



**Munene & 4 others v Mathenge (Environment and Land Appeal  
47 of 2023) [2024] KEELC 5064 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5064 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 47 OF 2023**

**JM MUTUNGI, J**

**JULY 4, 2024**

**BETWEEN**

**JOSEPH MUNENE ..... 1<sup>ST</sup> APPELLANT  
PRISCILLA WAMBUI ..... 2<sup>ND</sup> APPELLANT  
EDWARD MURIMI ..... 3<sup>RD</sup> APPELLANT  
GOSPEL REVIVAL CENTRE KIBURU ..... 4<sup>TH</sup> APPELLANT  
ERICK BUNDI KIRAGU ..... 5<sup>TH</sup> APPELLANT**

**AND**

**TERESIA WANGECHI MATHENGE ..... RESPONDENT**

**RULING**

1. This Ruling is on the Applicants' Notice of Motion application dated 9<sup>th</sup> February 2024 seeking inter alia the following orders:
  1. That this Honourable Court be pleased to stay execution of the ruling and/or order made on 24/11/2023 pending the hearing and determination of this application.
  2. That this Honourable Court be pleased to issue an order for the status quo to be maintained pending the hearing of the appeal.
  3. That this Honourable Court be pleased to stay execution of the ruling and/or order made on 24/11/2023.
  4. That the cost of this application be provided for.
2. The motion was predicated upon the annexed affidavit of Joseph Munene, the 1<sup>st</sup> Applicant, who was authorized to swear the affidavit on behalf of the other applicants. He deponed that they had been



residing on the property known as Mwerua/Kagioini/881 (referred to as the suit land) for the last more than 50 years. He stated that the Lower Court in Baricho PMCCNo. 25 of 2019 had issued orders for their eviction ex-parte, without giving the Applicants an opportunity to present their case. He further deponed that the orders compelled them to leave the suit land within 6 months of the date of the Ruling made on 24/11/2023. He explained the reason for their non-attendance at the hearing was the lack of notification by their Advocates about the hearing date, leading to their absence and the subsequent ex-parte Judgment against them. The Applicants sought to have the Judgment set aside, but their application was dismissed with costs, prompting them to appeal and seek a stay of the execution of the ruling dated 11/02/2024. The Applicants argue that issuing the stay of execution order is crucial for justice, as failing to do so would render their appeal meaningless.

3. The application was opposed by the Respondent through her Replying Affidavit dated 15<sup>th</sup> February 2024. The Respondent contended that the Judgment delivered on 11<sup>th</sup> August 2023, still stands against the Applicants, and has not been appealed against. As per the said Judgment, the Applicants were required to vacate the disputed land within six months from the date of the Judgment which they failed to do. The Respondent further averred that the orders dated 24<sup>th</sup> November 2023, which the Applicants sought to have stayed, essentially dismissed an earlier application by the Applicants and, hence, were not subject to stay. These orders, she asserted were negative orders which were incapable of being stayed. The Respondent further asserted that the Applicants had illegitimately occupied the land, registered under Gerald Muthigani since 18<sup>th</sup> August 2010, for 14 years, thereby branding them as trespassers and in contempt of the Court's Judgment dated 11/08/2023. The Respondent stated she would suffer irreparable harm should the Court grant the application in favour of the Applicants.
4. The Applicants filed a Further Affidavit on 30<sup>th</sup> April, 2024, where they averred the suit was not res judicata as alleged by the Respondent. They clarified that the Kerugoya H.C Succession Cause No. 123 of 2023 had not been completed due to their decision to abandon it. The Applicants explained that the appeal was based on the dismissal of their application to set aside the exparte Judgment delivered on 11<sup>th</sup> August, 2024. They emphasized that if they were evicted, the appeal would be rendered nugatory. The Applicants contended that an order requiring the parties to maintain the prevailing status quo would no prejudice any of the parties.
5. The application was canvassed by way of written submissions. The Respondent filed her written submissions on 21<sup>st</sup> February, 2021, while the Applicants did not file any submissions. I have considered the application and the Replying Affidavit in opposition, and I have considered the submissions by the Respondent. The singular issue for determination in this matter is whether the Applicants have made out a case to justify a grant of an order of stay of execution of the ruling and/or order delivered on November 24, 2023.
6. The power to grant stay of execution of a decree or order pending the hearing and determination of an appeal is discretionary and an Applicant has to show that he/she stands to suffer substantial loss unless the stay is granted. The Applicant must also give security should the Court so direct. However, this discretion must be exercised with judicial prudence as was underscored in the Case of Butt v. Rent Restriction Tribunal [1982] KLR 417.
7. The principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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. Further to the above, stay may be granted by a Court if sufficient cause is demonstrated having regard to the overriding objective that the Courts are now enjoined to give effect to the provisions of Section 1A of the *Civil Procedure Act* in interpreting any of the provisions of the *Act*.  
 Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”  
 Section 1B of the *Act* outlines the objectives as being to facilitate; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
  
9. An application for stay of execution of a Decree or Order pending appeal should satisfy the conditions set out in Order 42 Rule 6(2), to wit;
  - a. that substantial loss may result to the applicants unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the Court orders for the due performance of such Decree or Order as may ultimately be binding on the Applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR and also *Kenya Shell Ltd v Kibiru & Another* (1986) eKLR.
  
10. The Primary consideration therefore in an application for stay of execution is whether the Applicant has proved or shown that he would suffer substantial loss unless the order of stay is granted. If the Applicant cannot show or demonstrate the substantial loss he stands to suffer, the likelihood of the appeal being rendered nugatory is minimal. In the Case of *Kenya Shell Ltd (supra)* Platt Ag JA observed as follows:-
 

“-----If there is no evidence of substantial loss to the Applicants, 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. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
  
11. In the instant application the Applicants are seeking an order for stay of execution of the Ruling and/or order made on the 24<sup>th</sup> November 2023 pending the hearing and determination of the appeal. The Ruling made by the Lower Court on 24<sup>th</sup> November, 2023 was on the Notice of Motion application by the Applicants where the Applicants sought inter alia an order to set aside the exparte Judgment delivered by the Lower Court on 11<sup>th</sup> August, 2023. In the alternative the Applicants in the application had sought stay of execution of the Judgment pending determination of an application pending before the Kerugoya HC Succession Cause No. 123 of 2023. The subordinate Court found no merit in the application and dismissed the same with costs. It is this Ruling the Applicants now seek stay of execution of. Is the Ruling really capable of execution and can execution of the same be stayed? The Ruling was delivered and the effective order was that the Ruling was dismissed. A dismissal order is



incapable of being stayed as it takes effect from the time it is made. The Ruling did not require the Applicants to perform any act save perhaps to pay the costs once they were ascertained.

12. The Applicants were not ordered to do anything or refrain from doing anything as per the ruling. The Court in effect issued what was in the nature of a negative order that was not capable of being executed and hence there was nothing that could be stayed. The resultant order that ensued following the ruling was in essence a negative order and is incapable of execution.
13. The Court of Appeal in the Case of *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (K)*(2015) eKLR dealing with a somewhat similar application held as follows:-

“An order for stay is ordinarily an interim order which seeks to delay the performance of a positive obligation that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay called a positive order –either an order that has not been complied with or has party been complied with.”

14. Similarly the Court of Appeal in the Case of *Kenya Commercial Bank Ltd v Tamarind Meadows Ltd & 7 Others* (2016) eKLR observed as follows concerning stay of execution:-

“In *Kanwal Sarjit Singh Dhiman v Kesharji Juvray Shah* (2008) eKLR the Court of Appeal while dealing with a similar application for stay of a negative order held as follows:-

The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the Superior Court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the Judgment with costs. By the order, the Superior Court did not order any parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs.”

Makhandia J (as he then was) applied the same reasoning in the Case of *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No. 15 of 2010 and stated as follows:-

“The order dismissing the application is in the nature of a negative order and is incapable of execution, save perhaps for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order---. The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to Court and therefore issues of substantial loss that he is likely to suffer and/or the appeal being rendered nugatory does not arise -----:”

15. There is no question that the Ruling/Order the Applicants have appealed against constituted a negative order since the Respondent was not ordered to do anything and/or restrained from doing anything. The order simply is incapable of being stayed. If the order cannot be stayed the issue of substantial loss and/or that the appeal will be rendered nugatory cannot arise;
16. In the premises the Applicants application is devoid of any merit and is dismissed with costs to the Respondent.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 4<sup>TH</sup> DAY OF JULY 2024.**



**J. M. MUTUNGI**  
**ELC JUDGE**

