



Mugambi v Deputy Commissioner North Imenti Sub County & 3 others (Environment and Land Appeal 012 of 2022) [2022] KEELC 13297 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 012 OF 2022
CK NZILI, J
OCTOBER 5, 2022**

BETWEEN

MARY KATHURE MUGAMBI APPLICANT

AND

**DEPUTY COMMISSIONER NORTH IMENTI SUB-COUNTY 1ST
RESPONDENT**

RUKIA SALEHE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

**SAINA KANYUA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE
OF SALEH MUGWIKA – DECEASED) 4TH RESPONDENT**

RULING

A. The Application

1. The court by an application dated February 25, 2022 is asked to stay the execution of the decree by the trial court pending the hearing and disposal of this appeal.
2. The application is premised on the reasons given in the supporting affidavit and a supplementary affidavit by Mary Kathure Mugambi sworn on February 25, 2022 and April 25, 2022 respectively.
3. The application is opposed through a replying affidavit of Saina Kanyua, the 4th respondent dated April 20, 2022.
4. In an application for stay of execution under order 42 rule 6 of the *Civil Procedure Rules*, a party must demonstrate substantial loss and damage if stay is not granted; that the application has been filed without delay; that he is willing to offer security for the due performance of the decree should the



- appeal fail and that it is in the interest of justice that the orders be granted. See [*Visshram Ravji Halai v Thornton & Turpin Ltd*](#) (1990) KLR 365.
5. Addressing the above key ingredients, the court in [*James Wangalwa & another v Agnes Naliaka Cheseto*](#) (2012) eKLR took the view that substantial loss must be demonstrated through tangible evidence and that it was not enough to state there was an impending execution since execution of a decree is a legal process and or to mere state that one is in occupation of the suit premises.
 6. Therefore, a party must demonstrate evidence of loss above the normal cause of things to the satisfaction of the court as held in [*Century Oil Trading Co Ltd v Kenya Shell Ltd NRB*](#) (2008) eKLR, [*Samvir Trustee LTD v Guardian Bank Ltd*](#) (2007) eKLR.
 7. Further, in [*Butt v Rent Restrictions Tribunal*](#) (1979) eKLR, the court held the court in granting stay the court aims at trying to balance the rights of a successful litigant who entitled to the fruits of his judgment against those of a losing party who has an equal right of appeal which should not be impeded if the subject matter would be substantially altered to his detriment and render the appeal nugatory.
 8. In [*Victory Constructions v BM \(a minor suing through next friend one PMM\)*](#) (2019) eKLR the court held that the overriding objection under sections 1A & 1B of the [*Civil Procedure Act*](#) has to be considered, over and above the parameters in order 42 rule 6 of the [*Civil Procedure Rules*](#), including the efficient disposal of court business in a cost effective and timely manner, using the available resources.
 9. On the issue of delay, in [*Jaber Mohsen Ali & another v Priscillah Boit & another*](#) (2014) eKLR, the court held that delay depends on the circumstances of each case and any order given after the judgment such as the directives as to when to offer vacant possession or comply with the decree.
 10. Applying the above principles, and the case law, the applicant has prayed for stay, inhibition and restraining orders from eviction or the disposal of the suit land against a decision rendered on January 27, 2022. The applicant avers that she has been in possession of the suit lan;, she risks eviction; the property is likely to be sold to third parties; the appeal has good grounds, execution is imminent; third parties have been brought to view the land and the trees; she has planted, she does not live on the land; there is need to preserve the property and if restricted from farming activities therein it will be akin to an eviction.
 11. The respondents have countered the assertions by the applicant stating that the family of Salehe Mugwika has been in possession while the applicant lives in Nairobi and if she is granted the orders it will amount to dispossessing them to their detriment. That they were not likely to dispose of the suitland since the decree was to the effect that the land reverts to the estate of the deceased who is her father and that they were yet to lodge a succession cause. That to allow the application would be tantamount to perpetuating an illegality and injustices which the estate has so far suffered from the applicant.

B. Submissions

12. By written submissions dated February 25, 2022 the applicant has maintained she is in occupation which was admitted by the respondents during the hearing and evicting her will deny her the enjoyment of the proceeds from the land. Reliance is placed on [*Halai & another v Thornton & Turpin*](#) (supra).
13. The applicant has maintained that the orders of stay are intended to preserve the property so that no party is prejudiced more so since her appeal raises arguable points. Further, the applicant has submitted



the application has been brought without unreasonable delay. In the alternative, the court is asked to grant orders of preserving the *status quo*.

14. The 2nd and 4th respondents have submitted that the applicant is not entitled to stay since no special circumstances exist to sway the court's discretion in her favour as it balances or weights the scales of justice by ensuring the appeal was not rendered nugatory, while at the same time ensuring that a successful party was not impeded from enjoying the fruits of his judgment as held in *Samvir Trustee Ltd v Guardian Bank Ltd NRB* (supra).
15. The 2nd and 4th respondents have submitted that other than stating she will suffer substantial loss, the applicant has failed to demonstrate through empirical or documentary evidence of any loss or damage likely to be suffered given at paragraph 4 of the 4th respondent reply it was clear the family of the 2nd respondent in occupation of the suit premises.
16. The court is also invited to take note of paragraph 5 at page 18 of the proceedings as read together with the applicants own affidavits where she has admitted she lived in Nairobi hence no threatened eviction or disposal of the suit land as alleged or at all. Reliance was placed on *Kenya Shell Ltd v Kibiru* (1986) KLR 416 on the proposition that substantial loss is what has to be prevented from happening.
17. Concerning an order for inhibition under sections 68 (1) *Land Registration Act*, the 2nd & 4th respondents guided by the case of *Dorcas Muthoni & 2 others v Michael Ireri Ngari* (2016) eKLR have submitted that there should be good grounds for a court to issue such orders since they are in the nature of prohibitory injunctions aimed at preserving a property in dispute pending trial and since there is no threatened transfer the orders sought cannot be granted where the property is still under the deceased's name and no letters of administration have been sought, otherwise the application lacked merits.

C. Determination

18. The court has gone through the submissions and the application.
19. Applying the case law set above all, parties herein are in agreement that there exists no residence of the applicant in the suit land. She does not reside there. All what she has on the land are trees which damage is quantifiable in nature. Such a damage has not been established by way of photographic evidence or an assessment by an agricultural or forest officer.
20. On the issue of delay, the judgment was delivered on January 27, 2022 while this application was filed on March 15, 2022. Even though the appeal was filed on February 25, 2022, no explanation has been given for a delay of one and half months. As regards security for due satisfaction of the decree should the appeal fail, the applicant has not made any proposal.
21. An *Arun C Sharma v Ashana Rankundalia t/a Rairundalia & Co advocates & 2 others* (2014) eKLR the court held the security is aimed at giving the decree holder a guarantee since a judgment is like a debt to the respondent. Costs in this matter were ordered to be paid by the applicant. No offer has been made for the same or compensation for the damage the respondent has suffered for being denied the use of the suit land for the many years the applicant has denied the respondents the enjoyment of their land.
22. Coming to the interest of justice and the order for inhibition, the respondents have stated the decree was that the suit land reverts to the name of the deceased estate. The applicant has not disputed the said fact that no letters of administration have been sought and or obtained over the estate of the deceased. The applicant has not attached any search and or a confirmed grant as evidence that the suit land is about to change ownership and more so move beyond the control of the court or the applicant. The court cannot issue orders in vain and out of speculation.



23. *In Re-estate of Timotheo Gatheru (deceased)* (2021) eKLR, the court took the view that an inhibition would serve no purpose especially since the law requires an expeditious administration of estates of deceased's persons with a stipulation for a confirmation of grant within 6 months.
24. The applicant will have an opportunity also to file a protest or an objection to the succession cause once one is filed.
25. In the premises I find the application lacking merits. The same is dismissed with costs.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 5TH DAY OF OCTOBER, 2022.

In presence of:

C/A: Kananu

Mwirigi for appellant

Kirimi for 2nd and 4th respondents

KIeti for 1st & 3rd respondents

HON. C.K. NZILI

ELC JUDGE

