



**Kinyanjui & another v Mbiyu (Environment and Land Case E009 of 2023) [2023] KEELC 18581 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18581 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND CASE E009 OF 2023**

**LN GACHERU, J**

**JULY 6, 2023**

**BETWEEN**

**PETERSON MIRINGU KINYANJUI ..... 1<sup>ST</sup> PLAINTIFF**

**ELIUD GACHANJA KINYANJUI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EDMUND MWANGI MBIYU ..... DEFENDANT**

**RULING**

1. Vide an application dated March 2, 2023, the plaintiffs/applicants have sought for the following orders;  
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  1. That there be a stay of execution of orders granted in Thika Succession Cause No 484 of 2015, issued on February 27, 2023, and other consequential orders thereon pending the hearing and determination of this application;
  2. That this court be pleased to set aside and/or vary the orders of eviction issued on February 27, 2023, in Thika Succession Cause No 484 of 2015, pending the hearing and determination of this application;
  3. That there be a stay of execution of orders granted in Thika Succession Cause No 484 of 2015, issued on February 27, 2023, and other consequential orders thereon pending the hearing and determination of this suit; and
  4. That this court be pleased to set aside and/or vary the orders of eviction issued on February 27, 2023, in Thika Succession Cause No 484 of 2015, pending the hearing and determination of this suit.
  5. Costs of the application.



2. The application is premised on the grounds stated thereon and on the supporting affidavit of the applicants who averred that they have been in occupation of land parcel No Loc/5/Githunguri/22, (the suit property) for over 60 years. They further averred that the suit property was registered in the defendant/respondent's name by way of transmission from the Estate of James Mbiyu (deceased) in Thika Succession Cause No 484 of 2015.
3. It was the applicants' contention that the previous registered owner of the suit property James Mbiyu (deceased) was holding half the suit property in trust for their late father Hezron Kinyanjui (deceased) on the instruction of the plaintiffs/applicants' and defendant/respondent grandfather. However, being an issue of trust, the probate court stated that it could not determine the matter and therefore directed the protesters to the Environment and Land Court. Further, the plaintiffs/applicants averred that their parents and the defendant/respondent's parents were both buried on the suit property.
4. Lastly, the plaintiffs/applicants averred that the eviction orders had been issued on February 27, 2023, in Thika Succession Cause No 484 of 2015, and that should this application be denied, they stand to be evicted and rendered destitutes.
5. The defendant/respondent opposed the application through a replying affidavit dated April 11, 2023, wherein he averred that he was an administrator of the Estate of James Mbiyu (deceased) and the registered owner of the suit property by way of transmission. He further averred that his attempts to distribute the suit property were hampered by the plaintiffs/applicants who were protesters in Thika CM succession cause No 484 of 2015. That upon granting of the confirmation of grant in the matter, he requested the plaintiffs/applicants to vacate the suit property, but the plaintiffs/applicants filed Kiambu HC miscellaneous application No 169 of 2020 on March 17, 2022, which was subsequently dismissed.
6. The defendant/respondent averred that the plaintiffs/applicants had numerous opportunities at the Magistrate's Court and the High Court to have their cases heard as to why they should not be evicted which they failed to respond to. The defendant/respondent further averred that the matter raised by the applicants is *res judicata*. Lastly, the respondent prayed that the court allow him to evict the applicants from the suit property.
7. Through a further affidavit dated April 17, 2023, the applicants explained the shortcomings relating to their various suits as owing to the death of their former advocate James Macharia, whom they averred died while having care of the matter, therefore resulting in their application being dismissed for lack of appearance. The applicants further averred that their protest in the succession cause was dismissed during the absence of parties during the Covid-19 pandemic, which caused confusion during the adjustment period for virtual court attendance.
8. Lastly, they averred that the dismissal of Kiambu Misc civil case No 169 of 2020, was made on technical grounds and not on the merits of the case and hence *res judicata* was not applicable to the present suit. The applicants averred that they had retained new counsel who advised them to file the present suit in the Environment and Land Court at Murang'a in order to determine the matter of trust instead of pursuing the appeal out of time.
9. The court directed that the matter be dispensed with by way of written submissions.
10. The plaintiffs/applicants through the law firm of Mbiyu Kamau & Co Advocates, filed their written submissions in support of the application on May 12, 2023. It was submitted that the application before the court raised major issues for determination on whether to stay, set aside or vary the orders of eviction issued on February 27, 2023. The applicants relied on the case of *Consolidated Marine v Nampijja & another* – Civil App No 93 of 1989, which cited the case of [Charles Kariuki Njuri](#)



*v Francis Kimaru Rwara (suing as administrator to the estate of Rwara Kimaru alias Benson Rwara Kimaru (deceased)* [2020] eKLR wherein the court held as follows:

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

11. It was further submitted that this court is clothed with the necessary discretion to preserve the suit property. On this issue, the plaintiffs/applicants relied on the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, wherein which the court held as follows:

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.”

12. It was further held:

“The court in exercising its discretion on whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.”

13. The applicants further submitted that if stay is not granted, the entire suit would be rendered nugatory with the plaintiffs/applicants likely to be evicted from the suit premises. On this issue the applicants relied on the case of *Chris Munga N. Bichage v Richard Nyagaka Tongoi & 2 others* [2013] eKLR, where the court held;

“...the law as regards application for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say not frivolous.

Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

14. Lastly, the plaintiffs/applicants submitted that they have an arguable case with a high chance of success and that the extent of loss was substantial. They relied on the case of *Mukama v Abuoga* [1988] eKLR, where the court defined substantial loss as that which has to be prevented by preserving the status quo because such loss would render the appeal nugatory. The plaintiffs/applicants prayed that the application be granted as prayed.

15. The defendant/respondent through the law firm of Ndung’u Mwaura & Co Advocates, filed his written submissions on June 20, 2023. The respondent raised three issues for determination;

16. On whether the plaintiffs/applicants application attained the threshold for issuance of stay of execution orders; what the pre-requisites conditions for setting aside and/or varying orders of eviction; and whether the plaintiffs/applicants should be granted the orders sought.

17. On the first issue of the threshold for issuance of stay of execution orders, the court’s attention was drawn to the case of *Giella v Cassman Brown* [1973] EA 358, wherein the principles for granting of injunction were set out: These being; -

- i) That an application must show a prima facie case with a probability of success;



- ii) That an application will not normally be granted unless the applicant might otherwise suffer irreparable injury that cannot be adequately compensated by an award of damages; and
  - iii) That when the court is in doubt, it will decide the application in a balance of convenience.
18. The defendant/respondent further submitted that the plaintiffs/applicants had failed to establish a *prima facie* case since they only claimed to be beneficiaries by way of trust, without any supporting evidence. He further submitted that the plaintiffs/applicants were paying rent on the suit property indicating that they were not the true owners. Lastly, it was submitted that the applicants had no valid claim to the suit property with any probability of success.
19. On the second principle as to whether the plaintiffs/applicants stand to suffer irreparable injury that cannot be adequately compensated by an award of damages, it was submitted that the applicants' late father was allocated his share of his grandfather's land elsewhere in Gitura Scheme, where the applicants cultivate without any interruption. It was further submitted that the applicants seek to claim property that is not rightfully theirs and therefore the irreparable injury can only be suffered by the defendant/respondent due to the applicants' unjust enrichment.
20. On the final principle of where the balance of convenience lies, the defendant/respondent submitted that since the applicants failed to demonstrate that they are beneficiaries of the suit property by way of trust, then the balance tilted in his favour. The respondent relied on the case of [Pius Kipchirchir Kogo v Frank Kemeli Tenai](#) [2018] eKLR, where the court defined the concept of balance of convenience as follows:
- “The meaning of balance of convenience is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiffs would be greater than that which would be caused to the defendant if the injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff to show that the convenience caused to them will be greater than that which may be caused to the defendants. Inconvenience be equal, it is the plaintiffs who will suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.”
21. On the second issue raised, on the pre-requisite conditions for setting aside and/or varying eviction orders, the defendant/respondent submitted that the applicants were guilty of failing to cooperate in the matter for the expeditious disposal of the matter through their frequent non-appearance in court especially during the application for eviction in succession cause No 484 of 2015.
22. The respondent also submitted that in light of the applicants' failure to respond to the eviction application or appear in court to explain their inaction, they had failed to meet the requirements for setting aside or varying of eviction orders as set out in the case of [Captain Philip Ongom v Catherine Nyero Owota](#) SCCA 14/2/2001 [2003] KALR.
23. On the final issue on whether the plaintiffs/applicants should be granted the orders sought, the defendant/respondent submitted that court would be aiding an indolent party considering that the applicants failed to attain the threshold for granting of both stay of execution orders and setting aside of eviction orders, in addition to disregarding court rules. The respondent urged the court to dismiss the instant application with costs.



24. The court has read and considered the pleadings by the parties herein, the annexures thereto, rival written submissions and the relevant provisions of law, and finds that the main issue for determination is:-

**1) Whether the instant application for stay of execution and/or setting aside of orders is merited?**

25. It is the plaintiff/applicants' contention that they have lived on suit land, Loc/5/Githunguri/22, (the suit property) for the past sixty years. They further contended that the suit property which was the subject to succession proceedings in Thika Succession Cause No. 484 of 2015, and previously registered in the name of James Mbiyu (deceased), who held the suit property in trust for himself and his brother Hezron Kinyanjui (deceased). The Applicants made the claim to the suit property as the sons of Hezron Kinyanjui (deceased).

26. The Defendant/Respondent opposed the application and stated that the suit property was not trust land, but was solely owned by their late father James Mbiyu (deceased) and as a result, his only rightful beneficiaries were his children.

27. The present suit was initiated following the issuance of eviction orders in Thika Succession Cause No. 484 of 2015, following the transmission of the suit property to the Defendant/Respondent. The Court in its judgement stated that it had no jurisdiction on the issue of trusts and therefore dismissed the Applicants' protest and confirmed the grant.

28. Dissatisfied by the orders issued, the Plaintiffs/Applicants filed the present suit to determine the issue of trust relating to the suit property. The present application hereby seeks to stay execution of the eviction orders, pending the hearing and determination of this suit and application.

29. This Court notes that the Plaintiffs/Applicants have not provided Letter of Administration to sue on behalf of their late father Hezron Kinyanjui's (deceased) estate in relation to the suit property.

30. In the event that the suit property was held in trust by James Mbiyu (deceased) on behalf of himself and his brother Hezron Kinyanjui (deceased) then the administrator of the Estate of Hezron Kinyanjui (deceased), ought to be the party representing, collecting and preserving the estate.

31. The law governing stay of execution is provided for Order 42 Rule 6 (2) of the Civil Procedure Rules, the relevant part of which states as follows:

(1) No order for stay of execution shall be made under sub rule (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.”

32. In the case of Halai & another v Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal held inter-alia:-

“The Superior Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”



33. It is evident from the above provisions of law that the grant of orders of stay of execution are subject to the Court's discretion; - the Court being guided in this regard by the provisions of Order 42 of the *Civil Procedure Rules*. The question of how the Court should exercise this discretion was extensively discussed by the Court of Appeal in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, who stated thus;
1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."
34. The Court will now consider whether the Plaintiffs/Applicants have met the prerequisites to warrant an order of stay of execution as sought by them.
35. The Plaintiffs/Applicants have moved this Court for stay of execution pending appeal on the basis that the Defendant/Respondent has sought eviction orders against them. As discussed above, the Defendant/Respondent was the successful party in the Probate Court, and it is only fair that he be given an opportunity to enjoy the fruits of his judgment. On the other hand, the Plaintiffs/Applicants avers that they have a beneficial interest, stemming from a constructive trust, which will be curtailed if stay of execution pending appeal is not granted.
36. The Supreme Court in Application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, held that an Applicant must satisfy the Court that (i) *the appeal* or intended appeal is arguable and not frivolous; and that (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. The principles were also echoed in the Court of Appeal Case of *Butt v Rent Restriction Tribunal* [1982] KLR 417.
37. The first aspect is the issue of sufficient cause which should be established by an Applicant. This was discussed in the case of *Antoine Ndiaye v African Virtual University* [2015]eKLR , as follows:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules.”



38. The three conditions for granting stay to wit, substantial loss on the part of the Applicant; that application is made without delay and the applicant to furnish such security as will be directed by court.
39. The first condition is that the application should be brought without unreasonable delay. What amounts to inordinate delay differs from case to case. However, this Court is guided by the holding in Nairobi Civ No. 32 of 2010, *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR, where the Court while considering what amounted to inordinate delay stated as follows:
- “Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.”
40. This Court notes that judgment was entered in Succession Cause No. 484 of 2015, on 10th July 2019, while the eviction orders were issued on 27th February 2023. The present application to stay the eviction order was made on 3rd March 2023. No action was taken after the judgement in the succession cause was delivered, in which the grant was confirmed in July 2019. The Plaintiffs/Applicants were only jolted into action by the service of the eviction notice. This period of inaction between the judgement and the filing of this suit was however sufficiently explained as owing to the demise of the Plaintiffs/Applicants’ advocate and the outbreak of the Covid-19 pandemic, which interrupted Court proceedings. On this issue, the Court finds that the application was made with undue delay which was sufficiently explained.
41. The second issue is in relation to substantial loss. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Rhoda Mukuma v John Abuoga* [1988] eKLR, as follows:
- “Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”
42. Substantial loss refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal as was held in *Tropical Commodities Suppliers Limited 7 others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331).
43. In the present case, the substantial loss herein is that the Applicant stands to lose the suit property that may or may not be subject to a trust, but that is also subject to a succession decision in favour of the Defendant/Respondent. The Plaintiffs/Applicants averred that they have lived on the suit property for over 60 years and therefore eviction would render them homeless. From the proceedings presented before the court, it is evident that the Plaintiffs/Applicants have been served with summons for eviction proceedings, and an eviction notice dated 27th February 2023, was issued.
44. Thus, the Court finds that the Plaintiffs/Applicants have demonstrated that there is an imminent danger of eviction from the portion of the suit property that they occupy. Therefore, this Court is satisfied that substantial loss has been established.



45. The final condition related to the provision of security for costs. Order 42 Rule 6(2)(b) of the Civil Procedure Rules, is couched in mandatory terms to the effect that the applicant must furnish security for the due performance of the order or decree. In the case of Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co Advocates & 2 others [2014] eKLR, the Court held that;
- “The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....civil process is quite different because in civil process the judgment is like a debt hence the Applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as a security for the performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”
46. The Plaintiffs/Applicants have not provided security for the due performance of the order or expressed their willingness to provide security for the due performance of any decree that may be binding on them.
47. In the case of Trust Bank Kenya Ltd v Ajay Shah and 3 others [2012] eKLR, the court held that;
- “The conditions set out in Order 42 Rule (2)(a) are cumulative. All three must be satisfied before a stay can be granted. The appellant satisfied one condition and failed to satisfy others.”
48. This suit being centred on land, this Court finds as it has done previously before, that the issue of security for costs cannot suffice. This Court relies on the holding in the case of Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates (2014) eKLR where the Court held as follows:
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
49. The disputed land is registered in the name of the Defendant/Respondent, and he is in possession of the title. The value of this property is unknown to the Court as it would have directed the Plaintiffs/Applicants to deposit a monetary amount as security for costs. As such this Court will exercise its discretion in favor of granting stay of execution of the Orders, on condition that the Plaintiffs/Applicants shall continue to occupy the suit land, but shall not conduct any economic activity on the said until this suit is heard and determined. The Defendant/Respondent on the other hand shall not sale, alienate and/ or sub-divide the suit property.
50. This Court having found that the Plaintiffs/Applicants have met the prerequisites conditions for the grant of stay of execution, allows their application for stay pending the hearing and determination of the suit.
51. Having stayed the execution Orders that were issued on 27th February 2023, at Thika Succession Cause No. 485 of 2015, this Court finds no reasons to set it aside and/or vary the said Orders.



52. The Application for setting aside/varying can be done before the trial Court at Thika.
53. The upshot of the foregoing is that this Court finds that the Plaintiffs/Applicants have satisfactory convinced this Court on the need to stay the execution Orders as issued by Thika CM's Court on 27th February 2023. For the above reasons, the Court allows prayer \*No. 4\* of the Notice of Motion dated 2nd March 2023, with costs being in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 6TH DAY OF JULY, 2023.**

**L. GACHERU**

**JUDGE**

**Delivered online in the presence of; -**

**Ms Njoroge H/B Mr Mbiyu for the 1st and 2nd Plaintiffs/Applicants**

**M/s Kiarie for the Defendant/Respondent**

**Joel Njonjo – Court Assistant**

**L. GACHERU**

**JUDGE**

**6/7/2023**

