



REPUBLIC OF KENYA



**Thuo v Kimani & 2 others (Family Appeal E014 of 2024)
[2025] KEHC 4520 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL E014 OF 2024
FN MUCHEMI, J
APRIL 3, 2025**

BETWEEN

DANIEL MACHARIA THUO APPLICANT

AND

REUBEN NDUNGU KIMANI 1ST RESPONDENT

PATRICIA NJERI THUO 2ND RESPONDENT

HELLEN KABURA THUO 3RD RESPONDENT

RULING

1. This application dated 7th June 2024 seeks for orders of stay of execution in respect of the judgment in Thika CM Succession Cause No. 171 of 2006 Estate of Thuo Gachora, delivered on 21st May 2024 pending the hearing and determination of the appeal. The applicant further seeks for orders of injunction restraining the 1st respondent either by himself or his agents, servants or persons claiming under him from selling, charging or in any way alienating land parcel Chania/Mataara/3803 pending the hearing and determination of the appeal
2. In opposition to the application, the respondent filed a Replying Affidavit dated 21st June 2024.

Appellant's/Applicant's Case

3. The applicant states that upon the delivery of judgment in Thika CM Succession Cause No. 171 of 2006 on 21st May 2024, the trial court granted his 30 days stay of execution which is about to come to an end thus leaving him vulnerable and at the mercies of the 1st respondent who is determined to execute for settlement of the decree.
4. The applicant avers that the 1st respondent in total contempt of the court orders on 4th June 2024, in the company of about 30 hired men, invaded the property subject matter and maliciously destroyed



pineapples on a one acre piece of land estimated to be about Kshs. 1 million. The applicant states that he reported that incident at Mataara Police Post vide OB dated 5/6/2024. The applicant further states that the 1st respondent engaged in those malicious and primitive acts of hooliganism despite the fact that there is a pending case between him and the owner of the pineapples, being Gatundu CMCC No. E004 of 2023 coming up for hearing on 6/6/2024.

5. The applicant states that due to the 1st respondent's destruction of the pineapples, he is at risk of being subject to unnecessary litigation by the owner of the said pineapples, the lessee.
6. The appellant states that he has reliable information that the 1st respondent intends to demolish his matrimonial home and evict him together with his 8 children with an aim of occasioning miscarriage of justice in the matter. Further, the 1st respondent is in the process of disposing of the property herein, illegally and unlawfully obtained to the detriment, loss harm and damage of the applicant's family.
7. The applicant avers that he is a man of meagre resources and needs the protection of the court from the 1st respondent who has been using his resources to harass and intimidate him and his family. The applicant argues that unless the orders of stay of execution are granted by the court, the appeal shall be rendered nugatory and a mere academic exercise.

The 1st Respondent's Case

8. The 1st respondent avers that the applicant is in physical possession of land parcel number Chania/Mataara/3803. The Summons to Revoke the grant filed by the applicant was dismissed with costs on 21st May 2024 and consequently all the orders were discharged.
9. The 1st respondent states that he took possession of the suit land in the year 2006 when the sale agreement was executed between the applicant. Thus the present application is an afterthought where the applicant wants to hoodwink the court to grant interim orders realizing the status quo orders issued in Succession Cause No. 171 of 2006 have been discharged and his title deed upheld. The 1st respondent further states that the applicant, the purported landlord, as per the alleged leased agreements having sold one acre out of his portion in the year 2006, did not have capacity to lease the same to third parties in the year 2017 or at any other time.
10. The 1st respondent avers that the confirmation of grant was made on 27/9/2016 where the applicant was declared heir of 1/5 share of LR No. Chania/Mataara/408. The 1st respondent states that he filed MCLE No. 55 of 2022 in Thika Law Courts in order to enforce his claim on the applicant's share. Upon issuance of the decree, he proceeded to enforce the same against the share of the applicant.
11. The 1st respondent states that the applicant failed to execute the orders issued on 9/11/2021 and he filed summons dated 4/2/2022 where the executive officer was authorized to sign the necessary mutation, transfer forms and land control board forms. Upon sub division, the 1st respondent states that he was issued with title deed number Chania/Mataara/3808. The other portion measuring 5.5 acres being LR. No. Chania/Mataara/3804 is jointly registered in the names of the applicant and his sisters. Furthermore, the applicant's pineapples are on LR. No. Chania/Mataara/3804 and not on 3803.
12. The 1st respondent avers that the applicant and his children have destroyed his fence on LR No. Chania/Mataara/3803 and were subsequently charged in Gatundu CM Criminal Case No. E893 of 2023 with malicious damage to property.
13. The 1st respondent argues that there are no competing equities since he purchased his portion in the year 2006 and he is the registered proprietor of L.R. No. Chania/Mataara/3808.



14. The 1st respondent states that the applicant with goons invaded his land parcel and destroyed and burnt the fence and crops with a view to hoodwink the court to grant interim orders.
15. The 1st respondent avers that he has always been in possession of his suit parcel as confirmed by the statement of the applicant dated 27/9/2023 but the applicant and his children keep interfering.
16. The applicant filed a Further Affidavit dated 20th August 2024 and states that the court below granted him 30 days stay of execution and thus he has filed his appeal within time.
17. The applicant avers that he has been in possession of the suit land and the 1st respondent was issued with a title deed on 7th December 2022.
18. The applicant reiterates that it is the 1st respondent who invaded the suit land with his fellow hooligans and destroyed one acre full of pineapples. Thus, unless the orders sought are granted the 1st respondent is likely to unleash terror upon his family.
19. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

20. The applicant reiterates the contents of his affidavits and submits that he has an arguable appeal with high chances of success. Further, the applicant submits that unless the current application is allowed, the whole process will be rendered nugatory and a mere academic exercise.

The 1st Respondent's Submissions

21. The 1st respondent relies on the case of *Giella vs Cassman Brown & Company Limited* (1973) EA 338 and submits that the applicant has not established a prima facie case as the 1st respondent is the registered owner of the suit land. Furthermore, land parcel number 4808 allegedly leased to the applicant does not exist by operation of the law as it was sub divided pursuant to a court order.
22. The 1st respondent submits that the applicant does not stand to suffer irreparable loss or injury which would not be adequately compensated by an award of damages. The applicant quantified his loss to the sum of Kshs. 1,280,000/- in his counterclaim and therefore any potential loss can be compensated monetarily.
23. The 1st respondent argues that since the application fails on the first two limbs, the court does not even need to examine the third limb on balance of inconvenience. The 1st respondent submits that the applicant alleges that he is a tenant and that he has harvested his won crops, the balance of convenience tilts in his favour.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

24. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
 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 orders 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 1st 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.
25. Thus, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
26. Substantial loss was clearly explained in the case of [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
27. The applicant states that he stands to suffer substantial loss as the 1st respondent shall proceed to execute the decree leaving him and his family destitute which shall render the appeal nugatory and a mere academic exercise.
28. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant states that he stands to be rendered destitute as the 1st respondent will evict him from the suit land. On perusal of the record, the 1st respondent obtained orders from Thika CM MCL& E Case No. 55 of 2020 to the effect that he was entitled to one acre out of the applicant’s share of LR. No. Chania/Mataara/408 as per the certificate of confirmation of grant issued in Succession Cause No. 171 of 2006. The certificate of confirmation of grant was amended on 27th September 2021 reflecting the same but the applicant refused to sign the transmission forms prompting the 1st respondent to file an application in court seeking for orders that the Court Executive Officer so sign transmission documents on behalf of the applicant. The court delivered its ruling on 12th April 2022 and ordered the applicant to avail duly executed transmission, mutation forms, Land Control Board forms, transfer forms, original title deed and all the relevant documents to enable the transfer of the one acre out of his share in LR. No. Chania/



Mataara/408 and in default, the court Executive Officer do sign all the relevant documents on the applicant's behalf. It is therefore evident that the ownership of the suit land being LR No. Chania/Mataara/3803 has already been determined as that of the 1st respondent by a court of competent jurisdiction. The applicant and his sisters jointly own LR. No. Chania/Mataara/3804 and as such, they have their own land and will not be left destitute as the appellant claims.

29. Additionally, the trial court dismissed the applicant's application seeking for revocation of grant, which is in effect a negative order. Notably, the court cannot grant stay of the impugned ruling as it dismissed the applicant's application which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

30. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

31. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order. Accordingly, it is my considered view that the applicant has not demonstrated the substantial loss he stands to suffer.

Has the application has been made without unreasonable delay.

32. The ruling was delivered on 21st May 2024 and the applicant filed the instant application on 7th June 2024. Thus, the application has been filed timeously.



Security of costs.

33. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

34. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any form of security for the due performance of the decree.
35. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for 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 judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

36. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent his right of enjoying his judgment. The succession cause in the trial court was filed in the year 2006 and from the evidence on record, the applicant entered into a sale agreement with the 1st respondent on 11th August 2006. Thus, it has taken 19 years for litigation to come to an end. It would be prejudicial to deprive the 1st respondent the fruits of his judgment as he has been in the corridors of justice for 19 years. I have further perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise arguable points of law. It is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.
37. Having found that the applicant has not met the threshold of granting stay of execution pending appeal, the prayer for injunction has no chances of success in that the respondent is the legal owner of the land in question. Taking into regard the requirements of an application for injunction, the applicant cannot possibly establish a prima facie which is the core requirement of granting an injunction. As such, the court finds this prayer a non-starter in the circumstances and facts of this case.
38. Consequently, I find no merit in the application dated 7th June 2024 lacking merit and it is hereby dismissed.
39. The respondent shall have the costs of this application.
40. It is hereby so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF
APRIL 2025.**

F. MUHEMI

JUDGE

