Muthamia v State Law Office & another; Kangai & 5 others (Interested Parties) (Environment & Land Case E005 of 2023) [2025] KEELC 4716 (KLR) (23 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4716 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE E005 OF 2023

JO MBOYA, J

JUNE 23, 2025

BETWEEN

JOSEPH KITHINJI MUTHAMIA ..... PETITIONER

AND

STATE LAW OFFICE ..... 1ST RESPONDENT

THE GOVERNMENT (COUNTY) SURVEYOR ..... 2ND RESPONDENT

AND

SHELMITH KANGAI ..... INTERESTED PARTY

VELMA GACHERI ..... INTERESTED PARTY

ELVIS KINOTI ..... INTERESTED PARTY

STELLA KIRIMI ..... INTERESTED PARTY

EDNA MAKENA ..... INTERESTED PARTY

ARPHAXARD KIRIMI MUTWIRI ..... INTERESTED PARTY

RULING

1. The Interested Parties/Applicants approached the court vide two [2] previous applications dated 13th February 2025 and 17th February 2025; and wherein the Interested Parties sought various reliefs inter alia liberty to actively participate in the instant proceedings and orders of stay of implementation of the ruling issued on 19th December 2024.

2. The two applications [details in terms of paragraph *1* hereof] were heard and disposed of vide ruling rendered on 19th May 2025 and wherein this court found and held that the two applications were not only pre-mature and misconceived, but also found that same constituted a classic abuse of the

due process of the court. To this end, the court proceeded to and dismissed the two applications and thereafter directed that the previous orders of the court be implemented.

3. Following the delivery of the ruling rendered on 19th May 2025, [though irregularly referenced at prayer 2 of the Application as having been delivered on 19th May 2023] the Applicants have now approached the court vide the application dated 20th May 2025 and wherein same have sought the following reliefs:

    i. That this Application be certified urgent and the same be heard Ex-parte and/or on priority basis in the first instance.

    ii. That pending inter-partes hearing and determination of this application, this Honourable court be pleased to stay the proceedings herein and execution of the ruling delivered on 19th May 2023 and all consequential orders emanating therefrom.

    iii. That pending hearing and determination of the applicant's intended appeal and petition, this Honourable court be pleased to stay the proceedings herein and execution of the ruling delivered on 19th May 2025 and all consequential orders emanating therefrom.

    iv. That Costs be provided for.

4. The instant application is premised on various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the supporting affidavit sworn by the 3rd interested party, albeit on behalf of the rest of the interested parties as well as a further affidavit sworn on the 16th June 2025. Moreover, the applicants have annexed a copy of the notice of appeal dated 23rd May 2025, albeit lodged in court on 26th May 2025.

5. The petitioner/respondent filed grounds of opposition and wherein same has raised and canvassed three salient issues, namely; the ruling of the court which underpins the current application did not command the applicants to do any act and hence the orders of the court were negative orders; that the applicant[s] herein have neither established nor met the threshold for the grant of the orders of stay of Execution pending Appeal; and that the entire application constitutes an abuse of the due process of the court.

6. The respondents [through the Hon. Attorney General] also filed grounds of opposition and wherein same adopted and reiterated the position that the orders underpinning the current application are negative in nature. Furthermore, it has been contended that the applicants have neither met nor satisfied the requisite ingredients to warrant the grant of the orders of stay of execution pending the hearing and determination of [sic] the intended Appeal.

7. The instant application came up for hearing on 16th June 2025, whereupon the application was canvassed vide oral submissions. Suffice it to state that the submissions ventilated by and on behalf of the parties form part of the record of the court. Additionally, it is imperative to underscore that the court has reviewed the said submission[s] and taken same into account.

8. Having reviewed the application and the responses thereto and upon consideration of the submissions canvassed on behalf of the respective parties, I come to the conclusion that the determination of the instant application turns on three [3] key issues. The three issues are namely, whether the court is seized of the requisite jurisdiction to grant stay pending the intended appeal by the interested parties or otherwise; whether the application beforehand is competent or otherwise; and whether the ruling of the court which is sought to be stayed culminated into a negative order or otherwise.

9. Regarding the first issue, it is imperative to recall and reiterate that the applicants herein were joined in the instant matter as interested parties. Having been joined as interested parties, the applicants herein

could only participate in the proceedings, albeit on the basis of being interested parties. There is no gainsaying that an interested party plays a peripheral role in the proceedings and for good measure, an interested party cannot seek to generate and or canvass a separate and distinct cause of action. Instructively, the court dealing with a matter where there are interested parties is still obliged to frame and determine issues raised by the pleadings of the primary parties and not otherwise. [See Francis Karioko Muruatetu v the Republic [2016] eKLR; See Communication Commission of Kenya v Royal Media Services & 7 others [2014] eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR].

10. Having been joined as interested parties, the applicants filed two [2] sets of applications wherein same sought inter alia liberty to actively participate in the matter. Nevertheless, there is no gainsaying that by the time the applicants sought to be granted liberty to actively participate in the matter, the petition stood determined vide a judgment rendered by this court [differently constituted].

11. It is the said two applications which came up for hearing and were disposed of vide the ruling rendered on 19th May 2025. Furthermore, it is the said ruling which the applicants herein are now seeking to appeal against. Nevertheless, in an endeavor to preserve the status Quo, the applicants have now sought an order of stay of execution pending the intended appeal.

12. The question that does arise is whether a person who was joined in the proceedings as an interested party can file and or mount an appeal and thereafter seek to procure an order of stay. In my humble view, the role of an interested party is peripheral and an interested party cannot mutate and become a substantive party to warrant an appeal.

13. The supreme court of Kenya in the case of Senate & 3 others v Speaker of the National Assembly & 10 others [Petition 19 [E027] of 2021] [2025] KESC 11 [KLR] [21 March 2025] [Judgment] dealt with and expounded on the issue in the following manner:

> This issue turns on whether the 6th and 8th respondents, who were joined in the High Court as interested parties have the requisite locus standi to lodge their cross appeal before this Court. This Court in Muruatetu & another v. Republic; Kenya National Commission on Human Rights & 2 others [Interested Parties]; Death Penalty Project [Intended Amicus Curiae] [2016] KESC 12 [KLR] pronounced itself on the status of an interested party joined to any proceedings as follows: "Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the court....Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. [Emphasis added].
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> 73. It is common ground that the 6th and 8th respondents were joined in the High Court as interested parties. We note that one of the grounds upon which the 6th and 8th respondents' cross appeal is premised on is that the Court of Appeal applied the wrong standard of review to the matter at hand by relying on the Selle Case. It is instructive to note that none of the primary parties, that is, the appellants and the 1st and 2nd respondents, raised this issue or ground in their appeal or cross appeal, respectively.
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> 74. In Macharia & another v. Director of Public Prosecutions & 11 others [2022] KESC 61 [KLR], the petitioners therein, who were initially joined at the High Court as interested parties filed an appeal before this Court. In that regard, this Court expressed itself as follows: "The petitioners'

stake in the proceedings has throughout remained peripheral and cannot override the stake of the primary parties, who appear not to have been aggrieved....Ultimately, we respectfully agree that the petitioners, though interested parties before the superior courts below, cannot, at this juncture, have overriding interests above and beyond the primary parties or mutate from having a peripheral stake into central core parties ..."It follows therefore, that the 6th and 8th respondents, having been joined as interested parties at the High Court are bereft of locus standi to raise the issue of standard of review applied by the Court of Appeal through its cross appeal.

75. In addition, we also note that the other grounds of appeal raised in the 6th and 8th respondents' cross-appeal are more or less similar to the grounds raised in the appellants' appeal. As demonstrated in the IEBC Case, a cross-appeal is an action by a respondent who intends to counter an appellant's cause in an appeal.

76. Based on the foregoing, we find that the 6th and 8th respondents' cross appeal is not properly before us, and we hereby strike it out.

[Emphasis supplied].

14. Bearing in mind the ratio espoused by the Supreme Court in the decision [supra], I doubt whether the interested parties herein have the requisite locus standi to purport to file [sic] an appeal; or the intended Appeal. Nevertheless, I am alive to the fact that I am not called upon to make a precipitate finding on the said question. However, the ratio espoused in the foregoing decision brings to the fore the jurisdictional issue as to whether an order of stay can issue in favour of the interested parties [sic] pending the lodgment of an appeal; or intended Appeal.

15. I beg to underscore that a court of law can only engage with and address the question of stay of execution of Execution of a decree pending appeal, or intended Appeal, where it is demonstrated that there exists sufficient cause underpinned by an appeal [intended appeal] known to law.

16. Where the law does not allow the filing of an appeal, then the court is deprived of jurisdiction to purport to grant a stay pending [sic] an appeal. Such an endeavor would constitute an act in vanity and or futility. In any event, there is no gainsaying that jurisdiction is everything. Where a court does not have jurisdiction, the court cannot entertain the matter further and or grant any orders. [See in the matter of Interim Independent Electoral Commission [2011] eKLR at Paragraphs *29* & 30 thereof].

17. To my mind, the position of the law postulates that an interested party cannot by himself file and lodge an appeal. Consequently, I am afraid that I have no jurisdiction to grant the Order[s] of stay of execution sought.

18. Turning onto the next issue, namely; the competence of the application beforehand, it is important to observe that an applicant seeking to procure and obtain an order of stay of execution pending appeal to the court of appeal must first and foremost demonstrate that same has filed/lodged the requisite notice of appeal in accordance with the provisions of Rule 77 of the Court of Appeal Rules 2022.

19. Instructively, it is the notice of appeal [if any] lodged in accordance with the rules of the Court of Appeal that is deemed to constitute an appeal by virtue of the provisions of Order 42 Rule 6 [4] of the Civil Procedure Rules 2010. For ease of appreciation, it is imperative to reproduce the provisions under reference.

20. Same are reproduced as hereunder;

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

[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.

[c] Notwithstanding anything contained in subrule [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 subrule [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.

21. My understanding of the foregoing provisions of the law drives me to the conclusion that the applicant must first lodge the notice of appeal before same can proceed to file an application for stay of execution.

22. In this regard, there is no gainsaying that the existing and duly filed notice of appeal constitutes the foundation [fulcrum] upon which the application for stay is premised and or predicated.

23. Put differently, the notice of appeal filed in accordance with the Court of Appeal rules, 2022; constitutes a precursor, or prelude to the filing of the application for stay. In this regard, if the application for stay precedes the filing of the notice of appeal, then the application itself is founded in vacuum. In any event, the filing of an application for stay of execution before the lodgment of the notice of appeal is tantamount to putting the cart before the horse. Such kind of an endeavor is antithetical; irregular; and an unheard of.

24. The foregoing situation represents what is obtaining in the instant matter. Suffice it to underscore that the application for stay of execution was filed in court on 20th May 2025 whereas [sic] the notice of appeal was only lodged on 26th May 2025. Moreover, it is not lost on the Court that [sic] the Notice of Appeal has only been filed by Learned Counsel for the 1ST Interested Party and not otherwise.

25. Nevertheless, and in this regard, it is evident that by the time the application was being filed there was no existing notice of appeal to premise/ anchor the application.

26. Notably, learned counsel for the applicants conceded that the notice of appeal was filed long after the application. However, it was posited that the court should treat the filing of the notice of appeal after the filing of the application as a technical and procedural issue. To this end, the court was invited to deploy and invoke article 159 [2] [d] of *the Constitution*, 2010.

27. I beg to state that the existence of the notice of appeal is what provides [clothes] the court with jurisdiction. [See Order 42 Rule 6 [4] of the Civil Procedure Rules]. The absence of a notice of appeal at the time of filing of the application negates the application and deprives same of validity.

28. Furthermore, I wish to state that the subsequent filing of the notice of appeal cannot operate retrospectively/retroactively, to validate a process and or action that was null and void ab initio. In this regard, the contention by learned counsel for the applicants that the said notice of appeal would suffice is not only borne of misconception/ misapprehension of the law, but is also legally untenable.

29. Flowing from the foregoing, I come to the conclusion that the application for stay of execution [sic] pending appeal which was filed on 20th May 2025; prior to the filing of the notice of appeal, is incompetent.

30. Next is the issue as to whether the ruling of the court rendered on 19th May 2025 and which founds the instant application, culminated into a negative order or otherwise. To start with, there is no gainsaying that the applicants herein filed two [2] applications and which were thereafter heard and disposed of vide the ruling under reference.

31. Furthermore, it is worthy to recall that the court found and held that the two applications that were filed by the applicants were devoid of merits. In this regard, the court proceeded to and dismissed the applications with costs to the petitioner/respondent.

32. Having dismissed the two applications [details in terms of the ruling rendered on 19th May 2025] it became obvious that the orders that were previously issued by the court were amenable to be implemented. In any event, the court had previously granted an order of stay and following the dismissal of the two applications, the said orders of stay stood extinguished and were rendered otiose.

33. Be that as it may and for the sake of clarity, this court ventured forward and clarified that with the dismissal of the two applications, the orders of stay which had previously been granted stood discharged and vacated. Further, the court clarified that the petitioner was at liberty to implement the decree of the court.

34. Nevertheless, there is no gainsaying that the primary orders that were given and or issued by the court were orders dismissing the two applications. To this end, it is common ground that the resultant order was a negative order. In this regard, the contention by learned counsel for the applicants that the court issued orders capable of being stayed is erroneous and constitutes a misapprehension of the ruling.

35. Having found that the ruling of the court birthed negative orders, the next question that must be addressed is whether a negative order can attract stay of execution or otherwise?

36. Suffice it to underscore that the position of the law is to the effect that a negative order is incapable of being stayed, [See Western College of Applied Science and Arts v Oranga [1976] eKLR; See Charles Barongo Nyakeri v the county government of Kisii [2020] eKLR; Oliver Collins Wanyama v Engineering Regulatory Board [2019] eKLR and The Registered Trustees of Kenya Railways Staff Benefits v Milimo Muthomi & Co. Advocates [2022] KECA].

37. To the extent that the ruling of the court culminated into a negative order, I am afraid that the application for stay of execution [sic] pending the hearing and determination of the intended appeal is premature and misconceived.

FINAL DISPOSITION:

38. Flowing from the foregoing analysis, it must have become crystal clear that the application by and on behalf of the interested parties/applicants is not only misconceived, but same is legally untenable.

39. In the premises, the final orders that commend themselves to the court are as hereunder:

    I. The Application dated 20th May 2025 be and is hereby dismissed.

    II. Costs of the Application be and are hereby awarded to the Petitioner and the Respondents.

    III. The Costs in terms of clause [II] above shall be agreed upon and in default same shall be taxed in the conventional manner.

40. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 23rd DAY OF JUNE 2025

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma: Court Assistant

Mr. E. Kimathi for the petitioner/respondent

Ms. Miranda for the respondents

Mr. Kaba holding brief for Mr. Maranya for the 2nd – 7th interested parties/applicants

Mr. Ondieki for the 1st interested party