



**Mwabeka & 3 others v Yusuf (Environment and Land Miscellaneous Application
6 of 2021) [2024] KEELC 13565 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 6 OF 2021
AE DENA, J
DECEMBER 3, 2024**

BETWEEN

**SALIM ALI MWABEKA 1ST APPLICANT
FRANCIS MUNYAO MULINGE 2ND APPLICANT
JEREMIAH SOO MULINGE 3RD APPLICANT
KENYA COMMERCIAL BANK LTD 4TH APPLICANT**

AND

AHMED JAMA YUSUF RESPONDENT

RULING

1. The application the subject of this ruling is dated 14th August 2018. The applicant seeks orders that this Honourable court set aside the stay of execution. The application is supported by grounds on its face and the affidavit of Francis Munyao Mulinge.
2. The orders of stay of execution were made vide a Ruling dated 18/10/2011. It is stated that the ruling was allowed on condition that the status quo on the suit property be maintained pending the hearing and disposal of the appeal. That 7 years have elapsed since the ruling and the matter has since then never been heard in court. It is deponed that judgement in this matter was delivered on 30/3/2007. The same was in favor of the Applicants. The Respondents case was dismissed with costs. Costs were then taxed and a certificate of costs issued dated 28/4/2009. Dissatisfied with the judgement the Respondents made a Notice of Appeal dated 5/4/2007 and also sought for certified copies of the proceedings and judgement to facilitate preparation of the record of Appeal. That during the process of execution for recovery of costs the Respondents moved the court under certificate of urgency to stay the said execution pending hearing of the intended appeal.



3. That the orders of stay were granted vide the ruling herein and since then no record of Appeal has been filed as the Applicants have never been served with any hearing notice. That no record of Appeal has been instituted as required by section 82 of the *Appellate Jurisdiction Act* Cap 9 of the laws of Kenya. No substantive steps have been taken to file an appeal. It is averred that this is a travesty to justice since the Applicant has been denied his just entitlement to costs awarded 10 years ago and the matter decided without unreasonable delay.

Determination

4. The application is not opposed despite service upon the Respondents as evidenced by the affidavit of Jane Umara sworn on 7th October 2024 . The applicants sought that the application is allowed for being unopposed.
5. The application is brought under Order 22 Rule 52 of the *Civil procedure Rules* 2010, Section 1A, 1B and 3A of the *Civil procedure Act*. Order 22 Rule 52 provides that
Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of execution for not more than 14 days and shall call upon the attaching creditor by notice in writing to intimate to the court and all the parties in writing within 7 days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.
6. My understanding of this application is that the court is being invited to set aside the stay of execution orders issued by the court on 18th October 2011. I have perused the said ruling and the main motivation of the court was to avoid the sale of the Respondents house to offset accrued costs payable to the applicant and whose ownership was under contest under the concept of house without land. The applicant's prayer was allowed on condition that the status quo on the suit property shall be maintained pending the hearing and disposal of the appeal. It is argued that this appeal has not been filed since then.
7. Ms. Umara for the applicants informed the court on 16/6/2024 that the respondent called her and sought for time for they were bereaved. They also informed Ms. Umara that the suit property was razed by a fire, though for me this is a statement from the bar. Conversely it could be possible that their interest in the matter has further waned due to the alleged destruction of the house which their kin was keen to save from being auctioned. I have noted the conditional status quo. It is now over 11 years since the said stay was granted and the conditions for the appeal to be met. I must state in my view there is infact no active appeal if the memorandum of appeal has never been served and a record prepared. This can only be done by the Respondents. I need not overemphasise that the delay herein is quite inordinate compared to the 60 days required by law to file the record of appeal. The court must not continue to condone such inactiveness by a party who seems to want to enjoy status quo orders adinfinitum. The orders were granted based on equity and I'm inclined to vacate them for it is the same equity that does not aid the indolent.
8. The upshot of the foregoing is that I find the application dated 14th August 2018 to be merited and the orders for status quo issued on 18th October 2011 are hereby vacated. The Notice of Appeal dated 5/4/2007 is hereby struck out. Any execution shall be in accordance to the law and subject to substitution if required.
9. I shall not make any orders as to costs.

Orders accordingly

RULING DATED SIGNED AND DELIVERED THIS 3RD DAY OF DECEMBER 2024.

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A.E DENA

JUDGE.

No appearance for Applicants/Plaintiffs

No appearance for Respondents

Mr. Daniel Disii – Court Assistant

