



**Ngandi & 2 others v Muthami & another (Environment & Land Case 130 of 2018) [2023] KEELC 397 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 397 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 130 OF 2018  
CA OCHIENG, J  
FEBRUARY 1, 2023**

**BETWEEN**

**PETER NGANDI ..... 1<sup>ST</sup> PLAINTIFF  
PAUL N NGANDI ..... 2<sup>ND</sup> PLAINTIFF  
BERNARD M NGANDI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JOHN MUTHAMI ..... 1<sup>ST</sup> DEFENDANT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

- 1 What is before court for determination is the plaintiffs’ notice of motion application dated the May 26, 2022 where they seek the following orders:
1. Spent
  2. That a temporary injunction do issue restraining the respondents from executing the judgement issued on February 3, 2022 pending the hearing and determination of this application.
  3. That a permanent injunction do issue restraining the respondent from executing the judgment issued on February 3, 2022 pending the hearing and determination of the appeal.
  4. That a temporary injunction do issue restraining the respondents from executing the served upon the applicants pending the hearing and determination of this application.
  5. That a permanent injunction do issue restraining the respondents from executing the bill of costs served upon the applicants pending the hearing and determination of the appeal.



6. That the *status quo* be maintained pending the hearing and determination of the appeal.
  7. That the stay of execution of the bill of costs and judgement delivered on February 3, 2022 be granted.
  8. That the costs of this application be in the cause.
- 2 The application is premised on the grounds on the face of it and the supporting of Paul N Ngandi where he deposes that they filed a notice of appeal dated the February 15, 2022 with the intention to appeal against the whole judgement entered on February 3, 2022. He explains that they experienced challenges in filing the appeal owing to the delay caused by the ELC registry Machakos since they were not served with typed proceedings and judgement. He contends that he made several visits to the registry and wrote several emails requesting for the judgment and typed proceedings. He confirms that they are in receipt of the draft typed proceedings which are pending certification. Further, that they will file a record of appeal without delay, upon receiving the certified typed proceedings. He avers that the respondents have expressed their intentions to execute the judgement and bill of costs. Further, they are apprehensive that if the orders sought are not issued, the respondents will proceed to execute the judgement and bill of costs. He reiterates that their appeal has high chances of success and it is in the interest of justice that the orders sought should be granted. Further, that a *status quo* of the parcel number 139 Kawala adjudication section be maintained. He claims if the orders sought are not granted, they stand to suffer irreparable harm while the respondents will suffer no prejudice.
- 3 The 1<sup>st</sup> defendant opposed the application by filing a replying affidavit where he deposes that the instant application is incomprehensible, an afterthought and an abuse of the court process. He explains that judgement in this matter was delivered on February 3, 2022 and this application was filed after three months. He denies being served with the notice of appeal and memorandum of appeal. He further denies being served with the purported consent for the current lawyers to come on record for the plaintiffs in place of messrs Kalili & Company Advocates. He contends that his bill of costs dated the March 7, 2022 is scheduled for taxation on August 3, 2022 and there is no reason for orders of injunction. He reiterates that the instant application is an abuse of court process as it seeks orders of injunction which is misadvised, misconceived, misplaced and inappropriate as it relates to the pending appeal. He insists that no substantial loss will be suffered by the plaintiff if the costs, that are yet to be assessed are paid to him as he is a man of means that is capable of refunding it. He reaffirms that he was born and brought up on the suit land and there is nothing to injunct him therefrom, since his forefathers lived and are buried thereon.
- 4 The application was canvassed by way of written submissions.

### **Analysis and Determination**

- 5 Upon consideration of the instant notice of motion application including the various affidavits and respective submissions, the main issue for determination is whether the plaintiffs are entitled to orders of stay of execution pending appeal.
- 6 The plaintiffs in their submissions contend that they are entitled to orders of stay pending appeal as they have demonstrated sufficient cause of substantial loss. Further, that the appeal will be rendered nugatory if the instant application is not allowed. They aver that they are men of means and should the appeal be allowed, they undertake to pay costs, however in the interest of justice, provision of security should not be imposed upon them. To buttress their averments, they relied on the following decisions: *Visbram Ravji Halai v Thornton & Turpin* Civil Application No Nai 15 of 1990 (1990) KLR 365; *Attorney General v Halal Meat Products Ltd* Civil Application No Nai 270 of 2008; *Mukuma v*



*Abuoga* (1988) KLR; *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* (2019) eKLR; *Focin Motorcycle Co Limited v Ann Wambui Wangui* (2018) eKLR and *Butt v Rent Restriction Tribunal* (1979).

- 7 The 1<sup>st</sup> defendant in his submissions insists that the plaintiffs are not entitled to orders of stay pending appeal as they have not demonstrated the substantial loss they stand to suffer. Further, that the bill of costs has not been taxed. He further submitted that there is no indication that the 1<sup>st</sup> defendant will not be able to refund the costs paid to him. To support his arguments, he relied on the following decisions: *Kenya Shell Ltd v Kibiru & Another* (1986) eKLR 410 and *Scotch Whisky Association & 2 others v Africa Spirits Ltd* (2020) eKLR.
- 8 As to whether the court should grant a stay of execution pending determination of the appeal.
- 9 The plaintiffs claim they filed a notice of appeal but are yet to file the substantive appeal since they were unable to obtain certified copies of proceedings and judgement in time. I note the plaintiffs' suit in this court was dismissed on February 3, 2022. The plaintiffs have sought injunctive orders as well as a stay of execution of the bill of costs claiming they stand to suffer substantial loss. The defendant insists the bill of costs is yet to be taxed, hence there is nothing to injunct. I have perused the proceedings and judgement herein and I note the 1<sup>st</sup> defendant actually resides on the suit land where his father, stepmother and brother have been buried. The legal provisions governing stay pending appeal are contained in order 42 rule 6(2) of the *Civil Procedure Rules* which provides *inter alia*: '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.'
- 10 Further, rule 5 (2)(b) of the *Court of Appeal Rules* provides thus: "subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just."
- 11 In the *Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR the court held that: "The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential are of the applicant as the successful party in the appeal. This is what substantial loss would entail..."
- 12 See also the decision of *Samuel Mwaura Muthumbi v Josephine Ngugi & Another* (2018) eKLR and *Butt v Rent Restriction Tribunal* (1982) KLR 417.
- 13 In this matter, judgement was delivered on February 2, 2022 dismissing the plaintiffs' suit with costs. The plaintiffs being dissatisfied with the whole of the said judgement filed a notice of appeal on February 17, 2022. The plaintiffs also seek a stay of execution of the bill of costs which i note was yet to be taxed by the time they filed the instant application. The plaintiffs claim if the orders sought are not granted, the defendants will proceed to execute the judgement and bill of costs herein. The 1<sup>st</sup> defendant insists the plaintiffs are not entitled to orders of stay since they have not demonstrated the substantial loss they stand to suffer nor proof that he will not be able to refund the costs if the appeal is successful. He insists he is a man of means and can refund the costs.
- 14 From the averments in the respective affidavits, i find that plaintiffs have not demonstrated the substantial loss they will suffer if the orders of stay of execution pending appeal is not granted. I note that the plaintiffs' suit was dismissed and will make reference to the case of *Co-operative Bank of Kenya*



*Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal (Kantai J A) where it was held as follows: -

...An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co Advocates v National Insurance Corporation* (Civil Appeal No 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose .....’”

- 15 Based on the facts as presented while relying on this Court of Appeal decision, I find that there is no positive order to be stayed. I opine that since the bill of costs was yet to be taxed at the time the instant application was filed and further except for the notice of appeal, no substantive appeal is yet to be filed, the instant application for stay of execution pending appeal is actually geared towards denying the defendant his right to the awarded costs. In the circumstances, while relying on rule 5 (2) (b) of the *Appellate Jurisdiction Act (Court of Appeal Rules)* cited above and associating myself with the decisions quoted, I find that the applicants have failed to meet the threshold set for granting stay of execution pending appeal and will decline to grant the said orders.
- 16 It is against the foregoing that I find the plaintiff’s notice of motion application dated the May 26, 2022 unmerited and will proceed to dismiss it with costs.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

