considerate, and hence this Appeal. He claimed that the certificate of title held by the 1st Respondent was under investigation for having been obtained fraudulently, and thus the allegation that the 1st Respondent is the true owner of the suit land is denied. Further, he denied that the 1st Respondent has been in occupation of the suit land since 2019, when the transaction was allegedly concluded, as the Sale agreement in support was signed in the year 2020.

24. Further, the Appellants reiterated that the suit property has been their ancestral land since 1980, and the 1st Respondent intents to defraud them, and he does not have a quiet possession of the suit land, as he illegally acquired the title of the suit land. He also denied that the Appellants purchased another parcel of land, where they moved to, but claimed that they have been in occupation of the suit land, where they have planted and grow their subsistence crops.

25. The Appellants/ Applicants also denied that the 1st Respondent ever advanced any money to them to defray the hospital bills of their relative, and he claimed that the 1st Respondent only made some payment in 2012 as per annexture 'KAB1'. He urged the court to dismiss the 1st Respondent's allegations and averments as contained in his two Replying Affidavits, and allow their two Application.

26. The two deponents were cross-examined on 18th February 2025, by the respective advocates, and each of them reiterated the contents of their Affidavits and insisted in their ownership of the suit property.

Thereafter the court directed the parties to file brief written submissions in support of their respective positions.

27. In compliance thereto, the Law Firm of Tuya Kariuki & Co Advocates filed the submissions on behalf of the Appellants/ Applicants dated 12th March 2025, and urged the court to allow the two Applications. On his part, the 1st Respondent filed his submissions dated 1st April 2025 through the Law Firm of Abraham Sang & Co Advocates and urged the court to dismiss two instant Applications.

28. In their submissions, the Appellants/ Applicants identified three issues for determination being;

    i. whether the court should grant the orders for stay of execution of the ruling delivered on 18th December 2024;

    ii. whether the 1st Respondent should be cited for contempt of court;

    iii. who should bear costs of the two Applications.

29. Consequently, the Applicants relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, which sets out the principles to be considered in an Application for stay of execution pending Appeal; being substantial loss; application to be filed without delay and security for costs.

30. In support of their submissions and argument, they relied on various decided cases among them; James Wangalwa & Another vs Agnes Naliaka Cheseto(2012) eklr,RWW vs EKW (2019) EKLR; Absalom Dova vs Tarbo Transporter (2013) eklr and Raikundalia t/a Raikundalia & Co Advocates & 2 others (2014) eklr, and urged the court to allow the application for stay of execution pending Appeal.

31. On the Application for contempt, the Applicants submitted that the court did issue an order for maintenance of status quo on 17th January 2025, which was served upon the Respondents through their advocates on record. However, the Respondents defied the said Order and invaded the suit land with goons, and have continued to remain on the suit land despite full knowledge of the said orders of the court.

32. They submitted that the said orders were clear, unambiguous and binding on the parties; but the 1st Respondent has willingly and knowingly disregarded the said orders, and if there was any misunderstanding of the Order, the 1st Respondent should have moved the court appropriately for clarification.

33. Further, the Applicants submitted that Kenya is bound by the rule of law and National values as stipulated in Article 10 of *the Constitution*, which entails obedience and compliance of the Court orders, but the conduct of the 1st Respondent was a deviance of the court orders, which brings disrepute to court.

34. For the above submissions, the Applicants relied on the cases of Fred Matiangi vs Miguna Miguna & Others Criminal Appeal No. 1 of 2018(NRB), where the court observed that contempt jurisdiction is intended to protect the administration of justice and the rule of law. Further reliance was placed in the case of Kenya Ferry Services Ltd & Another vs Dock Workers Union (Ferry Branch) & 2 Others (2015) eklr; Simon Kamau & 19 Others vs Director of Pension & Another (2016) eklr, and Cleophas Malala vs Speaker of Kakamega County Assembly & 20thers (2014) eklr, and submitted that the 1st Respondent need to be deterred from disrespecting the Orders of the Court and also pay for the suffering of the Applicants.

35. On costs of the two Applications, it was submitted that though costs are awarded at the discretion of the court, but the same follow the event, and the 1st Respondent should be condemned to pay costs.

For this reliance was placed in the case of Rosemary Wairimu Munene ,Ex Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 where the court held;

> " The issue of costs is the discretion of the court as provided under the above section of law. The basic rule on attribution of costs is that costs follow the event. It is well recognised that the principle that costs follow the event is not to be used to penalise the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case"

36. In his submissions, the 1st Respondent asserted that he is the owner of the suit property CIS MARA/ ILMOTIOK/169, and has a title deed in his name to confirm his ownership of the suit land. It was his further submissions that the trial court did issue the orders of injunction on 11th July 2024, in his favour, which were later confirmed through a detailed ruling of 18th December 2024.

37. Further, he submitted that despite these clear and unambiguous court orders issued on 11th July 2024, and confirmed on 18th December 2024, the Appellants have been in constant disregard of the same, and the matter has severally been reported at Mulot Police Station, and therefore he was not in breach of any court order.

38. The 1st Respondent raised three issues for determination being;

    i. whether the Respondent's Certificate of title is valid and immune to unsubstantiated allegations of fraud;

    ii. whether the Respondent enforcement of his rights constitute contempt of court;

    iii. whether the Appellants Notice of Motion Application for stay of execution meets the threshold of the law.

39. In support of his submissions, the 1st Respondent relied on various decided cases and provisions of law. He submitted that he secured his rights by lawfully executing the court order of 18th December 2024, and thus was not in contempt of court, as the status quo orders of 17th January 2025, did not invalidate the earlier ruling of the court, since he was in possession of the suit property.

40. Further, he submitted that contempt of court requires disobedience of court orders that are clear unambiguous and binding as was held in the case of Samuel Nyamweya & Others vs Kenya Premier League Ltd (2015) eklr; Contempt must be proved as held in the case of Mutitika vs Baharini Farm Ltd (1985) KLR 229; And in Rosemary vs Wairimu Munene(2014) eklr where the court held admission of violating court orders are prima facie evidence of contempt.

41. On the issue of status quo, the 1st Respondent relied on the case of Nguruman Ltd vs Shompole Group Ranch (2014) eklr, where the court held that status quo refers to state of affairs existing at the time the order was issued. Further reliance was placed in the case of Kala vs Wanakuta (1982) KLR 112, where the court held that parties engaging in unlawful conduct cannot seek equitable relief, and that the Appellants have come to court with unclean hands.

42. On whether the Appellants Application has met the threshold for grant of stay orders, he submitted that the Appellants have nor proved substantial loss as they sold the suit land, and received the full consideration of Ksh.9,000,000/= and they hold no legal title over the suit land. Reliance was placed in the case of James Wagalwa vs Agnes Naliaka(supra); United India Insurance Co Ltd vs East Africa Underwriter (1985) KLR, where the court held that equity aids the vigilant and not the indolent,

or those who exploit the judicial process. He also submitted that the Appellants attempt to regain possession through stay of execution is a misuse of the court process.

43. In conclusion, the 1st Respondent submitted that the Appellants two Applications are flawed, anchored on falsehood and are designed to undermine his lawful ownership of the suit property. He urged the court to dismiss the instant Application in the interest of justice and equity with costs to him.

44. The court has considered the two applications, the Affidavits in support and against, the annextures thereto, the rival written submissions and the relevant provisions of law and finds as follows;

45. The court will consider and determines the two application sequentially. The first Application to be considered is the one dated 15th January 2025, wherein the Appellants/ Applicants have sought for stay of execution of Ruling of the trial court dated 18th December 2024, pending the hearing and determination of the Appeal herein.

46. This court does not have the benefit of the full pleadings before the trial court. However, it is evident that the trial court did deliver a Ruling on 18th December 2024, wherein the Plaintiff/ Applicant thereon, who is the 1st Respondent herein had sought for orders of temporary injunction to restrain the Defendants thereon, who are the Appellants/ Applicants from accessing and or interfering with the suit property , erecting structures thereto and or embarking on agricultural activities or otherwise.

47. From the Affidavits of the Respondent, since the Record of Appeal was not filed, it is evident that when the Application before the trial court was filed under Certificate of Urgency, interim orders were issued on 11th July 2024, wherein the Defendants thereon, who are the Appellants/ Applicants were restrained by an order of injunction by themselves, their servants or agents from trespassing onto, erecting structures, selling leasing, sub dividing , encroaching in any manner embarking on agricultural activities or otherwise dealing with the suit property being Cis Mara/ Ilmotiok/ 169, pending the hearing and determination of the Application.

48. It is evident that when the court delivered its Ruling on 18th December 2024, it confirmed the above orders, which were in force as from 11th July 2024. The Appellants/ Applicants did not dispute the existence of the above interim orders or knowledge of the same. However, it is evident that after the delivery of the Ruling on 18th December 2024, activities were heightened on the suit land by either parties.

49. The Appellants/ Applicants alleged that after the Ruling, the 1st Respondent threatened to evict the Appellants/ Applicants from the suit land, which prompted the Appellants to file the instant Appeal and Application for stay. Further that when the Court issued the status quo Order, the 1st Respondent with the help of goons destroyed the Appellants homes and razed them, thus being in blatant disobedience of the status quo order.

50. It is evident that the Appellants herein were aggrieved by the Ruling of the trial court, and filed the instant Appeal vide the Memo of Appeal dated 15th January 2025, and the Application for Stay of execution of the said ruling, which application is opposed.

51. The issue for determination is whether the Appellants are deserving of the orders for stay of the said order. It is not in doubt that a stay of execution of a temporary injunction order can be sought under Order 42 Rule 6 of the Civil Procedure Rules. This order allows the court to stay execution pending appeal, but it's a discretionary measure with conditions that must be met. Therefore, as provided by Order 42 Rule 6, the filing of an Appeal is not an automatic guarantee of stay of execution, as the Applicant must satisfy certain conditions.

52. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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."

53. Therefore, for stay orders to issue three conditions must be fulfilled , which are summarized as follows;

a. that substantial loss may result to the applicant unless the order is made;

b. application has been made without unreasonable delay;

c. security as the court orders for the due performance;

54. These principles were enunciated in the case of Butt vs Rent Restriction Tribunal [1979, where the Court of Appeal set out what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

55. Therefore, the Appellants/ Applicants herein must demonstrate the above conditions before the court can either grant or refuse to grant the stay of execution of the injunctive orders herein . The gist of the

Application before the trial court was that the 1st Respondent herein as the Plaintiff/ Applicant was the owner of the suit land being Cis Mara/ Ilmotiok/ 169 after purchasing the same from the Appellants/ Applicants herein.

56. Though the pleadings for the suit before the trial court have not been attached, it is evident that the Appellants as the Defendants thereon have disputed having sold the suit land to the 1st Respondent herein. The 1st Respondent is in possession of a title deed, which the Appellants have alleged was obtained by him fraudulently. As the rightly held by the trial court, the issue of whether the title document held by the 1st Respondent is genuine or fraudulently obtained can only be determined after the calling of evidence, in the main trial which evidence will be tested in cross-examination.

57. However, there is a dispute as to who is in occupation of the suit property. The 1st Respondent filed the suit before the trial court and sought for temporary injunction, against the Appellants/Applicants herein and interim orders were issued on 11th July 2024. It is not clear whether the Appellants were aware of these interim orders and whether they obeyed them. However, what is clear is that after the Ruling of 18th December 2024, the 1st Respondent attempted to execute them, and thus this Application.

58. The Appellants/Applicants have alleged that they rely entirely on this suit property for their survival, and if they are removed from the suit property on the strength of the temporary Orders of injunction, before the main suit is heard and determined, then they will be rendered destitute, and they will suffer substantial loss.

59. For the demonstration of substantial loss, the Applicants relied on the holding in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR , where the court held as hereunder:

> " 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 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 CPR. 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 has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

60. Further, in the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 , the Court stated that:

> " The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal

so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

61. It is evident that the Appellants/ Applicants have averred that they are the ones in possession of the suit land, they never sold the suit land to the 1st Respondent, and that he acquired registration of the suit land fraudulently. The issue of who is in occupation is in dispute, and the issue of whether the 1st Respondent acquired the suit land fraudulently is yet to be resolved. What is not in doubt is that the suit land initially belonged to the Appellants/ Applicants family, which they claim is an ancestral land. If indeed the Appellants/ Applicants are in occupation, and the 1st Respondent executes the orders as per the Ruling of 18th December 2024, the Appellants/ Applicants will be forced to move out of the suit land, and thus they have demonstrated substantial loss.

62. Further, it is evident that Substantial loss is a factual issue which must be raised in the Supporting Affidavit and further supported by evidence. In the case of Machira T/A Machira & Co. Advocates vs East Africa Standard [2002] eKLR, the court held that an applicant's ground for substantial loss must be specific and detailed as it is not enough to merely state that substantial loss will result or that if the appeal is successful, it will be rendered nugatory.

63. The 1st Respondent did file a Replying Affidavit to rebut the averments made by the Applicants herein in the Supporting Affidavit, and averred that the Appellants are the intruders and he has been farming on the suit land since 2019, when he purchased the suit land. He also admitted that he has had an altercation severally with the Appellants/Applicants and he has reported them severally at Mulot Police Station. That is an indication that the issue of ownership has never been fully resolved, and though there was an interim stay of execution, there was no evidence that the same was ever executed, and the Appellants/Applicants ceased being in occupation of the suit land.

64. Given that the 1st Respondent title is being challenged by the Appellants/ Applicants, who were the initial owners of the suit land, then this court will not be quick to holds that the 1st Respondent has been in occupation of the suit land.

65. The purposes of stay of execution is to preserve the subject matter, pending Appeal, so that the Appeal would not be rendered nugatory. See the case of RWW v EKW [2019] eKLR, where the court stated thus:-

> "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."

66. The 1st Respondent is not in possession of the suit land, and in the event the court was to find in his favour, then he will only seek for vacant possession of the suit land. However, if the Appellants/ Applicants are in possession and occupation of the suit land, and are removed from the suit land as per the court order of 18th December 2024, and eventually the court finds in their favour, they will have stayed out of the suit land, and thus the Appeal will be rendered nugatory.

67. On whether the Application was filed without unreasonable delay, it is evident that the impugned ruling was delivered on 18th December 2024, and the instant Application was filed on 15th January 2025, and thus there was no delay at all Indeed the Memorandum of Appeal was filed on 15th January 2025, simultaneously with this application, all of which were done within one month. This court thus finds that the Appeal and this Application for Stay of execution has been filed without undue delay.

68. On security, the Applicants submitted that the power whether to grant or not to grant Stay is discretionary one, and since the Ruling/ Order was not a money decree, then the Appellants/ Applicants must not be penalised with security for costs. The court was urged to look at the overriding objective of the Civil Procedure Rules as provided by sections 1A and 1B, and the findings of Machira T/a Machira & Co Advocates vs East African Standard (2002) KLR, where the court held; -

> " ...That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

69. In the case of in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, the Court of Appeal expressed itself as follows:

> " The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal."

70. The court has considered the Application herein and has noted that the Applicants did not give undertaking that they will give security for due performance, but given that this is a stay of an interlocutory Application, and the circumstances of the case, and the overriding objective of the Civil Procedure Rules, the court finds failure to give security for costs will not prejudice the 1st Respondent at all.

71. With regard to prayer No.3 of the said application the Appellants/Applicants sought for an order that; to balance interests of the parties herein, the court should bar both the Appellants and the Respondents from selling or disposing the disputed property in any manner.

72. The 1st Respondent is the one holding the title deed for the suit land which is being challenged by the Appellants/Applicants herein. If the 1st Respondent would dispose off the suit land, then the Appellants/Applicants would have nothing to claim.

73. The Application is brought under Section 1A and 3A of the *Civil Procedure Act* which provisions of law grants court powers to issue orders that are necessary for end of justice to be met. In barring both the appellants and the Respondents herein from selling or disposing the suit land, that would amount to maintaining status quo.

74. The Black's Law Dictionary, Butter Worth's 9th Edition, defines Status quo as a Latin word which means 'the situation as it exists.' The purpose of an order of status quo has been reiterated in a number of decisions.

75. In the Case of Republic vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013]eklr, the court held;-

> " when a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve the existing state of affairs.... Status quo must therefore be interpreted with respect to existing factual scenario.."

76. Further in the case of Kenya Airline Pilots Association (KALPA) vs Co-operative Bank of Kenya Limited & another [2020]eklr, the court explained the purpose of status quo Order 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 decisions."

77. Having considered all the pleadings herein and the facts as contained in the affidavits, the court finds that it is prudent to preserve the suit property by allowing the orders of status quo as prayed in prayer No.3.

78. Consequently, the court finds that the Appellants/ Applicants have met the conditions for grant of the orders of stay of execution of the Ruling delivered on 18th December 2024, and for these reasons, the court allows the said Application in terms of prayers No 4, with costs being in the cause.

79. In respect of the second Application for contempt, it is evident that on 17th January 2025, the court did issue status quo order wherein it held as follows; in the meantime, status quo prevailing to be maintained:

80. The Appellants/ Applicants alleged that after the status quo orders were served upon them, the 1st Respondent went ahead and razed the Appellants houses and destroyed their crops. These allegations were denied by the 1st Respondent, and he averred that he was the one in occupation, and the status quo meant that he remained in occupation.

81. It is evident that contempt proceedings are quasi- criminal and the degree of prove is high than balance of probabilities.

82. In the case of Samuel M. N. Mweru & others v National Land Commission & 2 others [2020] eKLR, the Court discussed in depth the applicable law on contempt of court as follows:

> " It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
>
> i. The terms of the order,
>
> ii. Knowledge of these terms by the Respondent,
>
> iii. Failure by the Respondent to comply with the terms of the order."

83. In the aforementioned case, the court proceeded to quote with approval the learned authors of the book; Contempt in Modern New Zealand thus:

> " There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-
>
> a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
>
> b. The defendant had knowledge of or proper notice of the terms of the order;
>
> c. The defendant has acted in breach of the terms of the order; and
>
> d. The defendant's conduct was deliberate."

84. It is very clear that the essence of the law on contempt is to safeguard the honour of the court and uphold the principles of the rule of law. In the case of Gatharia K. Mutikika – vs Baharini Farm Ltd [1985] KLR 227, the court held that-

> " A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily...... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.
>
> However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject...... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

85. The court in Koile*l & 2 others v Koilel & another (Civil Appeal E002 of 2021*) [2022] KEHC 10288 (KLR) (30 June 2022) (Judgment) discussed the essential elements of contempt:

> " Judicial borrowing from contemporary jurisdiction: in order to succeed in civil contempt proceedings, the Applicant has to prove;
>
> i. the terms of the order;
>
> ii. Knowledge of these terms by the Respondent; and
>
> iii. Failure by the Respondent to comply with the terms of the order (Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005)."

86. Therefore, given that if the 1st Respondent is to be found guilty of contempt, then his liberty will be at risk, there must be strict proof that he was indeed in breach of the court order. Firstly, the order allegedly disobeyed must be clear and unambiguous. The orders issued were for maintenance of the status quo. However, there is confusion of what status quo was since there was an earlier interim orders for temporary injunction, and the 1st Respondent averred that those were the status quo to be maintained.

87. It is therefore obvious that the orders of status quo were not clear and were ambiguous. Even if the 1st Respondent had knowledge of the status quo, this court cannot find and hold that he was in breach or disobedience of the court orders. The court cannot hold him to be in contempt of the orders of status quo.

88. For the above reasons, the court finds the Application dated 20th January 2025, not merited and the same is dismissed entirely with costs being in the cause. However, the Notice of Motion Application dated 15th January 2025 is allowed in terms of prayer No.4 with costs being in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 5TH DAY OF JUNE 2025.

L. GACHERU

JUDGE

In the presence of:

Meyoki – Court Assistant

Ms Muchiri Holding brief for Mr. Tuya for the Appellants/Applicants

N/A for the Respondents

L. GACHERU

JUDGE