Mutua & 4 others v M'Mwoboria & another (Environment and Land Appeal E005 of 2023) [2025] KEELC 119 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEELC 119 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E005 OF 2023

JO MBOYA, J

JANUARY 20, 2025

BETWEEN

HARUN MUTUA .... 1ST APPELLANT

CHARLES MWENDA .... 2ND APPELLANT

DENIS MUTETHIA .... 3RD APPELLANT

WILLIAM KAIMENYI .... 4TH APPELLANT

ROBERT KINYUA .... 5TH APPELLANT

AND

GRACE KARWIRWA M'MWOBORIA .... 1ST RESPONDENT

SABELA NKATHA M'MWOBORIA .... 2ND RESPONDENT

RULING

Introduction/Background

1. The appellants/applicants {hereinafter referred to as the applicants} have approached the court vide notice of motion application dated 16. 10.2024 brought pursuant to inter alia the provisions of Order 40 Rules 1 & 2: Order 10 Rule 1 of the Civil Procedure Rules and Section 68 of the *Land Registration Act* 2012 and in respect of which the applicants have sought for the following reliefs:

    a. That the honourable court do stay the execution of the decree issued in Meru CMCC ELC No. 122 of 2019 pending hearing and determination of the application.

    b. That the honourable court do stay the execution of the decree issued in Meru CMCC ELC No. 122 of 2019 pending hearing and determination of the appeal.

2. The instant application is premised on the various grounds which have been highlighted at the foot thereof. In addition, the application is supported by the affidavit of Charles Mwenda {deponent} sworn on 16.10.2024 and to which the deponent has annexed five documents.

3. Upon being served with the instant application the respondents filed a replying affidavit sworn by Grace Karwirwa {the 1st respondent}. In particular, the replying affidavit is sworn on 11.11.2024 and where the respondents have contended that the instant application constitutes an abuse of the due process of the court. Furthermore, the respondents have also posited that the applicants have neither established nor demonstrated substantial loss, if any that is likely to accrue if the orders sought are not granted.

4. The application beforehand came up for hearing/directions on 21.10.2024 wherefrom the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions in this regard the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

5. The applicants filed written submissions dated 18.11.2024, whereas the respondent filed written submissions dated 16.1.2025. The two sets of written submissions are on record.

Parties Submissions

a. Applicants' submissions

6. The applicants filed written submissions dated 18.11.2024 and wherein the applicants have adopted the grounds contained in the body of the application. In addition, the applicants have also reiterated the averments contained in the body of the supporting affidavit.

7. Furthermore, learned counsel for the applicants have ventured forward and highlighted 3 salient issues for consideration and determination by the court. Firstly, learned counsel for the applicants has submitted that the applicants herein have been in occupation of the suit property and same have equally developed their homestead thereon. In this regard, it has been contended that if the orders of stay are not granted then the appeal shall be rendered nugatory.

8. Secondly, learned counsel for the applicants has submitted that the applicants herein are on the verge of being evicted from the suit property. In this regard, counsel has submitted that in the event of eviction being undertaken, then the applicants shall be rendered homeless.

9. Thirdly, learned counsel for the applicant has also submitted that the application beforehand has been filed timeously and with due promptitude. In particular, it has been posited that the impugned judgment was rendered on 4.10.2024 while the application beforehand was filed on 18.11.2024. To this end, the applicants have contended that the application was filed without unreasonable delay. Arising from the foregoing, learned counsel for the applicants has therefore invited the court to find and hold that the application is meritorious. In this regard, the court has been implored to proceed and allow the application.

b. Respondents submissions

10. The respondents filed written submissions dated 16.1.2025 where the respondents have reiterated the contents/averments contained in the replying affidavit. Additionally, the respondents have proceeded to and highlight 3 salient issues for consideration by the court.

11. First and foremost, learned counsel for the respondents has submitted that the applicants beforehand had previously filed a similar application dated 30.3.2023 and wherein the applicants sought for inter alia orders of stay of proceedings before the chief magistrate's court as well as orders of stay of execution.

12. It was contended that the previous application namely: the application dated 30.3.2023 was heard and dismissed by the court. In this regard, it has been submitted that the current application therefore constituted an abuse of the due process of the court.

13. Secondly, learned counsel for the respondent has submitted that the applicants herein have neither established nor demonstrated that same are disposed to suffer any substantial loss or at all. In particular, it has been contended that the respondents have lawful and legitimate honours of the suit property which was transferred and registered in their name pursuant to a succession cause. On the other hand, it has been submitted that the application beforehand has been overtaken by events in so far as the judgment and the resultant decree of the court have since been executed. In particular, it has been submitted that the respondents are the ones in occupation of the suit property.

14. Premised on the foregoing submissions learned counsel for the respondent has invited the court and owned that the application beforehand is not only misconceived, but same constitutes an abuse of the due process of the court. To this end, the respondents have sought to have the application dismissed with costs.

Issues for Determination

15. Having reviewed the application beforehand; the response thereto and upon consideration of the written submissions filed on behalf of the respective parties the following issues emerge and are thus worthy of determination:

    i. Whether the applicants have established and demonstrated the existence of a sufficient cause or otherwise.

    ii. Whether the applicants have established or demonstrated that same are likely to suffer substantial loss or otherwise.

Analysis and Determination

Issue No. 1 Whether the applicants have established and demonstrated the existence of a sufficient cause or otherwise.

16. The application beforehand seeks for an order of stay of execution pending the hearing and determination beforehand. To the extent that the application seeks for an order of stay of execution, it is incumbent upon the applicants to first and foremost establish and demonstrate the existence of sufficient cause.

17. Suffices to state that sufficient cause constitutes and forms the prelude to partaking of and on benefiting from an order of stay of execution pending appeal. Instructively, where an applicant does not establish the existence of a sufficient cause, such an applicant cannot walk towards obtaining an order of stay of execution pending appeal.

18. Put differently proof and establishment of a sufficient cause constitute the key to opening the door of justice in perceived of an order for a stay of execution pending appeal.

19. Premised on the foregoing it is therefore appropriate to discern whether the applicant herein have indeed demonstrated the existence of a sufficient cause. To start with it is important to recall that

the applicants herein are seeking to stay the execution of the judgment and decree rendered on the 4.10.2024, yet there is no appeal, that has been filed as against and a reference.

20. Notably the appeal beforehand relates to and concerns a ruling which was rendered on 24.1.2023 and wherein the applicant's statement of defence was struck out and expunged from the record of the court for non-compliance with the conditions attached to the ruling of the court.

21. In the absence of an appeal against the judgment and decree herein, it is difficult to understand and appreciate the foundation upon which the applicants herein have approached the court to grant and order of stay of execution pending the hearing and determination of sic an appeal which is non-existent. Instructively the application beforehand has been made in a vacuum.

22. To my mind, an application for a stay of execution of the judgment and decree like the one beforehand can only be mounted in an appeal and not otherwise. For coherence, the application can only be mounted in the appeal file that relates to and concerns the judgment, decree, ruling and or order that is being appealed against and not otherwise.

23. At this juncture, it is imperative to cite and reference the provisions of Order 42 Rule 6 Sub-Rule 1 of the Civil Procedure Rules. The provisions under reference state as hereunder:

> " 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 the application being made, to consider such application and to make such order thereon as may to it seems just, and any person aggrieved by 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".

24. The wording of the cited provisions underscores the necessity to have an appeal pertaining to the order and/or decree sought to be stayed. In this regard, I hold the humble opinion that the application beforehand is premature.

25. Arising from the foregoing exposition of the law, it is my finding and holding that in the absence of an appeal against the impugned judgment and decree, there is no sufficient cause and or basis that has been established to underpin the application for stay of execution pending the hearing and determination of sic and non-existent appeal.

26. What constitutes sufficient cause has received judicial interpretation and pronouncement in several decisions, in particular, the meaning and import of sufficient cause was elaborated by the court of appeal in the case of The Hon. *Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011*; wherein the Court of Appeal observed and stated as follows:

> " Sufficient cause or good cause in law means:-
>
> > 'The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.' See Black's Law Dictionary, 9th Edition, page 251.
> >
> > Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a

Judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

Issue No. 2 Whether the applicants have established or demonstrated that same are likely to suffer substantial loss or otherwise.

27. Other than the requirement that an applicant seeking an application for a stay of execution must demonstrate and establish sufficient cause has a precursor, it is imperative to underscore that an application for a stay of execution pending an appeal cannot be allowed unless the applicant has proven the likelihood of substantial loss arising.

28. Pertinently it has been stated times without number that substantial loss is the key pillar and or cornerstone upon which an order of stay of execution pending appeal is anchored and predicated. Absent substantial loss a court of law is not enjoined to grant an order of stay of execution.

29. In this regard it suffices to cite and reference the decision in the case of Kenya Shell Ltd Vs Benjamin Karuga Kibiru (1986) eKLR where the court of appeal {per Platt, J.A} stated thus:

> " 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. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money".

30. Other than the said decision, the importance of substantial loss in an application for stay of execution was also underscored by the court in the case of James Wangalwa vs Agnes Naliaka Cheseto (2012) eKLR where the court stated as hereunder:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above".

31. From the foregoing it is worthy to state that every applicant who desires to partake over an order of stay of execution must therefore demonstrate the likelihood of substantial loss arising and or accruing unless the orders sought are granted. In any event, the evidence of substantial loss must be averted to and contained in the body of the supporting affidavit.

32. It is also instructive to underscore that substantial loss must be substantiated. To this end, an applicant cannot walk to court and anticipate that the court shall infer and or speculate on substantial loss.

33. Despite the foregoing position it is appropriate to state that the applicants herein have neither demonstrated nor established the existence/likelihood of substantial loss occurring. At the very best the applicant has indicated in their submissions that unless the orders sought are granted same {applicants} shall be disposed to eviction.

34. Nevertheless, there is no gainsaying that the judgment of the court which has been referenced did not direct eviction of anyone. For good measure, the judgment under reference is provided as hereunder:

    i. An order of permanent injunction be and is hereby issued restraining the defendants, their agents, servants or employees from entering or in any way interfering with the plaintiff's use or LR No. Kiirua/Naari/2303.

    ii. An order for the removal of caution placed by the defendants on LR No. Kiirua/Naari/2303 be and is hereby issued.

    iii. The plaintiffs shall have costs of the suit and interests thereon.

35. From the terms of the judgment, it is difficult to understand the foundation upon which learned counsel for the applicants and by extension the applicants are contending that same are exposed to eviction. Surely the fear and apprehension of eviction is imaginary.

Final Disposition

36. Having considered the two thematic issues {details highlighted in the body of the ruling} it must have become crystal clear that the application under reference is not only premature and misconceived but same constitutes an abuse of the due process of the court.

37. In the circumstances, the final orders that commend themselves to the court are as hereunder:

    1. The application dated 16.10.2024 be and is hereby dismissed.

    2. Costs of the application be and are hereby awarded to the respondents.

38. 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

Mr. Mwirigi holding brief for Mr. Joshua Mwiti for the Appellants/Applicants

Mr. Anampiu for the Respondents