



**Maina (Suing on His Behalf and on Behalf of 33 others) v Nzuki & 2 others (Environment & Land Case 18 of 2008) [2024] KEELC 6424 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6424 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 18 OF 2008**

**A NYUKURI, J**

**OCTOBER 2, 2024**

**BETWEEN**

**SIMON MURIITHI MAINA (SUING ON HIS BEHALF AND ON BEHALF OF 33 OTHERS) ..... PLAINTIFF**

**AND**

**ANTHONY NZUKI ..... 1<sup>ST</sup> DEFENDANT**

**EMMANUEL KAKULA (BOTH BEING SUED IN THEIR CAPACITIES AS ADMINISTRATORS OF THE ESTATE OF THE LATE RAPHAEL KAKULA NZUKI - DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**DIVISIONAL INTEGRATED DEVELOPMENT PROGRAMMES COMPANY LIMITED (DIPS) ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is a notice of motion application dated 6<sup>th</sup> July 2023 filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants seeking the following orders;
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That this Honourable Court be pleased to issue a stay of execution of the judgment dated and delivered on 26<sup>th</sup> April 2023 and all consequential orders thereto pending hearing and determination of the intended appeal.
  - e. That costs of this application be provided for.



2. The application is premised on the supporting affidavit sworn on 6<sup>th</sup> July 2023 by Antony Nzuki the 1<sup>st</sup> defendant. The applicants' case is that they are dissatisfied with the judgment made on 26<sup>th</sup> April 2023 in this matter and that on 8<sup>th</sup> May 2023, they filed a notice of appeal. According to them, the appeal is arguable and has overwhelming chances of success as the land belongs to Raphael Kakula Nzuki.
3. They also stated that the plaintiff had begun the process of execution and that if execution proceeds, the appeal will be rendered nugatory and reduced to an academic exercise. They also stated that the plaintiff had served them with a draft decree. They attached a copy of the judgment, notice of appeal and letter forwarding draft decree.
4. The application was opposed by both the plaintiff and the 3<sup>rd</sup> defendant. Simon Muriithi Maina the plaintiff swore a replying affidavit dated 20<sup>th</sup> July 2023 opposing the application. He stated that the plaintiffs have constructed on the suit property having been in possession thereof, for over 20 years, a fact conceded to by the applicants and that there is no evidence that even if the appeal was to succeed, it would be rendered nugatory as titles issued can always be revoked and that if the applicants succeed, having sought for eviction, nothing will stop them from proceeding to evict the respondents. Further that since the respondents have been in possession of the suit property for over 20 years, the applicants do not stand to suffer prejudice if stay is not granted and that there is no evidence that the suit property will be disposed by the respondents when they live thereon; upon acquiring the property for valuable consideration.
5. He also stated that the applicants had not offered any security. He stated that there is no demonstration by the applicants that their appeal has a probability of success.
6. Boniface Mutua Musyoki the Managing Director of the 3<sup>rd</sup> defendant filed a replying affidavit dated 18<sup>th</sup> July 2023 opposing the application. He stated that the applicants did not state the prejudice to be occasioned to them if execution proceeds. He stated that the court applied equity and stated that parties to a contract are estopped from denying what is in the contract. That as the plaintiffs came on the suit property on the invitation of the late Raphael Kakula Nzuki, having received monies from them it would be prejudicial and unconstitutional to deny the plaintiffs the right to own the suit property.
7. He stated that the 3<sup>rd</sup> defendant complied with the judgment and deposited Kshs. 1,752,988 in court. He stated that since the applicants had not provided security and had sought for stay of execution three months after delivery of judgment, they were not entitled to the orders sought. Further that the application was in bad faith and meant to prolong litigation. He attached the deposit slip.
8. In a rejoinder, Anthony Nzuki filed further affidavit sworn on 21<sup>st</sup> July 2023 and reiterated the contents of his supporting affidavit. He further stated that on 22<sup>nd</sup> November 2012, the court granted orders stopping the plaintiffs from constructing on the suit property and that construction thereon was in contempt of court. He stated that as the suit property belongs to Raphael Kakula Nzuki and he is the administrator of his estate, he will suffer prejudice if stay of execution is not granted because he will be unable to execute his duties and account for the deceased's properties. Further that the suit property may be subdivided and sold to third parties hence the appeal may be rendered nugatory.
9. He stated that he was ready to comply with the order for security.
10. The application was disposed by way of written submissions. On record are submissions filed by the applicant on 27<sup>th</sup> October 2023, those filed by the 1<sup>st</sup> respondent on 7<sup>th</sup> February 2024 and those of the 2<sup>nd</sup> respondent filed on 5<sup>th</sup> October 2023; all of which this court has carefully and duly considered.



## Analysis and determination

11. The court has carefully considered the application, the responses, the rejoinder as well as the submissions filed by the parties. The only issue that arise for the determination by this court is whether the applicants deserve orders of stay of execution of judgment herein pending hearing and determination of intended appeal.
12. Order 42 of Rule 6 of the *Civil Procedure Rules* grants the court the power to grant stay of execution pending appeal 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.
  3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
  5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
  6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
13. Therefore, to obtain stay pending appeal, the applicant must demonstrate that he or she stands to suffer substantial loss, and must have filed the application without unreasonable delay. The applicant should also demonstrate willingness to provide security for the due performance of the decree.
14. In the case of *James Wangalawa & Another v. Agnes Naliaka Chesoto* [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 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.

15. In the instant case, the applicants state that the suit property belongs to the estate of Raphael Kakula Nzuki and that they are administrators of his estate and if execution proceeds, they will not execute their duties. They also add that the suit property may be subdivided and sold to third parties.
16. The court in its judgment found that the suit does not belong to the estate of Raphael Kakula Nzuki and therefore the applicants proposition that they will fail in their duties as administrators if execution proceeds is unjustified and with no basis. On subdivision of the suit property, no evidence was presented by the applicants to show that the same will be done. The fact that there was a sale of the suit property by the deceased who received monies paid by the plaintiffs, allowing the 3<sup>rd</sup> defendant to sell the suit property to the plaintiffs is not in contest as the contract of sale is clear. Therefore, I find and hold that the applicants have not demonstrated substantial loss to be suffered if execution proceeds.
17. In addition, the judgment herein was delivered on 26<sup>th</sup> April 2023 and the applicants granted 60 days to comply. They however chose to sit on their laurels so that even after filing notice of appeal dated 8<sup>th</sup> May 2023, and waited until 6<sup>th</sup> July 2023 to file the instant application a period of over two months. The applicants have not bothered to explain why they had to wait till July to seek for stay of execution. Even then they have not even exhibited filing of the appeal in 60 days as expected under Rule 84 of the Court of Appeal Rules. I therefore find and hold that the application herein was filed after unreasonable delay without any justification, lawful excuse or plausible reason.
18. The upshot is that I find no merit in the application dated 6<sup>th</sup> July 2023 which I dismiss with costs to the respondents.
19. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 2<sup>ND</sup> DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Mundia holding brief for Mr. Nzei for applicants

Ms. Mutua for 2<sup>nd</sup> respondent

Mr. Kuloba for 1<sup>st</sup> respondent

Court assistant – Josephine

