



**Masai & another v Munguti & another (Environment and Land Appeal  
E043 of 2023) [2024] KEELC 1227 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1227 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E043 OF 2023**

**A NYUKURI, J  
MARCH 5, 2024**

**BETWEEN**

**JAMES KASWII MASAI ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH MASAI KASWII ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN MUMO MUNGUTI ..... 1<sup>ST</sup> RESPONDENT**

**HELLEN MUTHONI CHEGE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated 16<sup>th</sup> January 2024 filed by the appellants seeking stay of execution of the judgment of the lower court delivered in Machakos ELC Case No E11 of 2020 pending hearing and determination of the appeal.
2. The application is premised on the supporting affidavit sworn jointly by the applicants on 16<sup>th</sup> January 2020. The applicants' case is that judgment was made by the lower court in favour of the respondent whereof the court ordered injunction restraining the appellants from accessing Plot No 603 (suit property) while the appellants live thereon and that if the decree of the lower court is executed, they stand to lose their livelihood and home. That they will thus suffer substantial loss. They argued that their appeal had a high chance of success. They attached the judgment, draft decree and a letter requesting for proceedings.
3. The application is opposed. The 1<sup>st</sup> respondent John Mumo Munguti filed a replying affidavit sworn on 1<sup>st</sup> February 2024. He stated that the application is based on falsehoods and matters which were never raised at the trial, and therefore the same is misleading to this court. He stated that despite the orders clearly made prior to the judgment restraining the applicants from trespassing on the suit



property, they continue to ignore the judgment which led to an application for contempt. That on 19<sup>th</sup> July 2021, the court made a ruling in respect thereof. That when the matter came up for directions, the applicants agreed to comply with the orders and interim applications were abandoned so as to have the matter proceed to be heard on merit.

4. He further deposed that in the intervening period, the suit property was not put to any use although he had access to the same and that neither the applicants nor the respondents have farmed or carried out developments thereon.
5. He insisted that it was misleading for the applicants to state that they risk losing their homes or livelihoods since the suit property is vacant and no home or structure has been put up thereon. He further stated that he had facilitated extraction of the decree and already fenced the suit property and that therefore the application is overtaken. He stated that the land remains intact and nothing has been destroyed. He attached the ruling of 19<sup>th</sup> July 2021; order of 10<sup>th</sup> December 2020; decree and photographs.

### **Analysis and determination**

6. I have carefully considered the application and the response thereto. The only issue that arise for determination is whether the applicants have met the threshold for grant of orders of stay of execution pending appeal.
7. The jurisdiction of the court to grant stay of execution pending appeal is provided in Order 42 Rule 6 of the *Civil Procedure Rules* as follows;
  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.
8. Therefore, for an applicant to succeed in an application for stay of execution pending appeal, they must demonstrate that they stand to suffer substantial loss. Demonstrating imminent execution only, is not sufficient as execution is a lawful process which ought to proceed upon issuance of a decree or order. (See *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR).
9. In the instant case, the applicants contend that they live on the suit property where they have homes and that they get their livelihoods therefrom; hence if execution proceeds, they stand to suffer substantial loss as they will lose their livelihoods.
10. The 1<sup>st</sup> respondent has contested the allegations that the applicants have homes on the suit properties. He insists that the suit property is vacant, save that he has fenced the same. He maintained that the



matters raised in the supporting affidavit never arose in the trial and that the applicants are misleading this court.

11. On the question of whether the applicants stand to suffer substantial loss due to imminent loss of homes and livelihoods, I have considered the evidence presented by both parties, and it is clear that other than alleging that they have homes on the suit properties, no evidence was presented by the applicants on that allegation. In addition, they have not demonstrated how they eke their livelihoods from the suit property. Having considered the photographs presented by the respondents, it is clear that save that the respondents have fenced the suit property, the same is vacant.
12. Besides, from the ruling of the trial court dated 9<sup>th</sup> September 2021, it is on record that the applicants herein informed court that they had never entered on or interfered with the plaintiffs' use of Plot No 603. That being the position, I am satisfied that the suit property is vacant and there is no truth in the applicants' allegations that they eke their livelihoods from the same or that they reside thereon. There is no evidence that the applicants have put up homes on the suit property. For those reasons I find and hold that the applicants have failed to demonstrate that they stand to suffer substantial loss in the event the orders sought are not granted.
13. The upshot is that this court finds that the application dated 16<sup>th</sup> January 2024 is not merited and the same is hereby dismissed with costs to the respondents.
14. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5<sup>TH</sup> DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of:

Mr. Loki for respondents

Ms Mutua for appellants

Josephine – Court Assistant

