



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**

**ELC CASE NO. 799 OF 2013**

**JOHN KINYUA KABUL.....1<sup>ST</sup> APPLICANT**

**MURIITHI KABUL.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**BENINA WAIRIMU KABUL.....RESPONDENT**

**RULING**

By a Notice of Motion application dated 27<sup>th</sup> November 2020 and supported by an affidavit of even date, the Applicants herein approached the court seeking the following orders:

**i. Spent;**

**ii. That there be a stay of execution/implementation of judgement and decree of this Honourable Court dated 12<sup>th</sup> July 2019, pending hearing and final determination of the application;**

**iii. That there be stay of execution/implementation of judgement and decree of this Honourable Court dated 12<sup>th</sup> July 2019, pending hearing and final determination of the intended Appeal against the judgement of the Court;**

**iv. That the costs of the application be provided for in any event by the Respondent.**

2. The Applicants' prayers are grounded on the following premises:

a. That this court made a decision in this matter on the 12<sup>th</sup> of July 2019;

b. That the Applicants are dissatisfied with the said judgement and have applied for certified copies of the proceedings and judgement with the intention of appealing against the said judgement;

c. That it is necessary for this Honourable Court to stay execution/implementation of the judgement herein pending the hearing of the intended appeal;

d. That the Respondent will not be prejudiced in any way whatsoever if the execution/implementation of the judgement is stayed;

e. It is therefore imperative that the judgement is stayed pending hearing and final determination of the intended appeal.

3. The Respondent opposed the application on grounds that it was incompetent, incurably defective and bad in law by reason that the Applicants had not met the conditions spelt out under Order 42 Rule 6 of the Civil Procedure Rules, 2010.

4. The Respondent in turn also filed a Notice of Motion Application on 11<sup>th</sup> February 2021 and a supporting affidavit of even date. She sought the following orders:

i. Spent;

ii. That the Court be pleased to review-partly- the judgement and/or orders made on 12<sup>th</sup> July 2019 and issued on 19<sup>th</sup> August 2019, to include the specific names of the family members as stipulated in Paragraph 4 of the Plaintiff and subsequent thereto issue an amended decree as follows:

- a. A declaration that Land Parcel Numbers Mutira/Kaguyu/608 and 609 are in the names of the Defendants to hold in trust for themselves and all other family members, that is: Benina Wairimu Kabui; Joseph Karani Kabui; Mary Wakabari; Richard Kabue Karigu; Peter Mugeru; Lucy Wanjiru and Teresia Wangechi.
- b. An order be and is hereby issued compelling the Defendants to sub-divide Land Parcel Numbers Mutira/Kaguyu/608 and 609 in equal portions and to register the sub divisions and transfers in favour of the Defendants
- c. and all family members, that is: Benina Wairimu Kabui; Joseph Karani Kabui; Mary Wakabari; Richard Kabue Karigu; Peter Mugeru; Lucy Wanjiru and Teresia Wangechi.
- d. That the Honourable Court be pleased to order its Deputy Registrar to execute all necessary documents and/or completion documents on behalf of the Defendants in respect of Title No Mutira/Kaguyu/608 and 609 as per the decree therein.
- e. That the Honourable Court be pleased to order the Defendants/Respondents to produce the original Title deeds in respect of Land Parcel Numbers Mutira/Kaguyu/608 and 609 within the next 7 days and in default that the Court order the Land Registrar Kirinyaga to dispense with production of the title deed in respect of Land Parcel Numbers Mutira/Kaguyu/608 and 609 and the Defendant's identity cards, passport size photographs and PIN certificates.
- f. That the Honourable Court do order the officer in charge- Kerugoya Police Station to provide security during the sub-division exercise of Land Parcel Numbers Mutira/Kaguyu/608 and 609.

The Applicants opposed the application by filing their grounds of opposition on 04<sup>th</sup> March 2021 on grounds that there has been no discovery of new and important matters; that, the orders sought, if granted would be tantamount to the court sitting on appeal of its own decision; that parties are bound by their pleadings and any review would amount to changing the whole cause of action; that the amendment of the name Richard Kabue Karigu is a mere correction and does not warrant a review of the judgement and that lastly, no request had been made to them by the Applicant for the production of any document.

5. By consent, the parties agreed to canvass the two Notice of Motion applications dated 11<sup>th</sup> February 2021 and 27<sup>th</sup> November contemporaneously by way of written submissions.

The Applicants filed their submissions on 1<sup>st</sup> April 2021. They largely recapitulated the contents of their 27<sup>th</sup> November 2020 application and cited **Order 42 Rule 6 of the Civil Procedure Rules, 2010** in support of their application. It is their contention that they stand to suffer substantial loss should the court refuse to grant the orders sought on the basis that they are in occupation of the suit property together with their families. In relation to the Respondent's application dated 11<sup>th</sup> February 2021, it is their submission that the Plaintiff (now, Respondent) is attempting to amend her pleadings and that there has been inordinate delay in bringing up the application. Reliance is placed on the case of **HE Vs SM [2020] e KLR**. It is their view that the application is designed to imperil or to derail their appeal. They further submit that the application does not satisfy the limited conditions warranting a review. The decision in **Stephen Githua Kimani Vs Nancy Wanjira Mwangi T/A Providence Auctioneers (2016) e KLR** is cited to that effect. The Applicants therefore pray for the Respondent's application to be struck out.

6. The court has anxiously considered the Notice of Motion applications and the Parties' rival affidavits and submissions.

By way of a brief background, the applications herein relate to a judgement delivered by this court on 12<sup>th</sup> July 2019. In it, the Court found that the Defendants (now, Applicants) hold Land Parcel Numbers Mutira/Kaguyu/608 and 609 in trust for the remaining members of the family, having acquired the properties from their deceased father. The Court thus made the following orders:

- a. A declaration that Land Parcel Numbers Mutira/Kaguyu/608 and 609 are registered in the names of the Defendants to hold in trust for themselves and all the other family members stipulated in Paragraph 4 above.**
- b. An order be and is hereby issued compelling the Defendants to sub-divide Land Parcel Numbers Mutira/Kaguyu/608 and 609 in equal portions and to register the sub divisions and transfers in favour of the Plaintiffs and all the family members named in paragraph 4 above.**
- c. The Defendants to bear the costs of this suit.**

The paragraph referred to in the judgement was paragraph 4 in the Plaintiff filed by the Respondent (then, Plaintiff) on 08<sup>th</sup> November 2013. The paragraph in the Plaintiff provided as follows:

4. That the late Kabui Kabiru left the following:

BeninaWairimuKabui - Wife

Joseph KaraniKabui - Son

Mary Wakabari - Daughter

Richard Karugendo - Son

Peter Mugeru - Son

Lucy Wanjiru - Daughter

Teresia Wangechi - Daughter

The Court's analysis will begin with the earlier application, seeking stay of execution of judgement. The Court is in agreement with the parties that the relevant provision of law dealing with an application for stay of execution pending appeal is **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. The provision is reproduced hereunder.

**‘[Order 42, rule 6.] Stay in case of appeal.**

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub-rule (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”.
3. Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
6. Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.’

The provision is explicit on the matters to be taken into consideration in a decision of whether or not to grant a stay of execution. The case of **Stephen Wanjohi Vs Central Glass Industries Ltd HCC No. 6726 of 1991**, summarized the requirements as follows:

“For the court to order a stay of execution there must be: -

- i. Sufficient cause
- ii. Substantial loss
- iii. No unreasonable delay
- iv. Security and the grant of stay is discretionary”.

In **Butt Vs Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal held that:

- “1. The power of the court to grant and refuse an application for stay of execution is discretionary, that is discretionary power. To stay execution must however be exercised in such a way as not to prevent an appeal;
2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion;

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings;

4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.”

As is already discernible from the rival submissions, the court is called upon in considering the issue of stay of execution to do a balancing act. On the one hand, the Respondent/Judgement Creditor has a right to enjoy the fruits of the judgement, on the other, the Applicant/Judgement Debtor has an undoubted right of appeal. The following cases describe this balancing act perfectly: **Warsame, J** (as he then was) in ***Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997*** expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...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 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...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

In ***Machira T/A Machira & Co Advocates Vs East African Standard (No 2) [2002] KLR 63*** it was held that:

“.....to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

As observed, the Applicant is required first to demonstrate that he stands to suffer substantial loss should the order sought not be granted.

The Court of Appeal in the case of ***Mukuma Vs Abuoga (1988) KLR 645*** defined substantial loss as follows:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

In ***David Kipkoskei Kimeli Vs Titus Barmasai [2019] e KLR***, it was held that:

“The most important limb of the application for stay of execution is proof of substantial loss and it should be noted that mere mention or alleging that an applicant will suffer substantial loss is not enough.”

The judgement delivered on 12<sup>th</sup> July 2019 required the Applicants to subdivide the land to benefit their siblings. While it is true that the Applicants currently reside on the land, it is worth noting that their residence therein is not nullified by the judgement. They are required to subdivide the land to benefit all the family members, including themselves. As such, the substantial loss that the Applicants claim by reason of residence on the suit land is not convincing.

Onto the second limb. The Applicant next is required to show that his application was made without undue delay. The judgement having been delivered on 12<sup>th</sup> July 2019, and the applicants application filed on 27<sup>th</sup> November 2020, a 1 year 4 Months delay is evident. No reason has been given to explain this delay.

In the case of ***Jaber Mohsen Ali & Another...Vs...Priscillah Boit & Another, ELC No.200 of 2012 (2014) eKLR***, the Court held that:-

“The question that arises is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after the Judgement could be unreasonable depending on the Judgement of the court and any order given thereafter...”

Lastly, on the question of security, the court in ***Aron C. Sharma Vs Ashana Raikundalia T/A Rairundalia & Co. Advocates*** explained the purpose of the requirement as follows:

“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 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.”

The decision in *Equity Bank Ltd Vs Taiga Adams Company Ltd [2006] e KLR*:—suggests that where an order as to security has not already been made, the Defendant/Applicant ought to raise it and express their willingness to abide by the conditions given.

“.....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd Vs Deposit Protection Fund Board & 3 Others*. “The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute. I find in this matter the applicant has failed to meet the four mandatory tenets under which this application is brought. The applicant has failed to satisfy any of the four mandatory tenets under which stay of execution can be granted. The Court is of the view that the Applicant has failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion in this matter; hence it is of the view that the application is not merited.”

From the foregoing analysis, it is clear that the Applicants have failed to satisfy the conditions precedent to a grant of stay pending appeal.

Now, the second application lodged by the Respondent, prayed for the part review of the orders given in the Judgement dated 12<sup>th</sup> July 2019. Again, the Parties have correctly traced the legal foundation of review applications to *Section 80 of the Civil Procedure Act, Cap 21 and Order 45 of the Civil Procedure Rules, 2010*. Given that the second application turns on these provisions, the same have been captured hereunder verbatim.

#### **Section 80 of the Civil Procedure Act, Cap 21**

“Any person who considers himself aggrieved —

- a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.’

#### **[Order 45, rule 1.] Application for review of decree or order.**

1. (1) Any person considering himself aggrieved —

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

An application for review is required to meet any of the three criteria set out under *Order 45 Rule 1*, that is:

- a. Where there has been a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant’s knowledge or could not be produced by them at the time when the decree was passed or the order made;
- b. On account of some mistake or error apparent on the face of the record;
- c. For any other sufficient reason.

Of the three grounds upon which an application for review can be premised, the Respondent founds her application on an error apparent on the face of the record and other sufficient cause. The court of Appeal decision in *Muyodi Vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*, adopting the decision in *Nyamogo & Nyamogo Vs Kogo (2001) EA 174* described an error apparent on the face of the record as follows:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a

possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us." (underline, mine)

It is clear, and the Respondents in this application, being children of the Applicant agree that the name of their brother was mistakenly noted down in the plaint as *Richard Karugendo* instead of *Richard KabueKarigu*, so that, when the judgement made reference to the family members under Paragraph 4 of the Plaint, he was prejudiced. The two sides are in agreement that there was an error on the name, which error qualifies for correction under review. The change of name does not in any way change the judgement or prejudice the Respondents and is therefore allowed.

In relation to orders (c), (d) and (e) the Respondents have already submitted that they have not been approached by the Applicant requesting for documents. The Applicant has not controverted this position. In any case, the court had already made an order compelling the Defendants/Respondents to sub-divide Land Parcel Numbers Mutira/Kaguyu/608 and 609 in equal portions and to register the sub divisions and transfers in favour of the Plaintiffs and all the family members. This court has already noted in previous decisions that **Section 31 of the Land Registration Act, No.3 of 2012** vests the Land Registrar with discretion to dispense with the production of an original title deed. The correct procedure then, where a party desires the exercise of this discretion in its favour, is to request the Land registrar in writing citing reasons for why they ought to be allowed not to produce the original title deed. Only where the registrar refuses to exercise that discretion should the party move to court if aggrieved by the registrar's decision. See the decision in the ***Estate of Phillip Kiogo Tunga (Deceased) [2020] e KLR***, where the court pronounced itself as follows:

"Be that as it may, I am aware that production of the original title deed is the general requirement in registration of transfer of land. Nonetheless, I have lamented times without number in this jurisdiction about failure by registrars to exercise discretion provided in law to dispense with production of original title deed in appropriate cases... The import of the above provision is that the Land Registrar has power to dispense with the production of the original title. There is no requirement that exercise of the power is dependent upon a Court order to do so...I will couple the power in section 31 with the power of the Land Registrar under section 14 of the Land Registration Act to require any person to produce any instrument certificate or other document or plan relating the land, lease or charge in question, and that person shall produce the same; summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation... Land Registrars should exercise the discretion and power given to them by statute. Failure thereto may become a subject of mandamus proceedings- something I think is not desirable to be in the file of a public officer."

More importantly, prayers (c) (d) and (e) do not qualify as grounds for review because as numerous decisions have stated, 'any other sufficient reason' must be translated in light of the other two grounds. See ***Nasibwa Wakenya Moses Vs University of Nairobi & another [2019] eKLR***

".....the expression 'any other sufficient reason'.....means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement."

The upshot of the foregoing analysis is that the 1<sup>st</sup> Application dated 27<sup>th</sup> November 2020 is dismissed. The 2<sup>nd</sup> Application dated 11<sup>th</sup> February 2021 partly succeeds as follows:

**a. A declaration that Land Parcel Numbers Mutira/Kaguyu/608 and 609 are in the names of the Defendants to hold in trust for themselves and all other family members, that is: Benina Wairimu Kabui; Joseph Karani Kabui; Mary Wakabari; Richard Kabue Karigu; Peter Mugera; Lucy Wanjiru and Teresia Wangechi.**

**b. An order be and is hereby issued compelling the Defendants to sub-divide Land Parcel Numbers Mutira/Kaguyu/608 and 609 in equal portions and to register the sub divisions and transfers in favour of the Defendants and all family members, that is: Benina Wairimu Kabui; Joseph Karani Kabui; Mary Wakabari; Richard Kabue Karigu; Peter Mugera; Lucy Wanjiru and Teresia Wangechi.**

**c. Each party should bear its costs.**

**RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 18<sup>TH</sup> DAY OF JUNE, 2021.**

.....

**E.C CHERONO**

**ELC JUDGE**

In the presence of:-

1. M/S Githaiga holding brief for Ngigi Gichoya for Plaintiff

2. M/S Kimata holding brief for Ombachi for Defendant

3. Kabuta – *Court clerk.*