



**Thiong'o (Suing as the legal representative of the Estate of Michael Thiong'o Gatete)
 & another v Ontonyi & 3 others (Environment & Land Case 462 & 551 of 2016
 (Consolidated)) [2024] KEELC 6865 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6865 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT KISII
 ENVIRONMENT & LAND CASE 462 & 551 OF 2016 (CONSOLIDATED)**

M SILA, J

OCTOBER 17, 2024

(FORMERLY KISII HCCC NO. 125 OF 2011)

BETWEEN

**PETER GATETE THIONG'O (SUING AS THE LEGAL REPRESENTATIVE OF
 THE ESTATE OF MICHAEL THIONG'O GATETE) PLAINTIFF**

AND

JAMES ONTONYI 1ST DEFENDANT

BEATRICE ONTONYI 2ND DEFENDANT

MACUKA ONTONYI 3RD DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 551 OF 2016

BETWEEN

MABEYA ONTONYI PLAINTIFF

AND

**PETER GATETE THIONG'O (ON BEHALF OF THE ESTATE OF THE LATE
 MICHAEL THIONG'O GATETE) DEFENDANT**



RULING

(Application for stay pending appeal to the Court of Appeal; need for one to first file a Notice of Appeal before filing such application; no notice of appeal filed in this instance; application dismissed)

1. The application before me is that dated 14 March 2024 but filed on 15 April 2014 by the unsuccessful defendants. The application seeks orders of stay of execution of the judgment and decree pending appeal and also for the law firm of M/s Miyienda & Company to come on record in place of the law firm of M/s S.M Omwega & Company. The application is opposed.
2. To put matters into context, one Michael Thiong'o Gatete as the original plaintiff (now deceased) commenced suit on 28 June 2011 seeking orders to have James Ontonyi, Beatrice Ontonyi and Machuka Ontonyi, give vacant possession of the land parcel Nyaribari Chache/B/B/Boburia/9634. That case was filed as Kisii HCCC No 125 of 2011 and is the current Kisii ELCC No 462 of 2016. A related suit, originally filed as Kisii HCCC No 258 of 2011, was filed by Mabeya Ontonyi against Michael Thiong'o Gatete on 10 November 2011. The two suits were consolidated with the case filed by Michael Thiong'o Gatete being the lead file and him being generally the plaintiff and the defendants that he had sued and Mabeya Ontonyi being generally the defendants.
3. The case of the original plaintiff was that he purchased the land parcel Nyaribari Chache/B/B/Boburia/403, which was land measuring 12 acres, in a public auction held on 30 September 1975. At the time of sale, that land was registered in the name of Mabeya Ontonyi who had charged the land to Kenya Commercial Bank. The said land was transferred to the original plaintiff and he got registered as proprietor on 19 January 1976. The original plaintiff averred that after he purchased the land, Mabeya Ontonyi and his family pleaded with him to have them remain on the land as they had nowhere else to go. To settle the matter, he agreed to subdivide the land into two portions which came to be registered as Nyaribari Chache/B/B/Boburia/9633 and 9634. He agreed to keep the land parcel No 9634 and have Mabeya Ontonyi and his family retain the parcel No 9633. Mabeya Ontonyi and his family could not however agree who would be registered as proprietor and the title is therefore still in the name of the original plaintiff. He sued because the family of Mabeya Ontonyi took possession of both parcels No 9633 and 9634. In the other suit, Mabeya Ontonyi claimed that Michael Thiong'o Gatete fraudulently got himself registered as proprietor of the land parcel No 403. He sought a declaration that this land belongs to him and an order to cancel the two subdivisions No 9633 and 9634. Michael Thiong'o Gatete died on 10 December 2020 before the case could be heard. He was substituted by his son and legal representative, one Peter Gatete Thiong'o, who is the respondent in this application.
4. I heard the dispute and delivered judgment on 27 September 2023. I concluded that the correct version of events was that provided by the plaintiff/respondent. I found that the original plaintiff had purchased the land parcel No 403 in a public auction and so that he can have peace he agreed to cede half the land to the family of the applicants. That is why he subdivided the land parcel No 403 into the parcels No 9633 and 9634, on the understanding that he was to keep the parcel No 9634 and the applicants to keep the parcel No 9633. I entered judgment for the respondent and ordered the applicants to give vacant possession within 14 days.
5. In this application, the applicants now seek a stay of execution of the judgment pending appeal. The supporting affidavit is sworn by James Ontonyi. He deposes that they are aggrieved with the judgment and have prepared an appeal. He raises issues on how the original plaintiff got registered as proprietor of the suit land which he avers they wish to prosecute on appeal.



6. The respondent/decree holder filed Grounds of Opposition. There are some grounds raised contesting the coming on record by the law firm of M/s Miyienda & Company which I need not go into because on 17 July 2024 I allowed the said firm to come on record after judgment. On the substance of the application, the grounds contend inter alia that the applicants have not demonstrated how they stand to suffer loss if stay is not granted; that they have not annexed a Memorandum of Appeal to demonstrate that they have an appeal that has good chances of success; that there was inordinate delay in filing the application; that the applicants have not deposited any security; and that the application is an abuse of the court process.
7. Mr. Miyienda, learned counsel for the applicants, fully relied on the affidavit in support of the application while Mr. Kilonzo, learned counsel for the respondent, filed submissions to oppose it. I have considered all these.
8. This is an application for stay of execution pending appeal and I stand guided by the provisions of Order 42 Rule 6 which provide as follows :

6. Stay in case of appeal [Order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.
9. From the above, it will be discerned that indeed, an unsuccessful party is at liberty to seek a stay pending appeal on satisfying certain conditions. This kind of stay, that is stay pending appeal, is of course aimed at protecting a party who has appealed, from being faced with the full force of the judgment while the appeal is pending. As the description pronounces, it is stay pending appeal, not just any kind of stay. One therefore needs to demonstrate that he has filed an appeal and that there is need to stay the execution of decree pending hearing of that appeal. As provided under Order 42 Rule 6 (4) for purposes of pursuing a stay of execution pending appeal, it will be deemed that there is an appeal pending, if a notice of appeal has been filed to the Court of Appeal.
10. In my view, before one can pursue a stay of execution pending appeal, he first needs to satisfy the court that he has complied with the provisions of Order 42 Rule 6 (4), that is, demonstrate that he has filed a Notice of Appeal to the Court of Appeal. Notices of Appeal in civil cases are addressed in Rule 77 of the *Court of Appeal Rules*, which provides as follows :
77. Notice of appeal
- (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
 - (2) Each notice under subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.
 - (3) Each notice of appeal under subrule (1) shall state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, shall—
 - (a) specify the part complained of;
 - (b) the address for service of the appellant; and
 - (c) the names and addresses of the persons intended to be served with copies of the notice
 - (4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.
 - (5) Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging the notice of appeal.
 - (6) A notice of appeal shall be substantially in Form D as set out in the First Schedule and signed by or on behalf of the appellant.



11. From the foregoing, particularly from subrule (2), it will be seen that a notice of appeal is to be filed within 14 days of the judgment.
12. In our case, I have perused the file but I have actually not seen any filed notice of appeal. What I have seen on record, and is indeed attached to the supporting affidavit, is only a draft Notice of Appeal dated 11 October 2023 but which does not have any evidence of filing. There is no payment receipt and no acknowledgment by the Deputy Registrar of the court, indicating when it was lodged. Moreover, it shows that it is drawn by the law firm of M/s Miyienda & Company Advocates. As at 11 October 2023, Miyienda & Company Advocates was not on record in this matter. The said firm first filed an application dated 16 November 2023 (filed on 27 November 2023) inter alia seeking to come on record for the applicants. That being the case, the said firm could have been able to file any Notice of Appeal on 11 October 2023 before even filing an application to come on record.
13. The long and short of it is that I am not persuaded that there is a Notice of Appeal lodged upon which an application for stay pending appeal can be mounted. In essence, you cannot seek stay pending appeal when you have no appeal in the first place. You need first to lodge a notice of appeal which will be the foundation for seeking a stay pending appeal. It would be a paradox for a court to give an order of stay pending appeal when there is no appeal. That would be a stay in a vacuum and not a stay pending appeal.
14. The court of appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* Civil Application No 327 of 2009 (2010) eKLR put it as follows :

“ At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5(2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgement of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”
15. Though the above is in respect of stay in the Court of Appeal, the principle is still applicable where one seeks stay in this court. One must have initiated the process of appeal by filing a notice of appeal before seeking stay pending appeal.
16. For failure to have a notice of appeal, this application lacks any foundation. I have no option but to dismiss it, which I hereby do. It is hereby dismissed with costs to the respondent.
17. In essence, there is nothing to bar the respondent from proceeding with execution.
18. Orders accordingly.

DATED AND DELIVERED THIS 17 DAY OF OCTOBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of:

Mr. Miyienda for the applicants

N/A on part of Mr. Kilonzo for the respondent

Court Assistant – David Ochieng’

