



**Bichage v Ismail & another (Environment and Land Appeal  
E033 of 2024) [2024] KEELC 6706 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6706 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E033 OF 2024**

**A NYUKURI, J  
OCTOBER 3, 2024**

**BETWEEN**

**CHRIS MUNGA BICHAGE ..... APPELLANT**

**AND**

**YUSUF KARANJA ISMAIL ..... 1<sup>ST</sup> RESPONDENT**

**ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES (IN  
TRUST FOR ST JOSEPH FREINADMETZ CATHOLIC CHURCH RUAI  
PARISH ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the ruling of the Chief Magistrate's Court  
at Mavoko by Hon. R. W. Gitau, Senior Resident Magistrate  
delivered on 11th June 2024 in Mavoko Civil Case No. E862 of 2021)*

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated 17<sup>th</sup> July 2024 filed by the appellant seeking stay of execution of the ruling and order of the lower court delivered on 11<sup>th</sup> June 2024 in Mavoko Civil Case No. E862 of 2021 pending hearing and determination of the appeal herein.
2. The application is supported by the affidavit sworn by Chris Munga Bichage the appellant, on 17<sup>th</sup> July 2024. The applicant's case is that there is a judgment and decree for the sum of Kshs. 907,568/- in favour of the respondent against the applicant and that the respondent placed prohibitory order on the applicant's Title No. Nairobi Block 136/5957 with intention to have the property sold in execution of the lower court's decree.
3. The applicant further stated that the 1<sup>st</sup> respondent proceeded to sell the said property to the 2<sup>nd</sup> respondent on 21<sup>st</sup> August 2023 without subjecting the same to valuation by both parties and



obtaining orders as to the manner and dates of sale of the same. That the 1<sup>st</sup> respondent filed the motion dated 9<sup>th</sup> February 2024 seeking to confirm the sale while the appellant filed the motion dated 18<sup>th</sup> March 2024 seeking to set aside the sale. That the trial court delivered a ruling dated 11<sup>th</sup> June 2024 dismissing the appellant's application and allowing the 1<sup>st</sup> respondent's application hence the appeal herein is against the said ruling.

4. He stated that he has an arguable appeal and that if stay is not granted his appeal shall be rendered nugatory because he has been in ownership and possession of the land since 2021 and that if the same is transferred to the 2<sup>nd</sup> respondent, he stands to lose possession. Further, that the land is valuable and the 2<sup>nd</sup> respondent may dispose it to third parties. He stated that he was willing to put the property at the court's disposal as a condition for stay.
5. He maintained that the first respondent will not suffer prejudice as he will be holding the sum of Kshs. 2,200,000/- being the proceeds of the alleged sale of the aforesaid parcel, which amount is more than sufficient to secure the decretal sum. He also stated that he had filed his application timeously.
6. The application is opposed. The 1<sup>st</sup> respondent filed a replying affidavit sworn on 2<sup>nd</sup> October 2024 opposing the application. He stated that the applicant had not presented evidence of substantial loss, if stay is not granted. He stated further that the appeal does not raise arguable issues and that the application is an afterthought to avert execution to prevent the 1<sup>st</sup> respondent from enjoying the fruits of the judgment.
7. He pointed out that the appellant herein has not appealed against the judgment or decree for payment of Kshs. 907,568/- and that he needs to be allowed to enjoy the fruits of his judgment. He stated that if the court is inclined to grant the orders sought, it should be on condition that the applicant should deposit the decretal sum of Kshs. 907,568/- in a joint interest earning bank account of both advocates as security.
8. He stated that the sale of the property herein was done within the law and the application is meant to frustrate the respondents. Further that the applicant had mischievously filed a similar application in the lower court through a proxy where the proxy alleges to lay claim on the property yet the applicant purports to use the same property as security.
9. He stated that the sum of Kshs. 2,200,000/- was paid by the 2<sup>nd</sup> respondent and not the appellant and cannot be used as security in this case. That the appellant has refused to share his bank details to receive the balance. He asked the court to dismiss the application as the same was an abuse of the court process.

### **Analysis and determination**

10. The court has duly considered the application and the response. The only issue that arise for determination is whether the applicant deserves orders of stay of execution pending appeal.
11. Order 42 Rule 6 of the [Civil Procedure Rules](#) grants this court power to order stay of execution pending appeal where it is demonstrated that the applicant is likely to suffer substantial loss; the application is filed without unreasonable delay and the applicant has given security for the due performance of the decree.
12. Therefore, to obtain stay an applicant must demonstrate that they stand to suffer substantial loss if stay is not granted; that they have sought for stay without unreasonable delay and show willingness to provide security for the due performance of the decree.



13. On substantial loss, the applicant must show that execution will cause irreparable loss and result in rendering the appeal nugatory. In the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, the court discussed the element of substantial loss 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.

14. In the instant matter, there is no dispute that there is a judgment and decree for payment of the sum of Kshs. 907,568/- in favour of the 1<sup>st</sup> respondent, which judgment has not been appealed against. Therefore, the 1<sup>st</sup> respondent's right to receive Kshs. 907,568/- has been settled by court with finality. The appellant's appeal disputes the legality of the sale. The appellant argues that valuations were not done prior to the sale and therefore he shall be unlawfully deprived of his property. Considering this argument, it is clear that the appellant has an arguable appeal which may be rendered nugatory if execution proceeds. Therefore, while the appellant has a right to pursue his appeal, the 1<sup>st</sup> respondent has a right to have the judgment complied with so that he can enjoy the fruits of the judgment which has not been appealed against.
15. In the premises and in the interests of justice, the order that commends itself in the circumstances of this case, which I hereby grant, is that pending the hearing and determination of the appeal herein, the execution of the ruling and order of the court made on 11<sup>th</sup> June 2024 in Mavoko CMCC Case No. E862 of 2021 is hereby stayed on condition that the appellant deposits the decretal sum of Kshs. 907,568/- into a joint interest earning account in the joint names of the counsel for the appellant and the 1<sup>st</sup> respondent within 30 days of today; in default execution to proceed.

16. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3<sup>RD</sup> DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Ms. Muriithi for 1<sup>st</sup> respondent

No appearance for the appellant

No appearance for 2<sup>nd</sup> respondent

