



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gathekia & 3 others v Mukui & 7 others (Environment & Land Case 224 & 517 of 2017  
(Consolidated)) [2023] KEELC 20585 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20585 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 224 & 517 OF 2017 (CONSOLIDATED)  
LN GACHERU, J  
OCTOBER 12, 2023**

**BETWEEN**

**WANJIRU GATHEKIA ..... 1<sup>ST</sup> PLAINTIFF**

**KAMAU GATHEKIA (SUBSTITUTED AS THE LEGAL REPRESENTATIVES OF  
JAMES MWANIKI KINUTHIA) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HEMED IDD MUKUI ..... 1<sup>ST</sup> DEFENDANT**

**KANGETHE ABDULLAHI IDD SUBSTITUTED AS LEGAL  
REPRESENTATIVES OF IDD RAJAB) ..... 2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 517 OF 2017**

**BETWEEN**

**HEMED IDD MUKUI ..... 1<sup>ST</sup> PLAINTIFF**

**KANGETHE ABDULLAHI IDDI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**WANJIRU GATHEKIA ..... 1<sup>ST</sup> DEFENDANT**

**KAGIRI GATHEKIA ..... 2<sup>ND</sup> DEFENDANT**

**MWANGI GATHEKIA ..... 3<sup>RD</sup> DEFENDANT**

**KIMEMIA GATHEKIA ..... 4<sup>TH</sup> DEFENDANT**

**KAMAU GATHEKIA ..... 5<sup>TH</sup> DEFENDANT**

**JAMES MWANIKI KINUTHIA ..... 6<sup>TH</sup> DEFENDANT**



## RULING

1. Vide this Notice of Motion Application dated 31<sup>st</sup> March 2023, the Defendants/Applicants have sought for these orders; -
  1. That the Defendants/Applicants be granted leave to act in person in place of the Law Firm of Kirubi, Mwangi Ben & Co. Advocates;
  2. That this honourable Court be pleased to order a stay of execution of the judgement, decree and its orders issued on 20<sup>th</sup> January 2021, pending the hearing and determination of this application;
  3. That this Court be pleased to stay of execution of the judgement, decree and its orders issued on 20<sup>th</sup> January 2021, pending the hearing and determination of the Appeal preferred by the Defendants/ Applicants;
  4. That the costs of this application do abide the outcome of the said Appeal.
2. The application was premised on the grounds stated thereon and on the Supporting Affidavit of the Defendants/Applicants herein, namely, Wanjiru Gathekia, Kagiri Gathekia, Mwangi Gathekia, Kimemia Gathekia and Kamau Gathekia, who averred that on 20<sup>th</sup> January 2021, this Court delivered a Judgement and ordered for the eviction of the 1<sup>st</sup> to 5<sup>th</sup> Defendants/Applicants herein from land parcel No. Loc.11 Maragi/2175, (the suit property). The deponents further averred that being dissatisfied with the said Judgement, they had preferred an Appeal, with a probability of success. Further that the Defendants/Applicants would be rendered destitutes should the orders be executed.
3. They also averred that following the said Judgement on 20<sup>th</sup> January 2021, their advocates filed a Notice of Appeal on 27<sup>th</sup> January 2021, and which their advocates failed to follow up on, only for the Defendants/ Applicants to resume with the appeal and pay for the appellate proceedings on 20<sup>th</sup> March 2023. That they received the typed proceedings and the decree on 24<sup>th</sup> March 2023, which enabled them to start preparing the Memorandum and Record of appeal.
4. Hemed Idd Mukui, the 1<sup>st</sup> Defendant in ELC 224 of 2017, opposed the application through his Replying Affidavit dated 25<sup>th</sup> April 2023; He averred that the application was an afterthought having been filed over 2 years and 3 months after judgement. He further averred that the legitimate decree's execution was not meant to render anyone destitute, but to deliver vacant possession of the suit property to the Defendants/Respondents in ELC 224 of 2017(OS) He also averred that the Applicants were scapegoating their advocates and had obviously gone to sleep on the Appeal. Further, that the Applicants intended to stall the proceedings by not taking up representation following the demise of the Plaintiff in ELC 224 of 2017 - James Mwaniki Kinuthia, on 21<sup>st</sup> August 2021.
5. The application was dispensed with by way of written submissions.
6. The Applicants, who were self-representing through Wanjiru Gathekia, filed their submissions in support of the application on 7<sup>th</sup> June 2023. It was submitted that the provisions for stay of execution as set out under Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) states 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 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.”
7. To buttress their claim, the Applicants relied on the case of *Public Service Commission & 72 Others v. Okiya Omtatah & 4 Others* (2021) eKLR, where the Court held as follows:

Rule 5(2)(b) of the *Court’s Rules*. It provides:

“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.”

The principles that guide the Court in the discharge of its mandate under the above Rule and which we fully adopt are as crystallized by the Court in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR. These require an applicant seeking relief premised on the above Rule to demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.”

8. It further submitted that the Applicants had met the threshold for granting of stay of execution as provided for under the Act.
9. On the condition of whether the Defendants/Applicants had exhibited sufficient cause and an arguable appeal, the Applicants submitted that they had known the suit property as their only home since 1968. The Applicants relied on the case of *Attorney General v. Law Society of Kenya & Another* C.A. Civil Appeal No. 133 of 2011, where it was held; -

Sufficient cause or good cause in law means:

The burden placed on a litigant (usually by a Court rule or order) to show why a request should be granted or any action excused See *Black’s Law Dictionary* 9<sup>th</sup> Edition page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable, and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

10. On the condition that the appeal was arguable, the Applicants submitted that there remained questions on the issues of law and fact over the ownership of the suit property. The Applicants’ position as purchasers for value and whether there was proper discretion of the Court. The Applicants relied on the case of *Sammy Mwangi Kiriethi & 2 Others v. Kenya Commercial Bank Ltd* (2020) eKLR, wherein the Court held;

As regards the chances of success of the intended appeal, all that a single judge is called upon to do is make a prima facie observation ”, otherwise there would be a danger of usurping



the powers of the full Court if at all the application for extension of time is allowed and the appeal is finally heard.”

11. On the third condition relating to whether the Applicants stand to suffer substantial loss, and whether the Applicant’s appeal shall be rendered nugatory unless the order is made, the Applicants submitted that they stood to suffer from the destruction of their property that they had maintained for 55 years and lead to the loss of their property. The Applicant relied on the case of [Ena Investment Ltd v. Benard Ochau Mose & 2 Others](#) (2022) eKLR, where the Court held;

Thus, they would suffer irreparable loss where stay was not granted. On the other hand, the Respondents have also waited for three years for their judgment debt to be paid and are yet to enjoy the fruits of their judgment. This Court while balancing these two interests, must satisfy itself that no party would suffer undue prejudice.

This principle was enunciated in the decision of the Court of Appeal in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, where it stated:-

”The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not as introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects 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.”

12. On the final condition for grant of stay of execution, that the application was made without unreasonable delay, the Applicants submitted that the application was filed out of time, but without unreasonable delay. That this was caused by their previous advocates who were not forthcoming with information thereby frustrating the appellate process. It was further submitted that it is only reasonable that the status quo be maintained until the legal avenues concerning the ownership of the suit property have been exhausted. The Applicants relied on Section 79G of the [Civil Procedure Act](#) which provides as follows:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

13. The Applicants also relied on the case of [Joseph Schmaderer v. Serah Njeri Ngene](#) (2021) eKLR, where the Court held; -

It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. However, whether or not to extend time for filing an appeal is an exercise of this court's discretion which should be based on reasons and not on whims or caprice.

For this court to grant an extension of time, it must consider; the length of the delay; the reason for the delay; the chances of the Appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted.”



14. Lastly, in relation to mistakes by an advocate befalling a litigant, the Applicants relied on the case of [\*Omwoyo Vs African Highlands & Produce Co. Ltd\*](#) (2002) 1KLR which held; -

Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant's advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment.”

15. The Defendant/Respondents through the Law Firm of J.N. Mbuthia & Co. Advocates, filed their submissions opposing the application on 20<sup>th</sup> June 2023. It was submitted that Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#) provides for stay of execution and requires that the application be made without unreasonable delay. The Respondents further submitted that the Applicants’ advocates had washed their hands off the matter at the time of filing of the notice of appeal and the Applicants were therefore on their own.
16. The Respondents further submitted that Rule 5(2)(b) of the [\*Court of Appeal Rules\*](#) is discretionary as the Court has the power to issue stay of execution. The Respondents relied on the case of [\*Attorney General Vs Law Society of Kenya & Another\*](#) Civil Appeal No. 133 of 2011, where the Court held that sufficient cause for delay must be rational, plausible, logical, convincing, reasonable, and truthful. That it should not be an explanation that leaves doubt in a judge’s mind, and the explanation should not leave unreasonable gaps in the sequence of events.
17. The Respondents also submitted that the Defendants/ Applicants fell short of the requirements for grant of stay of execution in that the in the event that the Applicants were evicted, they could be housed by the Estate of the Late James Mwaniki Kinuthia, who has land.
18. On the issue of whether the appeal was an arguable one, the Respondents submitted that Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#) does not require the Applicants to raise the issue of arguability of the Appeal, since this Court cannot analyse its own judgement to see where it went wrong.
19. Lastly, the Respondents submitted that this was not an appeal from a subordinate court and therefore Section 79G of the [\*Civil Procedure Act\*](#), did not apply in the present case. Further, that despite admission to the delay, the applicants failed to make an application for extension to file the appeal out of time. The Respondents urged the Court find and hold that there was inordinate delay and dismiss the instant application
20. The Court has considered the instant application, the Reply thereto and the rival written submissions, and finds the issue for determination is;

**1. Whether to grant the stay of execution as sought in the Notice of Motion Application dated 31<sup>st</sup> March 2023?**

21. The Court has perused the instant Application and has noted that the same is expressed to be brought under various provisions of law, among them; Articles 25 (c) 48, 80 & 50 (2) (a) of the [\*Constitution\*](#).
22. Article 25 provides for rights and freedoms that may not be limited and specifically Article 25(c) provides this right to be; -

“The right to a fair trial”.



231. Article 48 is on the right to access justice wherein the State is obligated to ensure access to justice for all persons. Article 50 is on the right to fair hearing, which provides that every person has a right to fair hearing and Article 159(2) (a) provides that justice shall be done to all irrespective of status.
24. Having perused this Court file, the proceedings and the Judgement that was delivered on 20<sup>th</sup> January 2021, this Court finds that none of the rights of the Applicants herein have been infringed. On the right to fair hearing, the Court has noted that this matter proceeded for interparties hearing in the presence of the parties and their Advocates. The witnesses were cross-examined and Judgement was delivered thereafter. On the right to access justice, it is evident that the Applicants have not been denied any access to Court or justice. With regard, to fair hearing, as the court stated above, the parties were granted their day in court, and were accorded an opportunity to avail their evidence, thus right to hearing. In regard to Article 159 (2) (a), that justice shall be done to all irrespective of status, there is no complain that any of the parties herein was treated unfairly because of status. Therefore, these provisions of the Constitution are misplaced.
25. The Application is also expressed to be brought under Sections 13(7), 16, 18 & 19 of the Environment and Land Act No. 19 of 2011.
26. Section 13, of the above Act provides for jurisdiction of the Court, and specifically section 13(7) is on the power of the Court to make or grant any orders that it deems fit; among them interim or permanent preservation orders including injunctions. The application herein is not seeking for an order of injunction.
27. Further Section 16 is on Appeal, and the said section provides that appeals from the Environment and Land Court shall lie to the Court of Appeal against any judgement, award, order or decrees issued by ELC. And Section 18 provides the guiding principles that are supposed to guide this Court as it exercises its jurisdiction.
28. Further, the application is brought under Sections 3A and 63 of the Civil Procedure Act.
29. Section 3A grants the Court inherent power to make such orders as may be necessary for the ends of justice and prevent abuse of the Court process and Section 63 grants the Court discretion to issue other supplemental orders in order to ensure that the ends of justice is met. Issuance of an Order of stay of execution is not one of them.
30. An application for stay of execution is ordinarily brought under Order 42, Rule 6(1) & (2) of the Civil Procedure Rules. The Applicants herein did not express that they had brought their application under the above stated order. However, Order 51 Rule 10(2) of the Civil Procedure Rules provides that no application shall be defeated on a technicality or for want of form, that does not affect the substance of the application.
31. Further Article 159 (2)(d), of the Constitution, provides that “Justice shall be administered without undue regard to procedural technicalities”.
32. Therefore, while determining this Application, this Court will thus be guided by the provisions of Article 159(2) (d) of the Constitution, and Sections 1A, 1B & 3A, of the Civil Procedure Act.
33. In prayer No. (2), the Defendants/Applicants have sought for leave to act in person in place of the Law Firm of Kirubi, Mwangi Ben & Co. Advocates.
34. A perusal of the Court file and proceedings confirms that indeed the Law Firm of Kirubi, Mwangi Ben & Co. Advocates, filed ELC No. 224 of 2017(OS) on 9<sup>th</sup> November 2017, which was a consolidated with case No. 517 of 2017, and have been representing James Mwaniki Kinuthia(deceased) all along.



35. The deceased Plaintiff (James Mwaniki Kinuthia) was substituted with the applicants herein Wanjiru Githekia and Kamau Gathekia, vide a Court order of 2<sup>nd</sup> February, 2023. Further, the Defendants in ELC No.517 of 2017, did appoint the Law Firm of Kirubi, Mwangi Ben & Co. Advocates to appear for them on 24<sup>th</sup> January 2018.
36. The said Law Firm, filed a Memo of Appearance and also filed a Defence on 7<sup>th</sup> February 2018. The Defendants/Applicants have all along been represented by the said Law Firm up and until the delivery of Judgement of the consolidated suits on 20<sup>th</sup> January 2021.
37. Immediately after the delivery of Judgement, the Law Firm of Kirubi, Mwangi Ben & Co. Advocates, filed a Notice of Appeal under Rule 75 of the *Court of Appeal Rules* 2010.
38. However, on 22<sup>nd</sup> April 2021, the said Law Firm of Kirubi, Mwangi Ben & Co. Advocates, filed an application dated 15<sup>th</sup> April 2021, seeking leave to be allowed to withdraw acting for the Plaintiff in ELC 224 of 2017(OS) and the Defendants/Applicants herein. This application was not opposed and on 19<sup>th</sup> May 2021, the said application was allowed. Thus, the Law Firm of Kirubi, Mwangi Ben & Co Advocates, ceased acting for the Plaintiff in ELC No. 224 of 2017, and the Defendants/Applicants in ELC No. 517 of 2017.
39. Once the said Advocates were granted leave to withdraw acting for the Defendants/Applicants, then they ceased acting for the Defendants/ Applicants herein, and therefore there was no need for the Defendants/ Applicants to seek for leave to be allowed to act in person as the said advocates are not on record for them.
40. On the 2<sup>nd</sup> prayer for stay of execution of the Judgement, Decree and Order, issued by this Court, pending the hearing and determination of the Appeal preferred, it is evident that the impugned Judgement was delivered on 20<sup>th</sup> January 2021.
41. Order 42 Rule 6 (1) of the *Civil Procedure Rules* is clear that no appeal shall operate as a stay of execution or proceedings or order appealed against, except when the Court appealed from grants such stay.
42. The said order further provides that stay may be issued when the Court appealed from is satisfied that there are sufficient cause for grant of such stay.
43. Further Order 42 Rule 6 (2), provides for grounds to be considered while determining such an application – “the court has to be satisfied that there will be substantial loss, unless the orders are issued, and that the application herein was made without unreasonable delay”.
44. Judgement herein was delivered on 20<sup>th</sup> January 2021, and a Notice of Appeal, was filed thereafter. The Applicants did not file any application for stay of execution. Further, the applicants did not request for the typed proceedings after filing the said Notice of Appeal.
45. From the Court records, it is evident that taxation proceedings have been ongoing. It is also not in doubt that James Mwaniki Kinuthia, the Plaintiff in ELC No. 224 of 2017, died on 21<sup>st</sup> August 2021. There were proceedings at the Chief Magistrate Court vide Murang’a CM P&A Misc Cause No. E078 of 2022, wherein the Wanjiru Gathekia and Kamau Gathekia were appointed as administrators of the estate of James Mwaniki Kinuthia, on a limited capacity, only for purposes of substitution in ELC 224 of 2017. Even with the said proceedings taking place, the applicants did not find it necessary to file an application for stay of execution. The Applicants have now filed this application because execution is imminent. The Application was filed more than 2 years after the Judgement was entered on 20<sup>th</sup>



January 2021. The Applicants have not satisfied this court that there is sufficient cause to warrant the court grant them the orders of stay of execution as sought by them.

46. There is indeed unreasonable delay exhibited on the part of the Applicants. Though the Applicants have alleged that the delay was caused by their advocates, it is evident that the advocates ceased acting for the Applicants in the year April 2021. There was no evidence brought by the Applicants to show that they indeed followed up the matter with their former advocate. In the case of *Habo Agencies Ltd vs Wilfred Odhiambo Musongo* (2015) eKRL, the court observed as follows;

“It is not enough for a party in litigation to simply blame the advocates for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by Counsel”

47. It is not enough for the Defendants/Applicants to blame their former Advocates who ceased acting for them almost immediately after the Judgement was entered.
48. The inordinate delay herein has therefore not been explained and the Defendants/Applicants have not even filed the said Appeal. The proceedings were requested for just the other day.
49. In their submissions the Applicants have submitted so much on what the Court of Appeal considers in an application brought under Rule 5(2) b of the *Court of Appeal Rules*. The Appeal is emanating from the Judgement of this Court and therefore, this Court cannot find or hold that the intended appeal is arguable. In any case, no evidence of such Appeal was availed. This court has noted that there was an unexplained delay and the above ground disqualifies the Applicants Instant Notice of Motion Application for stay of execution. This court finds no reasons to deprive the successful litigants of the fruits of their Judgements. In such an application for stay, each case has to be considered on its own merit and circumstances. In the case of *Cotecna Inspection SA vs Hems Group Trading Co. Ltd*. Civil Application No. 303 of 2000, the Court held as follows; -

It is the discretion of the Court to grant or refuse to grant stay, but what has to be Judged in every case is whether there are or not particular circumstances. In the case to make an order staying execution.....”

50. In this case, with the available unexplained delay, exhibited by the Applicants, this Court finds no particular circumstances to warrant grant of stay of execution.
51. Section 3A of the *Civil Procedure Act* confers the Court powers to make such orders that are necessary for the end of justice and to prevent abuse of the court process. The Applicants came to Court to seek for stay when they realised that execution was imminent. There is no appeal filed as yet and the Notice of Appeal has stayed for more than 2 years, without an accompanying Appeal. This is indeed abuse of the Court process. The necessary orders herein is to refuse to grant the orders of stay of execution.
52. Having now carefully considered the instant Notice of Motion Application dated 31<sup>st</sup> March 2023, the court finds it not merited and the said application is dismissed entirely with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. GACHERU**

**JUDGE**



Delivered in the presence of; -

Wanjiru Gathekia in person - 1<sup>st</sup> Plaintiff/Applicant

Kamau Gathekia in person - 2<sup>nd</sup> Plaintiff/Applicant

M/s Murira H/B for Mr Mbuthia for the Defendants/Respondents

M/s Murira H/B for Mr Mbuthia for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents

1<sup>st</sup> Defendant/Applicant

2<sup>nd</sup> Defendant/Applicant

3<sup>rd</sup> Defendant/Respondent

4<sup>th</sup> Defendant/Respondent

5<sup>th</sup> Defendant/Respondent.....Present in persons

Jeol Njonjo – Court Assistant

**L. GACHERU**

**JUDGE**

**12/10/2023**

