



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**  
**ELCA NO. 12 OF 2020**  
**(FORMERLY HCCCA NO. 24 OF 2020 (KERUGOYA))**  
**BETWEEN**  
**STANLEY MUGWERU MUCHIRA...1<sup>ST</sup> APPELLANT**  
**JOSEPH MUGO MUCHIRA.....2<sup>ND</sup> APPELLANT**  
**PAUL MUREITHI MUCIRA.....3<sup>RD</sup> APPELLANT**  
**VERSUS**  
**JOHN MUTHIKE MUCHIRA.....RESPONDENT**  
**RULING**

**Introduction**

The applicant moved this Court vide a Notice of Motion dated 14<sup>th</sup> September 2020 for the following orders:-

1. Spent.
2. That the Court be pleased to grant an order of stay of execution of the orders given on 29th May 2020 in Wang'uru PMCC No. 101 of 2011 pending the hearing and determination of this appeal.
3. That the Court be pleased to grant an order of stay of execution of the orders given on 29th May 2020 in Wang'uru PMCC No. 101 of 2011 pending the hearing and determination of this appeal.
4. Costs of this application be provided for.

**Grounds in support of the Application**

- a. That respondent had filed Wang'uru PMCC No. 101 of 2011 against some lessees of rice holding number 1632 Mwea Section Unit 1, namely Gikaria Phineas and Wairimu Mwangi. The two were the only defendants and the respondent who was the plaintiff in the matter was seeking for permanent orders of injunction to restrain the two defendants from interfering with the rice holding.
- b. That judgment was entered against the said defendants who were dissatisfied with the Court's judgment and filed Kerugoya HCCA No. 304 of 2013 which appeal was dismissed. The appellants were not parties in that appeal either.
- c. The appellants, who were brothers to the respondents together with their other siblings appeared before the Mwea irrigation Scheme and by consent, the rice holding was sub-divided into 6 equal portions of ¼ acre each. All the new tenants were issued with licences and tenant cards for their respective portions, including the respondent(s) who became the owner of Rice holding No. 1631 F which the respondent later sold to a third party by the name JOSEPH MURIITHI MUNYI.
- d. The new licencees took occupation of their respective rice holdings.

e. Later the respondents herein filed an application in the same suit at Wang'uru Court naming the appellant herein as the respondents, and seeking to execute the initial decree as against the appellants herein, yet they have never been parties in the suit land by the time of filing of the application, they had become licensees of their respective portions.

f. Despite the Court being functus officio in the matter, it re-opened the case and issued orders of injunction against the appellants herein not to cultivate their respective portions, despite them being strangers in the case. This prompted the immediate filing of this appeal.

g. That an application was filed for stay of execution of the orders given by the trial Court as by law provided, but the Court while granting the orders for stay of execution granted unrealistic and unreasonable conditions that the three appellants, who are peasants farmers, each deposits in Court as security for costs Ksh. 700,000/= hence totaling to Ksh. 2,100,000/= (two million one hundred thousand shillings) within seven (7) days from the date of the Court's ruling of 10th September 2020 and in default, orders of stay to lapse and the suit property to vest in the respondent wholly.

h. Despite the Court not considering the current economic depression due to Covid-19 pandemic, it proceeded to even issue further orders of granting the original rice holding to the respondent wholly, irrespective of the fact that other new owners of the original rice holding will adversely be affected by the new order given hence condemning them unheard.

i. There is urgent need for this Court's intervention to forestall an imminent injustice not just to the appellants who cannot raise the excessive harsh condition of raising Ksh. 2,100,000/= within seven days from the date of the ruling, but also to their siblings who are not in this appeal but they risk losing their rice holding in the event the appellants are unable to meet the conditions within the time frame given.

### **Appellants Statement of Facts**

The appellants filed a supporting affidavit sworn by Stanley Mugweru Muchira and stated as follows:-

1. That the 2nd and 3rd appellants as well as the respondents are his brothers.
2. That the rice holding initially belonging to their late father who had appointed the respondent as the successor and since he was a minor, to be under the guardianship of Micere Muchira and therefore could not succeed the rice holding without the approval of the committee of the then National Irrigation Board.
3. That sometimes on 22/10/2010, they had a family meeting and agreed to share the rice holding among the family members whereby the brothers were to get one acre each. In good faith, they leased part of the rice holding to one Gikaria Phineas and Wairimu Mwangi though by then they didn't have tenant cards or licensees in their names.
4. That their brother, the respondent herein, to their surprise, filed Wang'uru PMCC No. 101 of 2011 against the two lessees.
5. That the trial Court in its judgment delivered on 16th April 2013 found in favour of the respondent herein, and who was the plaintiff in the Wang'uru case. At page 29 of the judgment, the Court held that it is common knowledge all land in the Mwea Irrigation Scheme is Government land managed and controlled by the National Irrigation Board and all occupants are tenants or licensees. Any sub-division of the rice holding requires the approval of the National Irrigation Board.
6. That the two defendants named in that suit were dissatisfied with the judgment and filed Kerugoya HCCA No. 304 of 2013 and which was dismissed on 18th April 2018 for want of prosecution.
7. That as it is clearly evident from the two annexures mentioned above, the appellants were not parties in that suit, or in the subsequent appeal later dismissed for want of prosecution.
8. That as family members, they again held a meeting and decided to comply with the procedures as directed in the Court judgment which was delivered on 16th April 2013.
9. That on 24th April 2013, around 8 days after the Wang'uru Court judgment, they agreed to sub-divide the land into six (6) equal portions of  $\frac{1}{3}$  acre each. They appeared before the Mwea Irrigation Scheme and signed a consent form provided by the said Mwea Irrigation Settlement.
10. That on 24th April 2013, the Mwea Irrigation Settlement implemented and effected the terms of the consent form such that the rice holding No. 1632 was sub-divided into numbers 1632A, 1632 B, 1632 C, 1632 D, 1632 E and 1632 F with the new owners being identified.
11. That on 9th May 2013, the six new owners were authorized to occupy the rice holdings hence the new licensees occupied their respective portions of  $\frac{1}{3}$  acre each.
12. That in the meantime, new tenants' cards and licenses were issued to all the six new licensees.
13. That the respondent herein having been part of and having been in agreement with the sub-division process, became the owner of rice holding number 1632 F which he later sold to a third party by name JOSEPH MURIITHI MUNYI and swore an affidavit of

surrender of 23rd June 2014. Having sold his entitlement and portion, he moved away and vacated to enable the new owner take occupation.

14. That having misused the money he received from the sale of his portion, the respondent moved back to Wang'uru Court in the same file PMCC No. 101 of 2011 and filed an application in 2019 seeking several orders whereby they were named as among the respondents. He was seeking for:-

- a. Eviction of the 1st and 2nd respondents (the defendants in the case) from rice holding No. 1632 Unit 1 Mwea Section.
- b. A permanent injunction restraining the 3rd, 4th and 5th respondents (the appellants herein) from cultivating the suit property.
- c. That the National Irrigation Board do issue a license and tenant card to the plaintiff for the suit property.
- d. A warrant of arrest be issued against the 1st and 2nd respondents (defendants in the suit) for contempt of the Court order issued on 16/4/2013.

15. That whereas the Court declined to grant prayer 3 for issuance of tenant card and prayer 4 for warrant of arrest, the Court in a surprising move issued orders against the three appellants as prayed. This despite the fact that they have never been parties in the suit, and the Court was allegedly executing the judgment given in favour of the appellant herein.

16. That this made them to promptly file this appeal, as its their strong belief that they have never been made parties in that suit or even in the impugned ruling, that the Court became functus officio the moment it pronounced itself on 16/4/2013 on the issue before it for determination, that strangers in a suit cannot be condemned unheard and worse still, at the execution stage.

17. That again, the right process of acquisition of tenant cards in their favour had been followed, and the entity with reversionary rights of ownership being the National Irrigation Board had given them the authority to occupy their respective rice holdings, as evidenced in his annexure SMM - 5 above. The Court then gave contradictory orders not to occupy their rice holding.

18. That after filing of the appeal, by consent of their previous advocate, there was notice of change of advocates to their current advocates who filed an application in the trial Court for stay of execution of the orders that had been given against them on 29th May 2020.

19. That they also learnt that the respondent was attempting to use fraudulent ways to acquire another tenant card for the whole initial rice holding and they issued a letter to the Manager of the Mwea Irrigation Authority not to flout the procedure as there has never been any Committee's recommendation of the National Irrigation Board for cancellation of their tenant cards and re-issue to the respondent, and neither has there been any Court order to that effect.

20. That on 10th September 2020, the trial Court, while granting orders of stay of execution of the orders of 29/5/2020, gave unreasonable conditions incapable of being met especially during this economic depression due to Covid-19 pandemic as they are peasant farmers. The Court directed that each of the three appellants deposit in Court Ksh. 700,000/= totaling to Ksh. 2,100,000/= (two million, one hundred thousand) within seven days from the date of the ruling and in default execution to proceed.

21. That the Court, which had declined to order that the respondent be issued with a tenant card and license for the whole rice holding and directed that the respondent follows the procedure provided in the Irrigation Act, overruled itself and directed that should they fail to meet the harsh conditions, the suit property will vest in the respondent herein wholly. No directions were given in that ruling as to how one rice holding will have multiple owners, and what will happen to their ownership which was granted lawfully, legally and procedurally. There is therefore urgent need for this Court's intervention in that other than granting unrealistic conditions, the trial Court purported to grant to the respondent the portions of his siblings who are not parties in this appeal, which amounts to condemning them unheard.

22. That he has been advised by his advocate which advice he verily belief to be true that they as the appellants have recourse to this Court for an application for stay of execution either upon refusal to order stay of execution by the trial Court or upon orders of stay being issued but the terms are unrealistic under the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules.

23. That they are all grown up utilizing the rice holding as it belonged to their now late father and therefore they have sentimental attachment to it which cannot be quantified. Again, they are the owners of their respective rice holdings through a lawful process and therefore legally entitled to utilize the same as opposed to the respondent who is not the owner and he even sold his portion. One wonders whether by the recent ruling of the trial Court that defaulting the terms of stay of execution order will lead to having the whole initial rice holding vest to the respondents, the respondent will also take back what he sold being rice holding No. 1632 F and the said third party was not involved in that application.

24. That this application has been filed without any undue delay whatsoever.

25. That going by the above averments, they have a very strong appeal with very high chances of success, and being guided by Article 159 of the Constitution that the Court should consider substantive justice, and in view of the economic depression currently experienced not just in this country, but worldwide, to consider the same while considering security for costs. He would urge that the orders of stay of execution be unconditional as currently they are very down financially. They are peasant farmers. Indeed, the trial Court found that as a matter of fact, the stay of execution orders should not be granted in such a way that it prevents an appeal,

while quoting *Butt Vs Restriction Tribunal*, but went against the grain of the same authority it cited in the ruling on 10/9/2020 by granting unrealistic conditions.

### **Respondents Statement of Facts**

The respondent opposed the said application by a replying affidavit on 1st October 2020 and stated as follows:-

1. That the contents of the application dated 14th September 2020 and its supporting affidavit are false and meant to mislead this Court.
2. That he has been advised by his advocates which advise he verily believes to be true that the said application and the entire suit is fatally defective, grossly incompetent and offends mandatory provisions of the law and the same ought to be struck out.
3. That the applicants herein had an advocate on record and they were well represented. When the ruling was delivered, their advocate should have filed this application earlier and not after order has been executed, annexed herewith and marked "JMM 5" is a copy of the said order issued on 3rd June 2020 and the said application has been filed for one month.
4. That the orders issued by Honourable Ochoi and still in force, the said purported changes said to have been made regarding Rice Holding No. 1632 Unit 1 Mwea Section was illegal since the orders were in force and the respondents is not aware of the same he never participated at all for the changes to be made.
5. That after the said order on 16th April 2013, they filed appeal against the order dated 16th April and the appeal was dismissed on 18th April 2018 vide appeal order duly signed and certified by the Court.
6. That the applicants filed application on 24th April 2020. The trial Court delivered on 10th September 2020.
7. That the applicants were granted stay and they have not shown any effort of honouring the terms of the said ruling.
8. That the applicants have not come to Court with clear matters the subject matter in issue purely lies under the National Irrigation Authority if they have any claim they should channel the same to the said body.
9. That the applicants have no right of filing such application and the same is an after-thought, should be dismissed with costs to the respondent.

### **Analysis and Decision**

I have considered the affidavit evidence and the submissions by the counsels. I have also considered the applicable law. The applicants have moved this Court under **Order 42 Rule 1** which provides as follows:-

"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 orders, 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 deem just, and any person aggrieved by an order of stay by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside".

The appellants/applicants had moved the trial Court for an order of stay of execution of an order issued on 29th May 2020. The trial Court granted the stay orders on 10/9/2020. While granting the said application, the trial Court directed that each of the applicants/appellants to deposit in Court Ksh. 700,000/= totaling to Ksh. 2,100,000/= within seven days from the date of the ruling and in default, execution to proceed. It is that order of stay which aggrieved the appellants/applicants and filed the present application stating that they are peasant farmers who cannot raise the said amount at this point in time due to harsh economic depression facing the country owing to the Covid-19 pandemic.

The Court of Appeal has rendered itself on the principles guiding the grant of stay pending appeal. In **Amal Hauliers Limited Vs Abubakar Hassan (2017) e K.L.R, Justice W. Korir** observed as follows:-

"This is an application that invokes the discretionary powers of the Court. Of course discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6 (1) of the Civil Procedure Rules 2010 which empowers this Court to stay execution, either of its judgment or that of a Court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6 (2) as follows ....."

In his order granting stay on terms which is being appealed to this Court, the trial Court cited the decision by the Court of Appeal in **Butt Vs Rent Restriction Tribunal (1982) K.L.R 417** where it was 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 the 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”.

The applicants in their supporting affidavit have stated that the sum of Ksh. 2,100,000/= which they have been asked to deposit as security for costs is too high and beyond their means being peasant farmers. They have also stated that they are unable to meet the terms due to the country's economic depression owing to Covid-19 pandemic. As observed by the Superior Court in the cited case of **Butt Vs Rent Restriction Tribunal** (supra), this Court is bound to consider the unique circumstance which this country and the world at large are going through due to the Covid-19 pandemic while considering whether to grant an application for stay of execution pending appeal and the terms, if any.

The powers of this Court under Order 42 Rule 6(1) are read together with **Article 165 sub-Article (7) of the Constitution of Kenya 2010** which provides as follows:-

“(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate Court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”.

The orders of stay granted by the trial Court on terms that each of the three applicants deposit the sum of Ksh. 700,000/= within seven days from the date of the impugned order are discretionary orders which this Court has supervisory powers to interfere and substitute with appropriate terms which it considers fair in the administration of justice.

In the upshot, I find the Notice of Motion dated 14th September 2020 merited and the same is allowed as prayed. Consequently, I hereby grant unconditional order of stay of execution of the orders given by the trial Court on 29th May 2020 in Wanguru PMCC No. 101 of 2011 and all other consequential orders pending the hearing and determination of the intended appeal. The costs of the application shall abide the appeal. It is so ordered.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this **11<sup>th</sup> day of December, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms. Wambui
2. Ms. Wanjiru Waweru holding brief for Magara
3. Mbogo, Court clerk