



REPUBLIC OF KENYA



**Mucheke & 5 others v Kinyua (Environment and Land Appeal
E060 of 2022) [2023] KEELC 430 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E060 OF 2022
CK NZILI, J
FEBRUARY 1, 2023**

BETWEEN

**HAWO ABDI MUCHEKE 1ST APPLICANT
RUKIA ABDI M'MUCHEKE 2ND APPLICANT
ADAN HUJA HALAKE 3RD APPLICANT
HASSAN ABDI 4TH APPLICANT
JAMILLA ABDI 5TH APPLICANT
SHARU ABDI 6TH APPLICANT**

AND

OBADIAH MUGAMBI KINYUA RESPONDENT

RULING

1. The court is asked to stay the execution of a decree issued in Maua ELC Case No 266 of 2018 following a judgment delivered on October 17, 2022. The application and its grounds are based on the supporting affidavit sworn on October 31, 2022 by Hawo Abdi Mucheke.
2. The reasons advanced are that the appeal has high chances of success which if no stay is granted it is likely to be rendered nugatory should the respondent proceeded to evict the applicants from the suit land.
3. By a consent dated November 17, 2022, parties agreed to maintain the status quo pending this ruling and to canvass the application through written submissions whose deadline to file was December 15, 2022.



4. Order 42 rule 6 *Civil Procedure Rules* provides that a party seeking for a stay of a decree must demonstrate substantial loss if the orders are not granted, file the application within reasonable time and offer security for due satisfaction of the decree should the appeal not succeed.
5. Sections 1A and 1B of the *Civil Procedure Act* also requires the court in determining whether or not to grant a stay to consider the overriding objective on the expeditious disposal of disputes in a timely, proportionate and cost-effective manner.
6. In *RWW v EKW* (2013) eKLR, the court took the view that in determining whether to grant stay or not is an exercise of balancing the two competing interests of a successful litigant out to enjoy the fruits of his judgment against those of an unsuccessful party who has undoubted right of appeal so that none is prejudiced.
7. Further in *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR the court took the view that an execution was a lawful process and a party alleging substantial loss must show other factors over and above the fact that the execution process was underway which may create a state of affairs likely to effect or negate the substratum of the appeal and the applicant in a manner likely to render the appeal nugatory. Concerning delay, the court has held that even a delay of one day may be inordinately long depending on the circumstances of each case.
8. In *Commission v Oduor & 4 others* (Petition 18 (E025) of 2021) 2022 KESC 10 (KLB) (Civ) (May 19, 2022) the court cited with approval *Board of Governors Moi High School Kabarak & another v Malcom Bell* (2013) eKLR that the principle objective of stay of execution was to preserve the subject matter of the appeal.
9. In this application judgment was rendered on October 17, 2022 while this application was filed on November 1, 2022. The period of one month is not inordinately long. Similarly, there is no indication if the respondent has executed the decree or taken over the subject land so as to be said that the application is already overtaken by events.
10. In the judgment delivered on October 17, 2022, the applicants were ordered to pay Kshs 300,000/= general damages, vacate the land after a notice of at least 90 days is issued to them and a permanent injunction to issue against the applicants from interfering with the respondent's peaceful use, occupation and development on the suit land.
11. There is no decree attached to the application herein. No notice to vacate has been exhibited by the applicants emanating from the respondents. The nature of and particulars of the applicant's substantial loss have not been substantiated in the supporting affidavits.
12. In *Silverstein v Chesoni* (2002) 1KLR 867, the court observed that substantial loss entails what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
13. A party must therefore give cogent and tangible material evidence on the real loss he is likely to suffer that may not be compensated with costs. A mere admission of occupation by the respondent during the hearing at the lower court is not enough demonstration of substantial loss and so is mere allegations of substantial loss on the supporting affidavit without an effort to illustrate how the state of affairs of the substratum to the appeal was likely to be affected should execution proceed.
14. Further, even though the trial court granted the respondents Kshs 300,000/= on general damages plus costs and interests, the applicants have not made a proposal for security for the due realization of the decree should their appeal not succeed.



15. It is not for the court to impose security. A party must satisfy the conditions for the grant of stay in order to assuage the court to grant the orders sought. This application is scanty on details as to the extent to which each of the applicants are in occupation of the suit premises, details of the likely loss for each of them and how the suit premises is likely to move beyond their control and that of the court. The deponent to the application has also failed to attach any authority to plead and swear the affidavit for and on behalf of the other applicants.
16. In the premises, I find the application lacking merits. The same is hereby dismissed with costs.
17. The lower court file to be availed on priority basis.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1ST DAY OF FEBRUARY, 2023

HON. C.K. NZILI

ELC JUDGE

In presence of:

C/A: Kananu

Omari for appellant

Ngugi Gikonyo for respondent

