



Wainaina & another (Suing as the Administrators of the Estate of Clement Wainaina alias Wainaina Ndirangu) v Molyn Credit Limited & 2 others; Anyangu (Defendant) (Environment & Land Case 5 of 2022) [2024] KEELC 7428 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7428 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 5 OF 2022
LC KOMINGOI, J
NOVEMBER 7, 2024**

BETWEEN

CHRISTINE NJERI WAINAINA 1ST APPLICANT

SARA MUTHOMI NGWIRI 2ND APPLICANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF CLEMENT
WAINAINA ALIAS WAINAINA NDIRANGU**

AND

MOLYN CREDIT LIMITED 1ST DEFENDANT

THE LAND REGISTRAR, KAJIADO 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, NGONG 3RD DEFENDANT

AND

LYDIA NYAMBURA ANYANGU DEFENDANT

RULING

1. This is the Notice of Motion dated 3rd May 2024 brought under;
(Provisions Order 42 Rule 6, of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), the inherent powers of the Court and the enabling provisions of the law)
2. It seek orders;
 1. Spent.
 2. Spent.



3. That the Honourable Court be pleased to grant a stay of execution of the Judgement and decree delivered on 11th April, 2024 pending the hearing and determination of the appeal.
4. That costs be provided for.
3. The grounds are on the face of the Application and are set out in paragraphs 1 to 7.
4. The Application is supported by the supporting Affidavit of Moses Anyangu, a director of the 1st Defendant/Applicant, sworn on the 3rd May 2024.
5. The Application is opposed.
There is a Replying Affidavit sworn by Christine Njeri Wainaina and Sara Njeri Muthoni Ngwiri, the Plaintiffs/Respondents herein.
6. The Notice of Motion was canvassed by oral submissions on the 14th October 2023.
7. I have considered the Notice of Motion, the affidavit in support, there response thereto, the rival submissions and the authorities cited. The issue for determination is whether this Application is merited.
8. Order 42 rule 6 of the Civil Procedure Rules provides that;
 - “(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. It is the 1st Defendant/Applicant’s case that it has erected houses on the suit property and if evicted it will lose its investments. That it stands to suffer substantial loss if the execution of the Judgement is allowed to proceed.

10. This court in its judgement dated and delivered on the 11th April 2024 observed thus;

“It is on record that National Land Commission recommended a restriction against the suit property, but the 1st Defendant went against it and it was her testimony that she developed the suit property and sold off some of the houses. Even if the court was to entertain the notion that there existed no restriction as asserted by the 1st Defendant, the act of disposing of a portion of the suit property while this legal action was pending stands in contradiction to the doctrine of lis pendens. The Court of Appeal in *Anne Jepkemboi Ngeny v Joseph Tireito & another* [2021]eKLR elaborated this doctrine and held that lis pendens is akin to contempt of court where it stated;

SUBPARA “32. In Civil Appeal Number 44 of 2014, *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR, the Court address the issue of lis pendens as follows;

“Black’s Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

... While addressing the purpose of the principle of lis pendens, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

33. The actions of the appellant and the 2nd respondent of proceeding to alienate the property and having it registered in their names during the pendency of the litigation process, ran afoul of the doctrine of lis pendens and was also tantamount to contempt of court.”

11. I agree with the Plaintiffs/Respondents’ submission that the houses were put up during the pendency of the suit herein hence the 1st Defendant/Applicant had assumed the risk.

12. I am guided by the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* (2012) eKLR to find that the 1st Defendant/Applicant has failed to demonstrate that it will suffer substantial loss if these orders are not granted.



13. Similarly, in the case of RWW Vs. EKW (2019) eKLR the court stated;

“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 safe guarded 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 judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

14. In conclusion I find no merit in this Application and the same is dismissed with costs to the Plaintiff/ Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 7TH DAY OF NOVEMBER 2024.

L. KOMINGOI

JUDGE.

In the Presence of:

Mr. Mageto for the Plaintiff/Respondent.

Mr. Muhuni for the 1st Defendant/Applicant.

N/A for the 2nd, 3rd Defendants/Respondents.

Court Assistant – Mutisya.

