



**Macharia & 2 others v Mwangi (Substituting John Mwangi Oscar Gitau) & 2 others
(Environment & Land Case E007 of 2024) [2024] KEELC 6512 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E007 OF 2024
LN GACHERU, LN GACHERU & LN GACHERU, JJ
OCTOBER 9, 2024**

BETWEEN

EDWARD MACHARIA PLAINTIFF

AND

**GRACE WAIRIMU MWANGI (SUBSTITUTING JOHN MWANGI OSCAR
GITAU) APPLICANT**

AND

ANTHONY MACHARIA PLAINTIFF

AND

**GRACE WAIRIMU MWANGI (SUBSTITUTING JOHN MWANGI OSCAR
GITAU) DEFENDANT**

AND

EDWARD MACHARIA 1ST RESPONDENT

ANTHONY MACHARIA 2ND RESPONDENT

RULING

1. The matter for determination is the Notice of Motion Application dated 9th February 2024, brought under Sections 1B, 2A, 2B and 3A of the Civil Procedure Act, wherein the Defendant/Applicant has sought for the following Orders :
 1. Spent.
 2. Allowed on the consent of the parties.
 3. Allowed on the consent of the parties.



4. That this Court do grant a stay of Execution of the Decree herein pending the hearing and determination of the Intended Appeal.
5. That costs of this Application be on the cause.
2. The Application is supported by the Supporting Affidavit of Grace Wairimu Mwangi (Applicant) sworn on 9th February, 2024, wherein she averred that she is the widow of John Mwangi Oscar Gitau (deceased), who was the Defendant in the instant suit wherein Judgment was delivered by this Court on 25th January, 2024 in favour of the Respondents.
3. She further contended that she was dissatisfied with the said Judgment and wishes to lodge an appeal against the said Judgement, before the Court of Appeal. It was her further contention that she has obtained interim Letters of Administration to substitute her late husband in the suit herein. Therefore, her main prayer is for the Court to grant a stay of execution of its Judgment dated 25th January, 2024, wherein, the Court ruled that her late husband was holding land parcel number LOC.20/Githuri/67, (the suit property) in trust for himself, the 1st and 2nd Respondents and one Patrick Macharia.
4. This Court, in the said Judgment, had directed the Land Registrar to register the 1st and 2nd Respondents together with Patrick Macharia, as tenants in-common in respect of the suit land, and to sub-divide the same within sixty (60) days of the Judgment for the benefit of the mentioned parties.

The 1st Respondent's Response

5. The 1st Respondent opposed the instant Application through his Replying Affidavit sworn on 27th February 2024, wherein he averred that he is opposed to the Applicant's prayer No 4 seeking a stay of execution of the Decree of this court arising out of the Judgment dated 25th January, 2024, because the Applicant has not demonstrated that she stands to suffer substantial loss if the same is not allowed.
6. The 1st Respondent further contended that the Applicant has failed to indicate that she will provide any security to show due performance of the Decree as may be ultimately binding on her. Further, that the Applicant has also not shown that her intended Appeal is arguable and has high chances of success or that if the present Application is not granted, her Intended Appeal would be rendered nugatory.
7. The 1st Respondent further averred that the Applicant is obligated to present a just cause depriving the Respondents the right to enjoy the fruits of a successful Judgment which she has failed to do.

The 2nd Respondent's Response

8. The 2nd Respondent also opposed the instant Application through his Replying Affidavit sworn on 27th February, 2024, and filed on even date. However, he was not opposed to the Applicant's prayers Nos. 2 and 3, but is opposed to her prayer as contained in the instant Application. He reiterated the same averments advanced by the 1st Respondent in his Replying Affidavit also 27th February, 2024.
9. The Court directed that the Application be canvassed by way of written submissions, and the parties did comply with the said directives.

The Applicant/intended Appellant's Submissions

10. The Applicant/Intended Appellant filed her written submissions dated 26th March, 2024, through the Law Firm of Irungu Mwangi Ng'ang'a T.T. & Co Advocates, and submitted that she had lodged Civil Appeal Case No. E047/2024, before the Court of Appeal at Nyeri against the decision of this Court dated 25th January, 2024.



11. She further submitted that through the instant Application, she is seeking to exercise her rights pursuant to Article 50 and Article 164 of the Constitution of Kenya. She also argued that if this Court does not grant a stay of execution as sought in her prayer No 4, she stands to lose irreparably as the suit property may be subdivided by the Respondents and transferred to her detriment.
12. It was her further submissions that the purpose of a stay of execution is to protect an Intended Appeal from being rendered nugatory, and that the suit land was registered in her late husband's name, and it remains the source of her family's food and income. She argued that unless the Court grants her a stay of execution of the Judgment dated 25th January, 2024, she will suffer irreparable damage together with her family.
13. The Applicant further submitted that her husband was murdered prior to the delivery of the Judgment of this Court, and on Order for stay of execution is merited in the circumstances. Reliance was placed in the decision of the Court in the case of *Githunguri v Jimba Corporation Limited* [1988] KLR 838, to anchor the proposition that an applicant seeking a stay of execution needs to show the Intended Appeal is not frivolous and is an arguable appeal.
14. Further reliance was sought in the holding of the Court in the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others* to buttress the argument that a stay of execution derives from the provisions of Article 164(3) of the Constitution, and it form part of the Court's inherent jurisdiction to preserve the substratum of the appeal/intended appeal.
15. The Applicant also relied on the reasoning of the Court in the case of *Butt V Rent Restriction Tribunal* [1982] KLR 417, for the elements to be considered by a Court handling an application for stay of execution.

The 1st and 2nd Respondents' Submissions

16. The 1st and 2nd Respondents jointly filed their written submissions dated 8th May, 2024 through the Law Firm of Njui Kariuki & Co Advocates, and they identified two issues for determination being:
 - i. Whether the Applicant's prayer for Stay of execution pending Appeal is merited?
 - ii. Reliefs available.
17. It was the 1st and 2nd Respondents submissions that the grant of stay of execution is governed by the principles set out under Order 42 Rule 6 (2) of the Civil Procedure Rules. Reliance was sought in the holding of the Court in the cases of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, to buttress the proposition that the operationalizing of the process of execution by itself does not amount to "substantial loss"; and therefore, an applicant seeking a stay of execution needs to show that the execution in question will create a situation that will negate essential core of the Intended Appeal.
18. Further reliance was sought in the holding of the Court in the case of *Kingoina (Suing as the Legal Representative of Jeremiah Kingoina Obego – Deceased) v Kingiona & 3 others (Environment & Land Court Case No. 457 of 2013 [2023] KEELC 20819 (KLR) (18 October 2023) (Ruling)*, to also buttress the argument that an applicant seeking a stay of execution of a judgment needs to demonstrate that he/she stands to suffer substantial loss if the same is not granted.
19. The Respondents also submitted that the process of subdividing the suit property pursuant to the Judgement of this Court is a lawful process. In response to the Applicant's claim that her family derives



both food and income from the suit property, they argued that the Applicant is set to acquire a portion of the suit land upon sub-division, and therefore, she does not stand to suffer any damage at all in terms of income and food.

20. On the question as to what amounts to substantial loss, reliance was placed in the decision of the Court in the cases of *Samvir Trustee Limited v Guardian Bank Limited* (Nairobi Milimani HCCC 795 of 1997; *Mukuma v Abuoga* [1988] KLR 645; *Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. limited* [2014] eKLR; and, *New Stanly Hotel Ltd v Arcade Tobbaconist* [1980] KLR 757.
21. On the issue of the Applicant's failure to furnish security to show due performance of the Decree sought to be appealed against, the Respondents submitted that the Applicant was doing everything possible to ensure that they do not enjoy the fruits of a successful Judgment.
22. Relying on the holding of the Court in the case of *Consolidated Marine V Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Respondents submitted that the purpose of a stay of execution is to preserve the substratum of the Appeal/Intended Appeal, and that the Applicant did not attach a Memorandum of Appeal, hence it is not possible to determine whether the Intended Appeal is arguable or not.
23. The above are the Pleadings, the rival written submissions and the cited authorities which this court has carefully considered and the court finds the issues for determination are; -
 - i. Whether the Applicant/Intended Appellant is entitled to the Orders Sought?
 - ii. Who shall bear the costs of the suit?

i. Whether the Applicant/Intended Appellant is entitled to the Orders Sought?

24. The Applicant seeks for a stay of execution of this Court's Judgment dated 25th January, 2024, wherein it was held that the suit land registered in the name of John Mwangi Oscar Gitau (deceased), is the subject of a trust on account of it being family/ancestral land; and, the court directed that the said land be apportioned between the deceased, the 1st and 2nd Respondents and one Patrick Macharia.
25. The principles governing the grant of a stay of execution have been set out with clarity by the Courts. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court reasoned as follows:

“The granting of stay of execution pending appeal by the High Court is governed by Under Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant... Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:

- a. Substantial loss may result to the applicant unless the order is made,
- b. The application has been made without unreasonable delay, and
- c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”



26. Further, in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & Ruth Wairimu Karuga* (Civil Application 97 of 1986) [1986] KECA 94 (KLR) (Civ) (2 July 1986) (Ruling), the Court declared as follows:

“In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.”

27. This Court takes note of the Applicant’s claim that she derives food and income from the suit land, and that stands to suffer irreparable loss if the Judgment of this Court dated 25th January 2024, is not stayed pending her appeal before the Court of Appeal (Nyeri).

28. In the case of *Linotype – Hell Limited v Baker* [1992]4 ALL ER 887; *Sewankambo Dickson v Ziwa Abby* HCT-00-CC MA 0178 of 2005, the High Court of Uganda defined substantial loss in the following terms:

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...”

29. In the event the Applicant herein is successful in the Intended Appeal and the subdivisions/transfers of the suit property are nullified by the appellate Court, then, the suit land in its entirety is set to revert to her late husband’s estate. If, however, she is unsuccessful on appeal, she gets to keep her husband’s portion of the suit property.

30. Pending the outcome of her Intended Appeal, she continues to utilize her late husband’s portion of the suit land. From the totality of the evidence placed before the Court by the Applicant, the Court is not persuaded that the process of sub-division of the suit land as directed in the impugned Judgment will occasion substantial loss to the Applicant herein because the Applicant is entitled to a share of the suit land through her late husband.

31. Therefore, this Court is satisfied that the Applicant’s prayer (4) for stay of execution is not merited, as the Applicant has not demonstrated that she stands to suffer substantial loss if the same is not allowed.

ii. Who should bear costs of this Application?

32. On the question of costs, the Court is bound to apply the provisions of Section 27 of the Civil Procedure Act, and award costs to the successful party in the instant Application and also considering whether there are special factors that would warrant the court to depart from the ordinary position. The Court is alive to the fact that the instant dispute involves family members who are related through marriage.

33. Therefore, this Court directs each party to bear its own costs in respect of the instant Application.

Having carefully considered the instant Notice of Motion Application dated 9th February 2024, the court finds and holds that it is not merited, and consequently, the said Application is dismissed entirely with an order that each party to bear its own costs.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF OCTOBER, 2024.

L. GACHERU

JUDGE

9/10/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Mrs Kariuki for the Plaintiffs/Respondents

Mr. Irungu Mwangi for Defendant/Applicant

L. Gacheru

Judge

09/10/2024

