



REPUBLIC OF KENYA



**Akwalu (Suing as the Legal Representative of the Estate of Joseph M'akwalu M'amuru alias Joseph Gachui – Deceased) v Anampiu (Sued as the Legal Representative of the Estate of M'anampiu M'amuru Gatunga alias Anampiu Amuru – Deceased) (Environment & Land Case 33 of 2019) [2023] KEELC 21511 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21511 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 33 OF 2019**

**CK NZILI, J**

**NOVEMBER 8, 2023**

**IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT, CAP 22**

**SECTIONS 7, 37 & 38**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT (NO. 3 OF  
2012) AND LAND ACT (NO 6 OF 2012)**

**BETWEEN**

**GABRIEL MUTUA AKWALU (SUING AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF JOSEPH M'AKWALU M'AMURU ALIAS JOSEPH GACHUI –  
DECEASED) ..... PLAINTIFF**

**AND**

**RICHARD KARUTI ANAMPIU (SUED AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF M'ANAMPIU M'AMURU GATUNGA ALIAS ANAMPIU  
AMURU – DECEASED) ..... DEFENDANT**

**RULING**

1. By an application dated 10.7.2023, the court is asked to stay the execution of its decree following the judgment delivered on 10.5.2023, which has been appealed against in the Court of Appeal. The reasons are contained on the face of the application and the supporting affidavit sworn on 20.7.2023, by Richard Karuti Anampiu. Briefly, the applicant says he has applied for copies of the proceedings to be certified; there is a need for an order of maintenance of *status quo*; the effect of the decree is to subdivide and transfer the suit land; if it happens the substratum of the appeal would dissipate; he has moved with diligence to file the appeal and the application and no prejudice will be occasioned if the



- orders are granted. In an undated further affidavit filed on 6.10.2023, the applicant avers his appeal is yet to be heard and determined; he does not wish to delay it, and it is only fair that he be granted the orders sought.
2. Gabriel Mutua Akwalu, the respondent, opposes the application through a replying affidavit sworn on 28.9.2023. He states that since filing the notice of appeal on 23.5.2023, it has taken the applicant 120 days, which is a delaying tactic. The respondent says there is no demonstration of any substantial loss if the decree is executed. The execution will only maintain and formalize the *status quo* as his family has exclusively developed and occupied five portions of the suit land, which facts were admitted at the trial. The respondent avers that the applicant has not offered any security for the due realization of the decree, and therefore, the application was a delaying tactic made in bad faith to deny him and his family the enjoyment of the fruits of his judgment.
  3. By written submissions dated 9.10.2023, the applicant submits that the ingredients under order 42 rule 6 of the [Civil Procedure Rules](#) had been met. Since an order of maintenance of status quo subsisted at the hearing, it was only fair to maintain it during the intended appeal; otherwise, if disturbed, it would be significantly detrimental to him.
  4. Further, the applicant submitted that if he succeeded in the appeal, he would have a herculean task of reversing the subdivisions and transfers so affected. He says that the application was also filed without inordinate delay and was willing to abide by any conditions set by the court should his application be allowed. The applicant relies on [Charles Kariuki Njuri v Francis Kimaru Rwara](#) (2020) eKLR.
  5. By his submissions dated 23.10.2023, the respondent took the view that the applicant has not met the conditions under order 42 rule 6 of the [Civil Procedure Rules](#). Reliance was placed on [Hamisi Juma Mbaya v Amakecho Mbaya](#) (2018) eKLR, [James Wangalwa & another v Agnes Naliaka Cheseto](#) (2012) eKLR and [Pauline Yebei & another v Estate of Kiprotich Letting](#) (2017) eKLR.
  6. A party seeking a stay of execution has to meet the ingredients set under order 42 of the [Civil Procedure Rules](#) as to applying without delay, demonstrating substantial loss or damage, offering security for the due realization of the decree should the appeal fail, and lastly, establish that it is in the interest of justice to grant the orders sought. In [James Wangalwa & another](#) (*supra*), the court said the execution was a lawful process that does not amount to substantial loss, and an applicant has to do more by showing that execution would create a state of affairs that will irreparably affect or negate the essential core of the applicant as the successful party in the appeal. The court said substantial loss would mean what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
  7. In [Charles Kariuki Njuri](#) (*supra*), the court cited with approval [Consolidated Marine v Nampijja & another](#) (NRB Civil Appeal No. 93 of 1999, that the purpose of the stay was to preserve the subject matter in dispute so that the right of the appellant exercising his right of appeal was safeguarded and the appeal, if successful, was not rendered nugatory. Further, the court cited with approval [Mukuma v Abuoga](#) (1988) KLR 645 that substantial loss was what needed to be prevented from happening. Additionally, the court cited with approval [Gethi v Gethi](#) (2008) eKLR, that it was not enough for the applicant to allege that they live or reside on the suit land and will suffer substantial loss without demonstrating the loss. The court also cited with approval [Machira t/a Machira & Co. Advocates v East African Standard](#) (No. 2) (2002) KLR 63 that a successful party is equally entitled to enjoy the fruits of his judgment and that the court must also consider the overriding objective of doing justice according to the law and avoid the abuse of the court process.
  8. In [Francis Kimaru Rwara](#) (*supra*), the court observed that an applicant must demonstrate the damages he would suffer if the stay order were not granted. As to security, the court cited with approval [Aron C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Co. Advocates & 4 others](#) (2014) eKLR that



the purpose of a security in civil matters, a judgment was like a debt and a security serves that purpose for an unsuccessful party was a judgment debtor.

9. In this application, the applicant moved to court on 11.7.2023, yet the judgment was delivered on 10.5.2023. The application was after a stay granted by the court expired on 10.7.2023. The delay of one day has not been explained. Secondly, the only attempt to demonstrate substantial loss is where the applicant submits that he will have a herculean task of reversing the subdivisions and transfers if he succeeds in his appeal.
10. Reversal of entries in the land register is not an irreparable loss. More needed to be said by the applicant to show that there will be a drastic change to the current affairs of the suit land such that even if he were successful, the damage or loss would be irreversible. The applicant is not faced with an eviction. He has not said what he has done on the suit land such that if the subdivisions occur, some of those developments will be lost or demolished. He has not denied that the respondent is in occupation and that the status quo subsisting will be realized in the interest of both parties if the subdivisions and transfers occur, settling the matter in favour of each of them. The applicant has not denied the status quo was defined by the respondent in his further affidavit. He did not take that opportunity to express or explain the loss or damage he would suffer and perhaps offer security for the due realization of the decree. See *Charles Kariuki Njuri v Francis* (*supra*). He has not told the court the status of the execution of the decree.
11. In *Kipsany Chepkwony v David Kiptoo Cheluget & another* (2014) eKLR, the court, in a decree of this nature, held that an appellate court could order a reversal in the registration of title and its occupation. Based on the case's circumstances, the court held that each party should remain in occupation of the respective parcels in which they reside and the land to be reserved as it was and, upon the determination of the appeal, to proceed with executing the decree. The court, however, imposed security to compensate the decree-holder for the loss of user.
12. In this application, the applicant has not offered to deposit the original title deed to the court as security. He has not attempted to explain the situation on the ground, which makes him believe he will suffer irreparable loss. Each party has occupied the respective portion going by the evidence tendered during the hearing for a long time.
13. The applicant did not explain how he would suffer prejudice if execution was to occur given that the entries can be reversed, if he succeeds in his appeal. The upshot is that I find it is not in the interest of justice to grant the orders sought. The application is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8TH DAY OF NOVEMBER 2023**

**HON. CK NZILI**

**JUDGE**

In presence of

Ringera for applicant

Miss Kiaenyi for Atheru for respondent

