



**Helbling v Masha & another (Land Case 157 of 2016)
[2023] KEELC 20386 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 157 OF 2016
EK MAKORI, J
OCTOBER 6, 2023**

BETWEEN

MARGARET KABIBI HELBLING APPLICANT

AND

KAREMBO ANTHONY MASHA 1ST RESPONDENT

LENNOX NZAI CHOGO 2ND RESPONDENT

RULING

1. This Court – Olola J on the 19th day of October 2022 delivered judgment in favour of the 1st Defendants/Respondents as follows:
 - a. “The Plaintiff’s suit is hereby dismissed;
 - b. A declaration is hereby made that the sale by the 2nd defendant of the three (3) acres which have been in use and occupation of the 1st Defendant since the year 2001 is void ab initio and unlawful;
 - c. Subject to the payment by the 1st defendant of the sum of Kshs 69,786/- to the 2nd defendant’s family, a declaration is hereby made that the 1st Defendant is entitled to the three acres out of the land parcel known as Kilifi/Mtondia/1116 which portion of land she has been in possession and occupation thereof since 2001;
 - d. Subject to the payment of the balance of the purchase price, the Register to be rectified to have the 1st Defendant registered as the owner of the three (3) acres of the parcel of land known as Kilifi/Mtondia/1116;
 - e. A permanent injunction is hereby issued restraining both the Plaintiff and the 2nd Defendant by themselves and /or through their authorized agents from interfering in any manner whatsoever



with the 1st Defendant's quiet possession of the three (3) acres of land currently comprised in Plot No Kilifi/Mtondia/1116; and

- f. The 1st Defendant shall have the costs of both suit and Counterclaim.”
2. Those orders provoked the current application seeking the stay of execution pending appeal to the Court of Appeal.
 3. The application is opposed. On March 7, 2023, the Court directed parties to canvass the application by way of written submissions. They did comply.
 4. The applicant contended that the application has met the threshold for a stay pending appeal as set in Order 42 Rule 6(2) of the *Civil Procedure Rules*. An appeal has already been lodged as evidenced by the Notice of Appeal dated November 22, 2022. The appeal raises triable issues and has a high chance of success.
 5. The applicant argued that she is quite apprehensive that the 1st respondent may execute the judgment at any time if the stay is not granted. If the three acres are hived from her land, she will suffer irreparable loss, which cannot be compensated by way of damages.
 6. The respondent averred that the conditions set in Order 42 Rule 6(2) of the *Civil Procedure Rules* have not been achieved at this stage. The respondent is in occupation of the three acres and does not intend to change the ownership yet. The continued stay on the land since 2001 cannot be denied, besides, the applicant has not provided security as required by law. The respondent concedes to the deposit of Kshs 1,000,000 as a condition precedent before orders of stay are issued. On substantial loss, the respondent argued that the setting in motion of the execution process per se does not automatically warrant stay as elucidated by Gikonyo J in the leading case of *James Wangalwa v Agnes Naliaka Cheseto* [2012]eKLR.
 7. The respondent also argued that the court needs to balance the interest of both parties – one on the exercise of the right of appeal and the other on the enjoyment of the fruit accruing from the judgment.
 8. I have considered the materials and submissions placed before me on the application for a stay. In *Samvir Trustees Ltd v Guardian Bank Ltd* [2000] eKLR, on the balancing act the Court has to undertake to preserve the right of appeal, and that of a successful litigant who has a right to enjoy the fruits of the judgment subject to an appeal - as succinctly stated by Warsame J that:

“I agree that every party aggrieved with a decision of this Court has a natural and undoubted right to seek the intervention of the Court of appeal. And as far as this matter is concerned, I do not think this Court should put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. In my understanding, a stay would be granted unless there is overwhelming hindrance to the exercise of the discretionary powers of the Court.

I appreciate and understand that the Court in considering whether to grant or refuse an application for a stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.”



9. The applicant has a legal title to the three acres and the respondent has been in physical possession of the same since 2001 by dint of purchase. This will be what the Court of Appeal will determine as to who should be entitled to the suit property. The respondent won the case and still retains possession. The respondent will not be evicted yet but awaits execution to be registered as the legal owner. If the appeal succeeds, the land will still revert to the applicant. The status quo as it is cannot be offset at this point.
10. The upshot is that the application dated November 21, 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 6TH OCTOBER, 2023.

E. K. MAKORI

In the presence of:

M/s Garama for the Plaintiff

M/s Katama for the Defendants

