



**Kirui v Metet & 12 others (Environment and Land Appeal E007 of 2024) [2025] KEELC 79 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 79 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND APPEAL E007 OF 2024  
LA OMOLLO, J  
JANUARY 23, 2025**

**BETWEEN**

**JOSIAH KIPKOSKE KIRUI ..... APPELLANT**

**AND**

**MICHAEL METET ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KIPRONO KOECH ..... 2<sup>ND</sup> RESPONDENT**

**FREDRICK KIPKURUI LANGAT ..... 3<sup>RD</sup> RESPONDENT**

**GEOFFREY KIPLANGAT MUTAI ..... 4<sup>TH</sup> RESPONDENT**

**KIPROTICH WILLY MUTAI ..... 5<sup>TH</sup> RESPONDENT**

**JOSEPH CHERUIYOT KORIR ..... 6<sup>TH</sup> RESPONDENT**

**PETER KIPTARUS KERICH ..... 7<sup>TH</sup> RESPONDENT**

**GRACE CHEPKOSKE LANGOI (SUING AS THE LEGAL REPRESENTATIVE OF WILSON KIPCHIRCHIR LANGOI (DECEASED)) ..... 8<sup>TH</sup> RESPONDENT**

**STEPHET LABOSO ..... 9<sup>TH</sup> RESPONDENT**

**SAMUEL MITEI ..... 10<sup>TH</sup> RESPONDENT**

**RACHAEL RONO ..... 11<sup>TH</sup> RESPONDENT**

**SHADRACK KORIR ..... 12<sup>TH</sup> RESPONDENT**

**ALBINA CHEPKURUI ..... 13<sup>TH</sup> RESPONDENT**



## RULING

### Introduction

1. This ruling is in respect of the Appellant/Applicant's Notice of Motion application dated 24<sup>th</sup> September, 2024.
2. The application is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*.
3. The application seeks the following orders;
  - a. Spent
  - b. Spent
  - c. Pending the hearing and determination of this appeal, this Honourable Court be pleased to grant a stay of execution of the judgement and decree delivered on 13<sup>th</sup> June 2024 in Kericho Chief Magistrate's Court ELC Case No. 5 of 2019.
  - d. The costs of this application be provided for.
4. The application is based on the grounds on its face and the supporting affidavit of one Josiah Kipkoske Kirui sworn on 24<sup>th</sup> September, 2024.

### Factual Background.

5. The Appellant/Applicant filed the Memorandum of Appeal dated 28<sup>th</sup> June, 2024 appealing from the judgement and decree of Hon. J Bii delivered in Kericho CM ELC Case No. 5 of 2019 on 13<sup>th</sup> June, 2024.
6. The grounds of appeal are as follows;
  - a. The Learned Magistrate erred in law and in fact by failing to consider the issue of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, as the suit herein against some of the Defendants was statute-barred at the time it was filed and thus could not be entertained.
  - b. The Learned Magistrate erred in law and in fact in granting the remedy of specific performance, despite the agreement in question being unenforceable as it had been overtaken by events in accordance with the *Limitation of Actions Act*.
  - c. The Learned Magistrate erred in law and in fact by failing to consider the provisions of Section 3(3) of the *Law of Contract Act*, which stipulates that contracts for the disposition of an interest in land must be in writing and signed by all parties thereto, and attested by a witness present when the contract was signed by such party.
  - d. The Learned Magistrate erred in law and fact by ignoring evidence presented by the Appellant which demonstrated that some of the agreements had already been rescinded and the money refunded to the Respondents.
  - e. The Learned Magistrate erred in law and in fact by entertaining the suit in its entirety, despite lacking jurisdiction to do so.



7. The Appellant/Applicant prays for the following orders;
  - a. The appeal be allowed and the judgement and decree of the Learned Magistrate be set aside.
  - b. This Honourable Court do find that the claim in the lower Court for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> Respondents/Plaintiffs was statute barred and thus could not be entertained.
  - c. This Honourable Court do find that the agreements for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> Respondents/Plaintiffs was unenforceable and specific performance should not have been granted.
  - d. This Honourable Court do find that the Learned Magistrate had no jurisdiction to entertain the claim for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> Respondents/Plaintiffs.
  - e. The Counterclaim in the lower Court be allowed against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> Respondents/Plaintiffs.
  - f. The Respondents do bear the costs of this appeal and costs in the lower Court.
8. The application under consideration first came up for hearing on 1<sup>st</sup> October, 2024 when the Court gave directions that it be served upon the Respondents.
9. The application was mentioned on 29<sup>th</sup> October, 2024 to confirm filing of responses and on 19<sup>th</sup> November, 2024 it was reserved for ruling.

#### **Appellant/Applicant's Contention.**

10. The Appellant/Applicant contends that he is aggrieved with the judgement delivered by Hon. J Bii in Kericho CM ELC Case No. 5 of 2019 and has preferred the present appeal on the ground that the Court erred in fact and in law in arriving at its decision.
11. The Appellant/Applicant also contends that in the said judgement, the Learned Trial Magistrate ordered him to surrender and transfer ownership of the suit land to the Respondents.
12. The Appellant/Applicant further contends that the trial Court made the said determination after ignoring key evidence including the fact that suit was time barred by the *Limitation of Actions Act* and that the agreements that formed the basis of the suit were rescinded by mutual consent between the parties.
13. It is the Appellant/Applicant's contention that he filed the Memorandum of Appeal dated 28<sup>th</sup> June, 2024 where he raised among other issues, the failure of the trial Court to consider the provisions of Section 3(3) of the *Law of Contract Act* which requires contracts for disposition of an interest in land to be in writing and signed by all parties. He adds that the trial Court failed to consider the evidence that showed that the agreements were unenforceable as they had been rescinded after the refund of the consideration.
14. It is also the Appellant/Applicant's contention that the Respondents are in the process of executing the judgement of the Court and unless this Court grants the orders sought, there is a risk that the Respondents will dispose of the suit parcel to third parties thereby rendering his appeal nugatory. He adds that if execution proceeds, it would result in irreversible consequences that cannot be compensated by way of damages.



15. It is further the Appellant/Applicant's contention that land parcel No. Kericho/Sorget/Kalyet Block 1/160 is his primary source of livelihood and the risk of it being sold or transferred to third parties during the pendency of the appeal will occasion him substantial loss.
16. The Appellant/Applicant contends that the Respondents have no known assets or financial means capable of compensating him in the event the appeal succeeds.
17. The Appellant/Applicant reiterates that if the land is transferred and/or developed before the appeal is determined he will suffer irreparable loss that cannot be adequately compensated in monetary terms.
18. The Appellant/Applicant contends that the balance of convenience tilts in his favour and that he is willing to abide by any reasonable conditions that would be imposed by this Court including the provision of security for due performance of the decree.
19. The Appellant/Applicant also contends that the Respondents will not suffer any prejudice if stay is granted. He adds that should his appeal fail, the Respondents will have an opportunity to enforce the judgement but if stay is not granted and execution proceeds, he stands to lose the suit parcel.
20. The Appellant/Applicant ends his deposition by stating that it is in the interest of justice that this Court grants the orders sought as it will preserve the status quo and allow the appeal to be determined.
21. The Respondents did not file any response to the application.
22. None of the parties filed submissions.

#### **Analysis and determination**

23. I have considered the application and the only issue that arises for determination is whether an order of stay of execution of the judgement and decree issued Kericho CMELC Case No. 5 of 2019 should be granted pending the hearing and determination of the appeal.
24. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows;
  - “(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.”
25. In the judicial decision of *RWW v EKW* [2019] eKLR the Court held as follows;

“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.”



26. In *Absalom Dova v Tarbo Transporters* [2013] eKLR the Court also held as follows;

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation...” (Emphasis mine)

27. In *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal held as follows;

- i. 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.
- ii. 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.
- iii. 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.
- iv. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

28. The first criterion set out under Order 42 Rule 6 (2) of the Civil Procedure Rules is that the Appellant/Applicant must bring his application without unreasonable delay.

29. The judgement the Appellant/Applicant is appealing from was delivered on 13<sup>th</sup> June, 2024 while the application under consideration was filed on 1<sup>st</sup> October, 2024. The application was filed three months and seventeen days after the delivery of the judgement.

30. In the judicial decision of *Francis K. Chabari & another v Mwarania Gaichura Kairubi* [2022] eKLR the Court held as follows;

“32. From the record, the ruling appealed against was made on 23<sup>rd</sup> September, 2021 and the application herein was filed on 3<sup>rd</sup> December, 2021. This was after about two months and nine days. In my opinion, the application was not made timeously and the Applicants have not even given an explanation for the delay in bringing the application herein.”

31. As was held in the above cited judicial decision, a delay of two months and nine days was considered to be inordinate. In the present matter, it is my view that the application has not been filed timeously and the Appellant/Applicant has not given any explanation as to the delay.

32. The second criterion is that the Appellant/Applicant must demonstrate that he is bound to suffer substantial loss if orders of stay of execution are not granted.



33. In the judicial decision of *Silverstein Vs Chesoni* (2002)1 KLR 867 the Court held as follows;
- “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”
34. In the judicial decision of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012]eKLR the Court observed as follows on what constitutes substantial loss;
- “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.”
35. The Appellant/Applicant contends that he stands to suffer substantial loss if stay of execution is not granted because the suit parcel is his primary source of livelihood and it is likely to be transferred before the appeal is determined.
36. The Learned Trial Magistrate made the following orders in his judgement;
- “1. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failure to cause the subdivision of land parcel No. Ker/Sorget/Kalyet Block 1/160 is unjustified.
  2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are hereby compelled to cause subdivision of land parcel No. Ker/Sorget/Kalyet Block 1/160 within 45 days of the date of this judgement.
  3. Failure in 2. Above, the Deputy Registrar is hereby directed to execute all necessary documents for the subdivision of land parcel No. Ker/Sorget/Kalyet Block 1/160 without further ado.
  4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall pay to the Plaintiffs costs of the suit as well as of the Counterclaim.”
37. In the judicial decision of *Samvir Trustee Limited Vs Guardian Bank Limited Nairobi* (Milimani) HCCC No. 795 of 1997 the Court held as follows;
- “For the Applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”



38. In the judicial decision of *Githuku v Gitichie & 3 others* (Sued in the capacity of the legal administrator of the estate of Tabitha Njoki Mwangi - Deceased) (Environment & Land Case 101 of 2023) [2024] KEELC 4486 (KLR) (6 June 2024) (Ruling) the Court held as follows;

“The Court is not satisfied from the material on record that the intended appeal shall be rendered nugatory in the absence of a stay. There is no evidence on record from which it may be concluded that the suit property shall not be available to the Defendants should their intended appeal ultimately succeed. There is no evidence on record to demonstrate that the suit property shall not be recoverable from the Plaintiff should the Defendants be successful in their appeal.

16. There is no allegation or demonstration that the Plaintiff intends to sell, charge, lease, transfer or lease the suit property. The Court takes the view that transfer of property is a reversible process. As a result, the Court is not satisfied that the Defendants have made out a case for the grant of a stay pending appeal.” (Emphasis mine)

39. In the above cited judicial decision, the Court held that transfer of property is a reversible process and on that basis declined to grant orders of stay of execution.

40. In the present matter, it is my view that the Appellant/Applicant has not demonstrated the substantial loss he is likely to suffer if orders of stay of execution are not granted. Merely stating that the suit parcel is his main source of income and that the transfer to the Respondents will occasion him substantial loss is not sufficient to warrant the grant of an order of stay pending appeal.

#### **Disposition.**

41. Taking into consideration my finding that there was inordinate delay in bringing this application and further that the Appellant/Applicant has failed to prove that he will suffer substantial loss, I find that this application lacks merit and it is hereby dismissed with costs.

42. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 23<sup>RD</sup> DAY OF JANUARY, 2025.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of:

Mr. Mwenda for the Respondent

Appellant (appearing in person) – Absent.

Court Assistant: Mr. Joseph Makori.

