



**Kairu & another v Kariuki (Deceased) & 3 others (Environment & Land Case 618 of 2014) [2023] KEELC 16189 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16189 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 618 OF 2014**

**JO OLOLA, J  
MARCH 9, 2023**

**BETWEEN**

**JANE WANGARI KAIRU ..... 1<sup>ST</sup> PLAINTIFF**

**JOHNSON MACHARIA KAIRU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JANE WACHUKA KARIUKI (DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**BERNARD KARIUKI THEURI ..... 2<sup>ND</sup> DEFENDANT**

**PAULINE WANJIKU KARIUKI KIGUTA ..... 3<sup>RD</sup> DEFENDANT**

**ALEX MWANGI KARIUKI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated February 15, 2022, Jane Wangari Kairu and Johnson Macharia Kairu (the Plaintiffs) pray for an order of stay of execution of the decree issued in this case pending the hearing and determination of the intended Appeal.
2. The application which is supported by an Affidavit sworn by the 2<sup>nd</sup> Plaintiff is premised on the grounds:
  - (i) That before the proceedings and Judgment are supplied and before the Appeal is filed and heard, the Defendants/Respondent might apply for execution of the decree issued.
  - (ii) That if execution takes place before hearing and determination of the intended Appeal, the Plaintiffs/Applicants will suffer irreparable loss and damage; and
  - (iii) That no prejudice will be occasioned to the Defendants if an order for stay is granted as the Defendants are still enjoying the portion of the suit land which is in dispute.



3. The three substituted Defendants are opposed to the grant of the orders sought on one ground stated in their Grounds of Opposition dated March 1, 2022 thus:
  1. The Court as moved has no jurisdiction to handle the application.
4. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before the Court by the Learned Advocates representing the parties herein.
5. The Plaintiffs herein pray for an order of stay of execution of the decree emanating from the Judgment of this Court as delivered at Nyeri on January 20, 2022. The Defendants on the other hand contend that this Court has no jurisdiction to handle the application.
6. In their submissions filed herein, the Defendants assert that once a Notice of Appeal has been filed in the Court of Appeal as is the case herein the jurisdiction to make the orders sought lies with the Court of Appeal under Rule 5 (2)(b) of that Court's Rules which donates independent original jurisdiction to that Court to consider such an application.
7. That contention is certainly incorrect and misleading. While indeed it is true that Rule 5 (2)(b) of the *Court of Appeal Rules* gives that Court the original jurisdiction to hear de novo an application for stay, the same does not oust the jurisdiction given to this Court under Order 22 Rule 22(1) of the *Civil Procedure Rules* to grant an order of stay of execution upon sufficient cause being shown [See *Githunguri -vs- Jumba Credit Corporation Limited* (1985) eKLR, 838].
8. Indeed the parameters under which an application under the said Rule 5(2)(b) are granted by the Court of Appeal are at variance with the requirements for stay of execution under the *Civil Procedure Rules* for under the *Civil Procedure Rules*, one need not attach a Memorandum of Appeal to prove to the Court that the Appeal is arguable. One only needs to prove that the application has been made timeously and that substantial loss is likely to be visited upon the Applicants if the stay is not granted. It follows that the Defendants' objection on the sole ground that this Court has no jurisdiction to hear the application has no basis in law.
9. As was stated in *RWW -vs- EKW* (2019) eKLR:

“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 safeguarded 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 Judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
10. In the matter before me, this Court made a determination that the Defendants had become entitled to adverse possession of the one acre piece of land currently in their possession the same being part of LR No Aguthi/Muruguru/615 which was registered in the name of the Plaintiffs' predecessor in title. The Court accordingly issued an order that the Land Registrar does register the Defendants as the absolute proprietors of the said one acre of land to be exercised from LR No Aguthi/Muruguru/615.
11. By this application, the Plaintiffs assert that they are apprehensive that the Defendants may apply to have the suit property sub-divided and transferred to them, a move that may put that portion of land permanently out of their reach. That did not seem to me to be a remote prospect given that once the



suit property is transferred into the Defendants' names, they shall be entitled to deal with the same in any manner they deem appropriate including disposal thereof to third parties.

12. In the circumstances, I am persuaded that there is need to preserve the subject matter of the dispute pending the hearing and determination of the Appeal. I note that the Defendants remain in occupation of the one acre portion of land awarded to them in the Judgment and hence no prejudice will be occasioned to them merely because the transfer into their names is stayed.
13. In the premises, I do find merit in the Motion dated February 15, 2022 and do hereby allow the same.
14. The costs of the application shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 9<sup>TH</sup> DAY OF MARCH, 2023.**

In the presence of:

Mr. S. K. Njuguna for the Applicant

Mr. C. M. King'ori for the Respondent

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

