



Kiberetu v Kibiti (Being sued as the administrator of the Estate of M’Irura M’Mungania alias Irura Mungania - Deceased) (Environment & Land Case E009 of 2023) [2025] KEELC 137 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEELC 137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E009 OF 2023
JO MBOYA, J
JANUARY 20, 2025**

BETWEEN

SAMSON KIBERETU PLAINTIFF

AND

SILAS KIBITI (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF M’IRURA M’MUNGANIA ALIAS IRURA MUNGANIA - DECEASED) DEFENDANT

RULING

Introduction And Background:

1. The Plaintiff/Applicant [herein after referred to as the Applicant] has approached the court vide Notice of Motion Application dated 7th day of January 2025; and wherein the Applicant has sought for the following reliefs [verbatim]:
 - i.Spent
 - ii. The Honourable be court be pleased to grant an order of stay of execution of the Judgment and decree issued on 28.2.2024 pending the hearing and determination of the Application inter-partes.
 - iii. The Honourable court be pleased to grant an order of stay of execution of the judgment and decree issued on 28.2.2024 pending the hearing and determination of the intended appeal to the Court of Appeal.
 - iv. Costs of the Application be provided for.



2. The instant application is anchored on the numerous grounds which have been highlighted in the body of the application. Furthermore, the application is supported by the affidavit of one, namely, Samson Kiberitu sworn on the 7th day of January 2025.
3. Upon being served with the subject application the Respondent herein filed a Notice of Preliminary objection and wherein same [the Respondent] has highlighted various issues including; that the decree sought to be stayed is a negative decree and hence not capable of being stayed. Further and in addition, it has also been contended that the application by the Applicant has been mounted with unreasonable delay and thus same constitutes an abuse of the due process of the court.
4. The instant application came up for hearing on the 20th day of January 2025; whereupon the parties covenanted to canvass and dispose of same by way of oral submissions. Suffices to state that the application was thereafter canvassed and ventilated by the respective parties on even date.

Parties Submissions:

a. Applicant's submissions:

5. The Applicant herein adopted the grounds contained at the foot of the application dated 7th day of January 2025; and thereafter reiterated the averments contained in the body of the supporting affidavit. In addition, the Applicant canvassed and highlighted three [3] salient issues for consideration by the court.
6. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein filed the instant suit claiming to have accrued/ acquired adverse possessory rights over and in respect of the suit property. Furthermore, it was contended that the instant suit was heard and determined vide Judgment rendered on the 28th day of February 2024.
7. Moreover, it was the further submissions by the Learned counsel for the Applicant that the court proceeded to and dismissed the Applicant's suit. In this regard, it has been posited that following the dismissal of the Applicant's suit, the Respondent herein has since commenced/ started the process of execution.
8. Arising from the foregoing, Learned counsel for the Applicant has submitted that the imminent execution and enforcement of the decree of the court shall culminate into the eviction of the Applicant from the suit property.
9. To this end, it has been contended that the Applicant shall therefore be exposed to suffer irreparable loss and thus the necessity to grant the Orders of stay of execution of the Judgment and the resultant decree, pending the hearing of the Appeal before the Court of Appeal.
10. Secondly, it has been submitted by learned counsel by the Applicant that the Applicant has lived and resided on the suit property since birth. Further and in addition it was submitted that the Applicant has also built/constructed permanent structures on the suit property.
11. Owing to the fact that the Applicant has resided and lived on the suit property, it was submitted that the execution of the judgment shall therefore render the Applicant homeless.
12. Finally, Learned counsel for the Applicant submitted that the Applicant has since filed a Notice of Appeal and thus demonstrating that same [Applicant] is keen to pursue the intended Appeal before the Honourable Court of Appeal.



13. Additionally, Learned Counsel for the Applicant has also submitted that the Notice of Appeal constitute[s] an appeal for purposes of the matter before the court.
14. Arising from the foregoing, Learned Counsel for the Applicant has invited the court to find and hold that the application beforehand is meritorious. In this regard, the court has been implored to grant/allow the orders sought at the foot of the application beforehand.

b. Respondent's submissions:

15. The Respondent adverted to the Notice of preliminary objection filed and thereafter sought to canvass four [4] salient issues for consideration by the court.
16. First and foremost, the Respondent submitted that the Applicant's suit was dismissed on the 28th day of February 2024. In this regard, it has been submitted that what came out of the dismissal of the Applicant's suit is a negative decree and not otherwise.
17. It was the further submissions of the Respondent that a negative decree/order is not capable of not being stayed either in the manner sought by the Applicant or at all. To this end, the Respondent invited the court to find and hold that the application seeking an order of stay in respect to a negative decree is not only misconceived and incompetent, but same amounts to an abuse of the due process of the Court.
18. Secondly, the Respondents submitted that there is a pending application which has been filed by himself [Respondent]. In particular, the Respondent submitted that the application filed by himself has been scheduled for hearing on the 17th day of February 2025. In this regard, it was submitted that the Applicant herein ought to have waited for the said application, namely, the one filed by the Respondent, to be heard and disposed of before filing the current application.
19. Moreover, it has been submitted that the filing of the instant application constitutes and amounts to forum shopping. Similarly, it has been submitted that the application beforehand constitutes an abuse of the due process of the court.
20. Thirdly, the Respondent has submitted that the application herein has been filed and mounted with unreasonable and inordinate delay. Further and in addition, it has also been submitted that the court lacks jurisdiction to entertain and adjudicate upon the subject application.
21. Flowing from the foregoing submissions, the Respondent has invited the Court to find and hold that the application by the Applicant is pre-mature, misconceived and otherwise constitutes of the an abuse of the due process of the court.
22. Premised on the foregoing submission[s], the court has been implored to find and hold that the application herein is devoid of merits and same should be dismissed with costs to the Respondent.

Issues for Determination:

23. Having reviewed the application dated 7th day of January 2025; the response thereto vide Notice of Preliminary objection and upon consideration of the oral submissions made on behalf of the respective parties, the following issues crystallize [emerge] and are thus worthy of determination;
 - i. Whether the application has been made with unreasonable and inordinate delay and if so: whether the application is defeated by the Doctrine of Laches.
 - ii. Whether the decree arising from the dismissal of the suit is a Negative decree; and if so, whether same is capable of being stayed.



Analysis and Determination

Issue No. 1

Whether the application has been made with unreasonable and inordinate delay; and if so, whether the application is defeated by the doctrine of Laches.

24. The application by the Applicant essentially seeks an order of stay of execution pending the hearing and determination of the intended appeal to the Court of Appeal. By virtue of the orders being sought, it is common ground that the instant application is premised and predicated on the provisions of Order 42 Rule 6[2] of the [Civil Procedure Rules, 2010](#).
25. To the extent that the application seeks for orders of stay of execution, it suffices to underscore that the order being sought is an equitable relief and hence the grant of same [Order of stay] is anchored on the discretion of the Court.
26. Consequently, and in this regard, it behoved the Applicant to file and mount the application beforehand without unreasonable and inordinate delay.
27. Put differently, it suffices to state that Applicant, the current Applicant not excepted, who is keen to procure an order of stay of execution, is obliged to file the requisite application timeously and with due promptitude.
28. Moreover, it is imperative to state that an Applicant seeking to procure an order of stay of execution pending the hearing and determination of an appeal is called upon to satisfy three [3] pertinent ingredients and/ or conditions. Instructively, an Applicant is obliged to file the application without unreasonable delay; demonstrate the existence of sufficient cause; and ultimately, prove that substantial loss, is likely to accrue, if the Orders sought are not granted.
29. Given the ingredients and or conditions that must be justified by an Applicant before partaking of an order of stay of execution; I am disposed to address the first ingredient/condition, namely, whether the application has been mounted timeously and with due promptitude.
30. To start with, there is no gainsaying that the Judgment and resultant decree that is sought to be stayed was delivered on the 28th day of February 2024. Besides, there is no dispute that the application under reference was filed on 7th day of January 2025.
31. From the foregoing position, it is evident and apparent that the application beforehand has been filed and mounted after a duration of more than 11 months from the date of the delivery of the impugned Judgment. Suffice to state and underscore that Eleven [11] months constitutes an unreasonable and inordinate period.
32. Nevertheless, it is not lost on this court that whereas Eleven [11] months constitute[s] an unreasonable duration, where an Applicant is able to account for the delay and indeed offers reasonable/ plausible explanation for same, then a court of law will interrogate the reasons and thereafter calibrate on the unreasonableness or otherwise. [See the holding of the Court of Appeal in the case [Andrew Kiplagat Chemaringo versus Paul Kipkorir Kibet](#) [2018] eKLR]
33. Put differently, it is not the duration taken that informs the determination of unreasonableness but the explanation, if any; that has been availed and/ or proffered. In this regard, even though I have found and held that the duration taken was unreasonable, if the Applicant justifies the delay, then the court may very well discern whether to exercise discretion in favour of the Applicant.



34. Be that as it may, it is imperative to state and underscore that despite the length of time taken prior to and before the filing of the current application, the Applicant herein did not find it apposite to tender any explanation for the delay or at all. Moreover, the supporting affidavit by the Applicant does not even attempt to proffer any plausible or cogent explanation, or at all.
35. For good measure, it is instructive to posit that whosoever wishes to partake of and benefit from the equitable discretion of the court and in particular, in application[s] like the one beforehand, must justify any delay.
36. Pertinently, it is the reasons, if any; given and/or offered that would provoke the flow of the court's discretionary power.
37. The essence of offering plausible and cogent reason[s] in an endeavour to accrue the discretion of the Court was elaborated in the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA1188 (KLR) (28 October 2022) (Ruling), wherein the Court [per Mativo JA] stated thus:

In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay.

The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

38. Moreover, the need to account for a delay in an endeavour to mitigate the doctrine of laches was also highlighted in the case of *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* (2018) eKLR, where the Court of Appeal, stated thus;

“...The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

39. There is no gainsaying that the Applicant herein was obligated to approach the court without unreasonable and inordinate delay. However, the time/duration taken by the Applicant herein before approaching the court is ex-facie [on the face of it] unreasonable and inordinate.
40. Other than the foregoing, it is not lost on the court that the Applicant has also not accounted for the delay in filing the application. Neither has the applicant found it just and expedient to offer/ proffer any plausible or cogent reason.
41. Based on the foregoing, there is no gainsaying that the Applicant herein is guilty of dilatoriness. In this regard, it suffices to underscore that the amount of delay creates a fertile basis and foundation for the



invocation and application of the Doctrine of Laches. [See the decision in *Chief Land Registrar & 4 Others vs Nathan Tirop Koeh & 4 Others* [2018] eKLR}.

Issue No. 2

Whether the decree arising from the dismissal of the suit is a negative decree; and if so, whether same is capable of being stayed.

42. Other than the duration taken by the Applicant before filing the instant application, it is also important to recall that the subject suit was indeed filed by the Applicant. For good measure, the Applicant sought to be declared as the owner of the suit property on the basis of adverse possession.
43. Suffice to state that the subject suit was thereafter heard and determined by the court. Pertinently, the court proceeded to and delivered a Judgment on the 18th day of February 2024; and whereupon the court found that the Applicant had failed to prove his claim. Consequently, and in this regard, the Applicant's suit was dismissed with costs.
44. The question that now arises and which the Court needs to grapple with, is whether the dismissal of the Applicants suit, which essentially culminated into a negative decree, is capable of being stayed. Instructively, there is no gainsaying that a negative decree or order does not command the losing party, [in this case], the Applicant to do any positive act or otherwise.
45. To the extent that a negative decree/order does not command the losing party to undertake any action, the question that the court ought to answer is whether such a decree or order, is capable of stay or otherwise.
46. It is worthy to state that the Respondent contended that a negative decree/order cannot be stayed. Indeed, the Respondent contended that there is nothing capable of being stayed and hence it was posited that the entire application beforehand is incompetent.
47. On the contrary, Learned counsel for the Applicant contended that there are exceptions where a negative decree or order can be stayed. To this end, Learned counsel for the Applicant contended that the exceptions include where the intended appeal is arguable and not frivolous. In addition, it was submitted that the order of stay can also issue where an Applicant has demonstrated that [sic] the appeal/intended appeal may be rendered nugatory.
48. Despite the submissions by and on behalf of the Applicant herein, it is common ground that a negative decree and or order, like the one beforehand, is incapable of being stayed. For coherence, the losing party and in this case, the applicant was not commanded to do and or refrain from doing any action or at all. Notably, the Judgment of the court merely dismissed the Applicant's suit with costs. Period.
49. Arising from the foregoing, it is my finding and holding that the application beforehand is not only pre-mature and misconceived, but same [Application] is also legally untenable. For good measure, the order of stay of execution of the negative decree, has been sought for in vacuum.
50. Before departing from this issue, it is instructive to cite and reference the holding of the Court of Appeal in the case of *Charles Barongo Nyakeri vs The county Government of Kisii* (2020) eKLR where the Court stated as hereunder;
 11. This Court has also consistently held that a negative order cannot be executed, and that where the trial court in its judgment has dismissed a suit, that is a negative order that is not amenable to grant of any stay. See *Western College Of Arts & Applied Sciences V Oranga & Others* [1976] KLR63.



12. The applicant’s claim was dismissed by the ELRC. What followed was a negative decree that cannot be executed. The order of stay of execution of the trial court’s judgment pending hearing and determination of the intended appeal sought by the applicant cannot therefore be granted.
51. Recently, the Court of Appeal re-visited the legal principle as to whether a negative decree and or order can accrue stay of execution in the case of *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others* (Civil Appeal (Application) E383 of 2021) [2022] KECA 491 (KLR) (18 February 2022) (Ruling), where the Court stated thus:

We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences vs Oranga & Others* (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered.”

Further, in the more recent case of *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR, the Court of Appeal expounded on stay of execution stating:

“In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

52. From the foregoing, it is trite and established that a negative order and or decree, which does not command a party to do or refrain from doing an action, is incapable of being stayed.

Final Disposition:

53. For the reasons which have been adverted to and highlighted in the body of the Ruling, it must have become apparent that the application by the Applicant is not only premature and misconceived; but same is legally untenable.
54. Consequently, and in the premises, the orders that commend themselves to the court are as hereunder:



- i. The Application be and is hereby Dismissed.
- ii. Costs of the Application be and are hereby awarded to the Respondent.
- iii. The costs in terms of clause [11] above shall be taxed by the Deputy Registrar in the conventional manner.

55. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF JANUARY 2025.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Mutuma – Court Assistant

Miss. Ochola for the Applicant.

Mr. Silas Kibiti – Defendant/ Respondent in person.

