



**Kisoloki v Mbatha (Suing on His Own Behalf and on Behalf of the Estate of Mbatha Waita - Deceased) (Environment and Land Appeal 29 of 2023) [2024] KEELC 1271 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1271 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 29 OF 2023  
A NYUKURI, J  
MARCH 6, 2024**

**BETWEEN**

**MUTIE KISOLOKI ..... APPELLANT**

**AND**

**PETER LUKA MUSEMBI MBATHA (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF MBATHA WAITA - DECEASED). RESPONDENT**

*(Being an appeal from the judgment of Honourable Anne Nyoike (SPM) in Machakos CMCC No. 67 of 2016 delivered on 23rd May 2023)*

**RULING**

**Introduction**

1. Before court is a notice of motion dated 4<sup>th</sup> July 2023 filed by the appellant seeking the following orders;
  - a. Spent
  - b. Spent
  - c. That this honourable court be pleased to order stay of execution of the judgment delivered on 23<sup>rd</sup> May 2023 in Machakos CMCC No. 67 of 2016 together with the decree and all consequential orders in this suit pending the full hearing and final determination of this appeal.
  - d. That the costs of this application be provided for and/or abide the outcome of the appeal.
2. The application is premised on the grounds on its face as well as the supporting affidavit sworn on 4<sup>th</sup> July 2023 by Mutie Kisoloki the appellant in this appeal. The applicant deposed that the lower court delivered judgment on 23<sup>rd</sup> May 2023 declaring that Parcel LR No. Iveti/Mung'ala/1213 (suit property) belongs to the respondent absolutely to the exclusion of the defendant; an order of



permanent injunction restraining the defendant from interfering with the suit property and general damages in the sum of Kshs. 100,000/-. He further stated that the initial stay of execution granted for 30 days has since lapsed and that the respondent has since sent his agents to survey the suit property. He stated that he is in occupation of the suit property where he resides with his family and is afraid of being evicted therefrom.

3. The applicant also averred that if the decree is executed, the appeal will be an academic exercise. He expressed his willingness and ability to furnish the court with reasonable security. He maintained that he has an arguable appeal with chances of success. He stated that if execution proceeds, he stands to suffer substantial loss.
4. The application was opposed. Peter Luka Musembi Mbatha, the respondent swore a replying affidavit dated 15<sup>th</sup> August 2023 opposing the application. He deponed that the application lacked merit and that the same was filed after inordinate delay without any explanation. He stated that the application was premised on falsehoods for the sole intention of denying him the fruits of his judgment. He maintained that the applicant had not demonstrated that he stood to suffer substantial loss if orders sought were not granted. He stated that if the court was inclined to grant the orders sought, the applicant should be ordered to pay Kshs. 300,000/- as security for costs.

### **Analysis and Determination**

5. I have carefully considered the application and the response and in my view, the sole issue for determination is whether the appellant has met the threshold for grant of orders of stay of execution pending appeal.
6. The law governing stay of execution pending appeal is Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#), which provides as follow;
  1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 subrule (1) unless—
      - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
      - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
    - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
    - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
  - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
7. Therefore for an applicant to succeed in an application for stay pending appeal, they must demonstrate that they stand to suffer substantial loss if stay is not granted. Merely demonstrating that execution is imminent and that there is appeal against the decision intended to be executed is not sufficient reason to grant stay of execution pending appeal as execution is a lawful process subsequent to a judgment.
  8. In the case of *James Wangalwa & Another v. Agnes Naliaka* [2012] eKLR, in underscoring the need to demonstrate substantial loss in an application for stay pending appeal, the court observed as follows;

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 *Civil Procedure Rules*. This is so because execution is a lawful process. The applicant must establish 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.
  9. In this case, the appellant states that execution of the judgment will result in substantial loss on his part as he is in occupation of the suit property. On his part the respondent stated that the applicant's averments are merely falsehoods.
  10. The applicant seeks to have the court stay a judgment of the lower court dated 23<sup>rd</sup> May 2023. That judgment was not attached to the application, and therefore this court is not able to appreciate the matters that were before the lower court in the context of the applicant's averments that he has an arguable appeal which will be rendered an exercise in futility if execution proceeds. Besides, on the question of substantial loss, the applicant states that he is in occupation of the suit property, while the respondent's response is that those averments are false. There is no iota of evidence provided by the applicant to demonstrate occupation of the suit property or in any way demonstrate that he will suffer substantial loss if the judgment of the lower court is executed. A mere mention of substantial loss is not proof that such substantial loss exists or is likely to be occasioned. That is a matter which ought to be proved by evidence, which is lacking in this matter.
  11. The upshot is that I find and hold that the application dated 4<sup>th</sup> July 2023 lacks merit and the same is hereby dismissed with costs to the respondent.
  12. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6<sup>TH</sup> DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**



In the presence of:

No appearance for the appellant

No appearance for the respondent

Josephine – Court Assistant

