



REPUBLIC OF KENYA



**Waita & 2 others v Waita (Legal Representative of the Estate of Daniel Mutuse Waita – Deceased)
(Environment and Land Appeal E009 of 2023) [2025] KEELC 3840 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3840 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E009 OF 2023**

**EO OBAGA, J
MAY 15, 2025**

BETWEEN

**JACKSON NDANGILI WAITA 1ST APPELLANT
PETER NGAO NDANGILI 2ND APPELLANT
MWOLOLO WAITA 3RD APPELLANT**

AND

**LEAH NDUKU WAITA RESPONDENT
LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL MUTUSE WAITA –
DECEASED**

RULING

1. Before this court for determination is the Notice of Motion dated 27th October, 2023 in which the Appellants/Applicants seeks issuance of the following orders:-
 1. Spent
 2. Spent
 3. There be a temporary stay of execution of the judgment, decree pending the hearing and final determination of the appeal.
 4. Spent
 5. Pending the hearing and determination of the appeal herein, the honourable court do issue a temporary injunction against the respondent, her agents, servants and/or representatives from entering, transferring, cultivating, constructing and/or in any other way interfering with land parcel number Kalembwani/Konza South BlocK 2/6X9.



6. Costs be provided for.
2. The application is premised on the grounds appearing on its face in addition to the supporting affidavit sworn by Jackson Ndagili Waita on even date. The Applicant averred that sometimes in 2019, the Respondent sued him for orders of injunction and declaratory orders over the suit property herein. That the subordinate court delivered its judgment on 16th October, 2023 allowing the Respondent's claim and dismissing the Appellants' defence and counterclaim.
3. The Applicant contended that he was dissatisfied with the judgment and for that reason he has appealed to this court. He further contended the Respondent has descended into the suit property and is in the process of cultivating the land. That unless the orders sought are granted, the Applicant stands to suffer irreparably and that his appeal will be rendered nugatory.
4. Opposing the application, the Respondent filed a replying affidavit on 6th February, 2024. She contended that the subject matter of this appeal is land parcel number Kalembwani/Konza South Block 2/6X9 measuring approximately 2.022 Ha. That the suit property is registered in the of the Respondent's deceased husband Daniel Mutuse Waita.
5. She further contended that the Applicants fully participated in the hearing of the suit and that the assertion that the trial court failed to consider the Applicants' defence is baseless. The Respondent averred that the Applicants have failed to demonstrate that they were likely to suffer any irreparable loss as the subject matter is an immovable asset which would be available to either party who eventually succeeds in the appeal.
6. The Respondent asserted that she had ploughed the suit property and planted maize and that it was the Applicants that re-ploughed the land and planted their crops, an incident which she had reported to the police vide OB No. 03/8/11/2023. She further asserted that the Applicants had not demonstrated that they would be able to furnish security as may be ordered by this court.
7. Parties agreed to dispose of the application by way of written submissions. Only the Respondent's submissions dated 6th August, 2024 were on record at the time of writing this ruling.
8. Counsel for the Respondent identified the following questions for determination:-
 - i. Whether stay of execution of the judgment and decree dated 16th October, 2023 in Kilung ELC No. E39 of 2019 can issue.
 - ii. Whether the injunctive orders sought are merited.
 - iii. Who should bear costs of this application.
9. It was submitted that the applicants had failed to demonstrate the conditions set out under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. Counsel contended that the Applicants do not have any interests whatsoever over the suit property which is registered in the name of Daniel Mutuse Waita (Deceased) and that the Respondent is the legal administrator thereof. Counsel further contended that the ownership of the suit property has not been challenged and thus the Respondent's right to property is protected under Section 26 (1) of the *Land Registration Act* in addition to Article 40 of *the Constitution*.
10. Counsel asserted that the suit property has at all times been in active occupation and use by the deceased and the Respondent but the same has come under serious threat of invasion by the Applicants who re-ploughed the land.



11. Counsel submitted that since the Applicants had failed to demonstrate their willingness to provide security for costs, then the court ought to dismiss their application with costs.
12. On whether injunctive orders should be issued, Counsel reiterated that the Applicants are not the registered owners of the suit property and hence they had failed to demonstrate a prima facie case. It was further submitted that the Applicants are neither beneficiaries of the estate of the deceased nor had they shown that they had been in possession of the suit property at any point in time.
13. The sole issue for determination is whether the Applicants have demonstrated the threshold for issuance of the orders sought.
14. The governing law in an application for stay of execution pending appeal is Order 42 Rule 6 (1) and (2) which provide as follows: -
 - (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 order set aside.
 - (2) No order for stay of execution shall be made under subrule (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.
15. This Court’s discretion to grant an order for stay of execution pending the determination of an appeal is guided by the decision of the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where it held as follows:-
 - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should 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.



5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
16. Platt Ag. J.A. (as he then was) held as follows in *Kenya Shell Ltd v Kibiru* [1986] KLR 416: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”
17. Whereas the Applicants have an undoubted right of appeal from the judgment of this court, the Respondent has an equally undoubted right to enjoy the fruits of its judgment. It is unclear whether the Respondent has already commenced a lawful execution of the decree in the lower court judgment. Nonetheless, the Applicant did not controvert the Respondent’s averments that the suit property is registered in the name of Daniel Mutuse Waita (Deceased) and that the Respondent has been in exclusive occupation of the land.
18. In the case of *Venture Capital & Credit Limited vs Consolidated Bank of Kenya Ltd* Civil Application No Nairobi 349 of 2003 (174 of 2003 UR) the Court of Appeal gave the following guidance on grant of temporary injunctions pending appeal: -
 - “a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited vs Kerr* (1985) KLR 840. The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries vs KCB* (1982 – 88) KLR 1088
 - (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
 - (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt vs Rent Restriction Tribunal* (1982) KLR 417
 - (d) The Court should also be guided by the principles in *Giella vs Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445”
19. The Applicant annexed a copy of the memorandum of appeal as Exhibits “JN5”. Nonetheless, it has not been demonstrated how execution of the decree by the Respondent would render the appeal nugatory.
20. Similarly, the Applicants did not demonstrate the manner in which they stand to suffer substantial loss in the event the subordinate court’s decree is executed by the Respondent. As stated before, the suit property has been in the exclusive occupation of the deceased as the registered owner.
21. Lastly, the Applicants did not offer to give security for the due performance of such decree as may ultimately be binding upon them.
22. In the circumstances of the case, it is manifestly clear that the application is deficient of any merit. The same is dismissed with costs.



HON. E. O. OBAGA

JUDGE

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF
MAY, 2025.**

