



M'Ananu (Sued as the legal representative of the Estate of M'Ananu M'Itere – Deceased) v Chabari & 3 others (Environment and Land Case 38 of 2015) [2023] KEELC 18741 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE 38 OF 2015**

**CK YANO, J
JULY 12, 2023**

BETWEEN

FABIAN KITHINJI M'ANANU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'ANANU M'ITERE – DECEASED) APPLICANT

AND

SILVANA KARIMI CHABARI 1ST RESPONDENT

DOMINICA MUTHOMI M'IBARI 2ND RESPONDENT

MAGDALENE MWARI MWAJA 3RD RESPONDENT

MWAROMO MUGIRA M'MUGAMBI 4TH RESPONDENT

RULING

1. By a notice of motion dated 20th February, 2023, the defendant/applicant is mainly seeking leave for the firm of Ngunjiri Michael & Co. advocates to come on record post judgment in place of Thangicia M. David & Co. advocates as well as stay of execution of the judgment dated 7th December, 2022 and or any consequent decree/Orders, injunction and inhibition over L.R No. Nkuene/Ngonyi/1400 pending the hearing and determination of the appeal. The application is supported by the affidavit of Fabian Kithinji M'ananua sworn on 20th February, 2023 and a further affidavit sworn on 4th April 2023.
2. It is the applicant's case that being aggrieved by the judgment of this court delivered on 7th December, 2022, he has lodged an appeal vide a notice of appeal filed in court on 16th December, 2022. That the appeal is arguable and has high chances of success and may be rendered nugatory unless stay orders are granted. The applicant is apprehensive that if the orders of stay sought are not granted, he may be evicted by the respondents from the suit land which he has developed and lived with his family for over 20 years and may therefore suffer irreparable harm/or substantial loss.



3. The applicant explains that the delay occasioned in filing the application was due to the Christmas court recess as well as challenges in getting his file from his previous counsel in order to instruct the new one and also the delay in procuring typed proceedings in the matter. The applicant states that he is willing to furnish reasonable security for purposes of appeal if stay is granted, adding that no prejudice will be occasioned to the respondents if the application is allowed.
4. The applicant has annexed copies of the judgment, the notice of appeal, letter requesting for certified proceedings and judgment, consent between the outgoing and the proposed incoming advocates and the draft memorandum of appeal. He has also annexed copies of draft application receipts court of appeal Christmas vacation notice and photographs showing permanent buildings on the suit property allegedly belonging to the applicant and his siblings.
5. In opposing the application, the respondents filed a replying affidavit sworn by Silvana Karimi Chabari, the 1st respondent on 5th Mach 2023 wherein it is stated that the applicant has not demonstrated how he would suffer loss if the stay of execution was not granted. That the explanation given in getting the file from the applicant's previous advocates is inadequate and that the appeal has no chances of success. It is further averred that the decree has been substantially executed by the issuance of the title deed to the respondents a copy of which has been exhibited. That the balance of convenience in this case tilts in favour of the respondents who are the absolute proprietors of the land but do not have access to the land. The respondents accuse the applicant of not being truthful and transparent as to acquisition of the land and pointed out that he was found guilty in criminal case 28 of 2015 in Nkubu. That the application is brought in bad faith and aimed at delaying the respondents' enjoyment of fruits of the judgment and respondents therefore argue that the application should be dismissed with costs.
6. The application was canvassed by way of written submissions. In his submissions dated 22nd May 2023 filed through the firm of Ngunjiri Michael & Co. Advocates, the applicant submitted that the notice of appeal was filed within time and consequently a valid appeal was filed on time. Counsel for the applicant cited the provisions of Order 42 Rule 6(4) of the Civil Procedure Rules and Rule 77 of the [Court of Appeal rules](#) and relied on the case of [Equity Bank Limited Vs West Link Mbo Limited](#) [2013] eKLR.
7. It is also the applicant's submissions that if the orders of stay of execution are not issued and eviction ensues as per the judgment, the applicant and his siblings being children of M'anania M'Itere will suffer substantial loss that no amount of money would adequately compensate them as no land is similar to the other. The applicant's counsel relied on the case of [Kenya Shell Ltd Vs Benjamin Kibiru & Another](#) (1986) KLR 410.
8. It is also submitted that the application was filed promptly and without undue delay and that the short delay has sufficiently been explained. The applicant relied on the case of [Moi Teaching and Referral Hospital Vs Kenya Union of Domestic Hotels Educational Institutions, Hospitals, & Allied Workers](#) [2012] eKLR.
9. Counsel for the applicant submitted that unless the stay of execution is granted, there is possibility that the appeal will be rendered nugatory in view of the possible eviction, adding that the respondents have partly executed the judgment by quickly getting registered as proprietors of the suit land.
10. The applicant further submits that he has already supplied adequate security for costs having already paid for costs of the appeal as provided for under the court of appeal rules. The applicant's counsel relied on the case of [Michael Ntouthi Miteu Vs Abraham Kivondo Musau](#) [2021] eKLR and submitted that given that the respondents have already transferred the land into their own names is sufficient security on the performance of the decree and/or costs. Counsel for the applicant also relied on the



supreme court decision in [Westmout Holdings SON BHD VS Central Bank of Kenya & 2 others](#) (Petition 16 (E023) of 2021 (2023) KESC 11 (KLR) 17th February, (2023) judgment.

11. On the issue of temporary injunction the applicant's counsel submitted that the order would rightly be to prevent acts by the respondents that may prejudice the applicant's appeal and ultimately render the appeal nugatory. That given that the respondents have title in their names, there is real danger that they intend to dispose off the property to third parties. The applicant relied on the case of [Jennifer Akinyi Osodo Vs Boniface Okumu Osodo & 3 others](#) [2021] eKLR and submitted that the application be allowed in terms of prayers 6,7,8,9 10 and 11 and that costs be awarded to the applicant as against the respondents.
12. In their submissions dated 5th June 2023 filed through the firm of Murango Mwenda & Company Advocates, the respondents submit that there exists no valid appeal on record as the applicant has not filed the memorandum and record of appeal within the stipulated 60 days window for filing. That no application to seek extension of time to file the record of appeal has been filed and in the circumstances the applicant has lost his right to appeal and the notice of appeal deemed withdrawn. Counsel for the respondents relied on the case of [Visbva Stone suppliers company Limited Vs RSR Stone \[2006\] Limited](#) [2020] eKLR and Rules 82 (1) and 83 of the [Court of Appeal Rules](#).
13. It is also the respondents' submission that the intended appeal has No chances of success or even demonstrate its arguability. They relied on [Nicholas Stephen Okaka & Another Vs Alfred Waga Wesonga](#) [2022] eKLR and cited Order 42 Rule 6(2) of the Civil Procedure Rules.
14. It is further submitted that there has been an unexplained inordinate delay by the applicant in filing the notice of appeal, the memorandum of appeal and bringing this application and reliance is made on the case of [Francis K.Chabari & another Vs Mwarania Gaichura Kairubi](#) [2022] eKLR and [Mistry Premji Ganji \(investments\) ltd Vs Kenya Nation Highways authority](#) [2019]eKLR.
15. The respondents submitted that the applicant has not shown how he will suffer but merely stated that he will be evicted from the land as per the judgment. As to what substantial loss is, the respondents counsel relied on the case of [James Wangalwa & another Vs Agnes Naliaka Cheseto](#) [2012] eKLR.
16. On whether the applicant has established the prerequisite ingredients to be granted temporary injunction, counsel for the respondents relied on the case of [Charter House investments Ltd, Vs Simon K. Sang & 3 others](#) [2010] eKLR and submitted that the applicant has no valid appeal on record hence does not have a prima facie case. It is further submitted that the applicant cannot aver that he will suffer irreparable harm to a property that was never his from the beginning, adding that the applicant was in contempt of the court orders where he continued to cultivate and develop the suit land despite the existing court orders during the pendency of the case. That the balance of convenience in this case tilts in favour of the respondents, adding that the respondents will be greatly prejudiced if the court grants the orders as their constitutional right under Article 40 of the [Constitution](#) 2010 which provides for protection of rights to property will be violated. It is the respondents' submissions that the application is a delaying tactic made in bad faith, is misconceived, incompetent, lacks merit and an abuse of the court process and ought to be dismissed with costs.
17. The issues for determination are whether the firm of Ngunjiri Michael & Co. Advocates should be granted leave to come on record, whether the applicant has met the re-requisite for grant of stay of execution pending appeal, whether the orders for temporary injunction and inhibition should issue pending the hearing and determination of the appeal.
18. The firm of Ngunjiri Michael & Co. Advocates have sought leave to come on record in place of Thangicia M. David & Co. Advocates who were previously on record for the applicants. It is not in



dispute that the said firm came on record after the delivery of judgment and need to seek leave of court as per the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#). Order 9 Rules 9 and 10 of the [Civil Procedure Rules](#) provides as follows-;

- “9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court.
- a) Upon an application with notice to all the parties, or
- b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
10. An application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

19. In this case, a consent has been filed on 20th February, 2023 between the firm of Thangicia M. David & Co. Advocates who were previously on record for the defendants/applicants and the firm of Ngunjiri Michael & Co. Advocates, the proposed incoming advocates. Order 9 Rule 9 requires that such a consent be filed between the outgoing advocate and the proposed incoming advocate. Rule 10 is also clear that an application under Rule 9 may be combined with other prayers provided that the question of change shall be determined first. It is therefore clear that the applicants have complied with the provisions of Order 9 Rule 9. The firm of Ngunjiri Michael & Co. Advocates is granted leave to act for the defendants/applicants in place of the firm of Thangicia M. David & Co. Advocates.

20. The principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities of this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows-;

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) 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 undue 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”



21. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of *Butt VS Rent Restrictions Tribunal* [1982] KLR 417 gave guidance on how a court should exercise the said discretion and held that-;

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is 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 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.”

22. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.

23. In the instant case, the judgment was delivered on 7th December, 2022 while the application is dated 20th February, 2023. That is a period of over two months. The applicant has stated that the delay in filing the application was due to the Christmas recess as well as challenges faced by the applicant in getting his file from his previous counsel in order to instruct another counsel to pursue an appeal on his behalf. That the delay was also partially caused by the delay in procuring typed proceedings in the matter. In my considered view, the delay in bringing the application was not inordinate and the applicant has given sufficient reason for not filing the application timeously.

24. As for the applicant having to suffer substantial loss, in the case of *Kenya Shell Limited – Vs Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982 – 1988) KAR 1017 the Court of Appeal pronounced itself to the effect that-:

“It is usually a good rule to see if Order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”

(see also the case of *Machira T/A Machira & Co. advocates – VS East African Standard (No. 2)* 2002) KLR 63).



25. The applicant has a burden to show the substantial loss he is likely to suffer if no stay is ordered. This is in recognition that both parties have rights, the appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory, and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination (see the case of *Absalom Dora – Vs Turbo Transporters* (2013) [eKLR]).
26. The applicant has stated that the intended appeal will be rendered nugatory if the stay is not granted and that he is apprehensive that together with his family members, may be evicted and their structures demolished which shall cause them suffer irreparable harm. It is not in doubt that the applicant is the one who has been in possession and occupation of the suit land. The decree issued herein required that he gives vacant possession. The respondents are already the proprietors of the suit land. The court has to balance the interest of the applicant who is seeking to exercise his constitutional right of appeal and the interests of the respondents who are seeking to enjoy the fruits of their judgment. No doubt, if the applicant is evicted and his structures demolished, he will suffer substantial loss. From the deposition on record, it is more probable that the issue at hand calls for status quo to be maintained pending the determination of the intended appeal. The issue whether the appeal has chances of success is not for determination by this court.
27. As for the applicant giving security, the applicant has deposed that he has already supplied adequate security for costs having already paid security for costs of the appeal as provided under the Court of Appeal Rules. The applicant further submitted that he is still willing to give security. I will therefore exercise my discretion and grant stay on condition that the applicant gives security. Therefore stay of execution is granted on condition that the applicant deposits a sum of Kshs. 100,000 /= in court as security for the due performance of the decree.
28. The other issue for determination is whether the applicant has met the criteria for the grant of orders of temporary injunction and inhibition. In *Madhapaper International Ltd Vs Kerr* (1985) KLR 480 the Court of Appeal held that this court has jurisdiction to grant an injunction after delivery of judgment if the interest of justice will be served by the preservation of the subject matter of the appeal. The court held as follows-;
- “... where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal . One of the important factors in making such a decision, of course is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions, and at the other extreme a judge may be very clear in his conclusion and yet on appeal be held to be wrong. No human is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quoad granting an injunction at all.’
29. Therefore, the object of an injunction is to keep things in status quo so that if after the determination of the appeal the appellant obtains judgment in his favour the respondents will have been prevented



from dealing in the meantime in the property in such a way as to make the judgment ineffectual. Following the judgment delivered herein, there is nothing the respondents cannot do to defeat the intended appeal, especially now that they have already transferred the suit property into their names. I am therefore persuaded that for the interests of justice orders of injunction and inhibition should be granted as prayed. This is because the court has jurisdiction to preserve the subject matter of the appeal. The balance of convenience in this case, if I had doubt, tilts in favour of the applicant so that the subject matter of the appeal is preserved.

30. In the result I allow the application dated 20th February, 2023 conditionally in the following terms-;

- a) Prayer 2 is allowed as prayed.
- b) Prayers 6, 7, 8 and 9 are allowed on condition that the applicant deposits in court the sum of Kshs. 100,000/= as security within thirty (30) days from the date hereof.
- c) Failure by the applicant to comply with order (b) above, the conditional stay of execution and orders of injunction and inhibition shall automatically lapse.
- d) Costs of the application are awarded to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF JULY, 2023

In the presence of;

Court Assistant – V. Kiragu

Ms Gatwiri holding brief for Murango Mwenda for plaintiffs

Njindo for defendant

C.K YANO

JUDGE

