



REPUBLIC OF KENYA



Mbinya & 2 others v Ng' Ondu & another (Environment and Land Appeal E075 of 2024) [2025] KEELC 4708 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4708 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E075 OF 2024**

NA MATHEKA, J

JUNE 25, 2025

BETWEEN

ELEN MBINYA 1ST APPELLANT

PETER MWANZIA NDIKU 2ND APPELLANT

PAUL KILUU NDIKU 3RD APPELLANT

AND

NANCY NG' ONDU 1ST RESPONDENT

THE LAND REGISTRAR, MACHAKOA 2ND RESPONDENT

RULING

1. The application is dated 17th December 2024 and is brought under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act* seeking the following orders;
 1. That the Application be certified as urgent and service hereof be dispensed with in the first instance.
 2. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to stay execution of the Judgment/Decree in Kithimani MCELC E023 of 2023.
 3. That the Honourable Court be pleased to stay the aforesaid Judgment/Decree pending the hearing and determination of the Appeal herein.
 4. That the costs to this Application be provided for.
2. It is supported by the grounds set out hereunder and the hereto annexed affidavit of Peter Mwanzia Ndiku and grounds that the Appellants/Applicants have preferred and appealed against the court's Judgment in Kithimani MELC E023 of 2023 pronounced on the 14th November, 2024 which appeal



is competent and has reasonable chances of success. That if execution of the said Judgment/Decree is not stayed the Appellants/Applicants stand to suffer irreparable harm and the aforesaid Appeal will be rendered nugatory. That the Respondents may at any time now apply for cancellation of title to land parcel Nos. Masinga/Kangonde/3437, Masinga/Kangonde/3438 and Masinga/Kangonde/3439 in execution of the said Judgment/Decree which will render the Appeal herein nugatory. That the Respondents may transfer, alienate and/or sell land parcel No. Masinga/Kangonde/3437, Masinga/Kangonde/3438 and Masinga/Kangonde /3439 thereby rendering the Appeal an academic exercise in the event the Appeal is successful. That it is thus fair and just that there be stay of execution of the aforementioned Judgment/Decree pending the hearing and determination of the Application and pending the hearing and determination of the Appeal as the case may be. That no prejudice will be suffered by the Respondents if the orders sought are granted.

3. This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows;

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

4. Order 42, rule 6 states:

“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.”

5. The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

6. The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be



rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus;

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

7. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

8. In the case of Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that;

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

9. We are further guided by the court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

“... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

10. The respondent stated that there is no proof that she intends to transfer the land. That the judgement was that the titles be cancelled and the land revert back to the deceased Ndiku Kiluu and be subjected to succession proceedings of which the 1st Appellant is a co administrator. The applicant on the other hand disputes the adjudication process which were relied on by the trial court.

11. I find that the applicant is not guilty of laches as judgement was delivered on 14th November 2024 and this application was filed on 17th December 2024. Secondly the draft memorandum attached to the application on the grounds of appeal do raise an arguable appeal and that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that



the applicant has fulfilled the above grounds mentioned to enable me grant the stay. I find that the application is merited and I grant the same. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF JUNE 2025.

N.A. MATHEKA

JUDGE

