

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ELC LAND APPEAL NO. E003 OF 2024

NAHASHON MBWERI MACHARIA.....1ST APPELLANT
CATHOLIC DIOCESE OF
NYERI TRUST (REGISTERED TRUSTEES).....2ND APPELLANT

-VERSUS-

JACOB NJIRU..... 1ST RESPONDENT
JOSEPHAT MWANGI.....2ND RESPONDENT
WINNIE WANJOHI.....3RD RESPONDENT
GAKUI MUNENE.....4TH RESPONDENT
(Being sued in their capacity as the Board of Directors)
MACHARIA PRIMARY SCHOOL.....5th RESPONDENT
LAND REGISTRAR NYERI.....6TH RESPONDENT
THE ATTORNEY GENERAL.....7TH RESPONDENT

**(Being an Appeal from the Judgment delivered on 13th December 2023 by
the Honourable Mr A.G. Kibiru)**

RULING

1. The Appellant/Applicants filed the Notice of Motion dated 14th March 2024 seeking the following orders:

1. Spent.

2. Spent.

3. THAT pending the hearing and determination of this appeal, this Honourable Court be pleased to stay the execution of the Judgment and Orders dated 13th December 2023 issued by the Honourable Mr A.G. Kibiru in Nyeri MCELC NO.111 of 2018.

- 4. THAT in the alternative, pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to issue a status quo order.**
 - 5. THAT the costs of this application be in the cause**
2. The application is supported by the Affidavit of the 1st Appellant/Applicant and the grounds that judgment was delivered by the trial court in Nyeri MCELC No.111 of 2018 against the Appellants. Being aggrieved with the decision, they appealed to this court. The Applicants state that the trial court declared that the respondents are entitled to a portion of 2 acres of the Appellants' property and consequently barred and restrained them from the said portion of land. They claim that no survey work has been carried out to determine the portion awarded, and he is unable to access any part of his land to carry out developments. The 1st Applicant deposed that this has denied him rights to use and enjoy his property as enshrined in the Constitution of Kenya 2010.
 3. The 1st Applicant is apprehensive of a threat of execution of the Judgment and Orders of the trial court, and the appellants run the risk of substantial loss. He deposed that the Respondents will continue to develop the suit property under the NG-CDF funds, causing damage to the current state of the suit property and further causing financial loss to the Appellants if they succeed on appeal. The Applicants further claim that the title to the suit property will be given to the Ministry of Education, which means that any other transfer of the suit property will have to go through approval by parliament, which further complicates issues.
 4. He also added that they have an arguable appeal with a good chance of success and sought the orders prayed for so that the suit would not be rendered nugatory and justice would be done.

The Respondents' replying affidavit

5. The 2nd Respondent swore an affidavit on the 14th of November 2024 in response to the instant application as the Chairman of the Board of Directors of Macharia Primary School. He deposed that before the case in the trial Court was filed, many donors were willing to develop the school following problems they were facing, such as flooding. The donors had been waiting for the determination of the case to enable them to carry out the developments.
6. After the judgment was delivered, the donors came to the school, demolished the old classrooms that had previously been flooded by rain and built new classrooms. The said classrooms are for use by pupils, and if the prayer for stay is allowed, the 5th Respondent will have to halt learning for the pupils.
7. The Respondents contend that the property claimed by the Appellants was used as a playground, school administration block and classrooms that were built by the government even before they allegedly bought the property and filed this suit.
8. It is also the Respondents' contention that the Applicants have not demonstrated how they will suffer substantial loss or how the appeal will be rendered nugatory if a stay is not granted.
9. The 2nd Respondent termed the appeal as an afterthought and a want of triable issues, as well as a delaying tactic that lacks merit and prayed that the application be dismissed.

The Applicants' written submissions

10. Counsel for the Applicants relied on Order 42 rule 6(2) and (b) Civil Procedure rules, submitting that for an order of stay to be granted, there must be substantial loss, the application must be made without unreasonable delay, and security must be offered.
11. On substantial loss, Counsel relied on the authority of **Mukuma vs. Abuoga(1988)KLR 645** and submitted that as a result of the judgment of the

trial court, the appellants are permanently restrained from entering upon any part of the suit land for which he paid substantial consideration. It is also submitted that there is a great risk of the suit property being alienated in favour of the 5th Respondent, and transferring it back to the 1st Appellant will be impossible if the appeal is successful. The 1st -5th Respondents, being a public education institute, the Appellants submit that it is unclear whether they are financially capable of restoring the suit property to its original state if the appeal succeeds. Further, they submit that the 1st Appellant will continue to be denied his right to use and enjoy his property as enshrined in the Constitution.

12. Counsel relied on the authority of **Antoine Ndiaye vs. African Virtual University(2015)eKLR** and averred that they have sufficiently shown that the Appellants will be at grave risk if the execution process is not stayed and that the appeal will be rendered nugatory. The appellants urged the court to preserve the status quo and allow their application.

13. It was also submitted that the application has been made without unreasonable delay, as the time that lapsed between the judgment date on 13th December 2023 and the filing of the instant application dated 14th March 2024 is attributed to the legal process involved in drafting and filing the appeal, and as such, the period of three months cannot be said to be inordinate. Counsel relied on the authority of **James Wagalwa & Another vs Agnes Naliaka Cheseto(2012)eKLR**.

14. On security, Counsel submitted that the main concern of the Courts is to protect the rights of the parties, stating that the Court ought to safeguard the rights of the Appellants/Applicants. They submit that the Respondents have not annexed any proof to confirm the narrative in the 2nd Respondent's affidavit. They relied on the authorities of: **James Wagalwa & Another vs Agnes Naliaka Cheseto(Supra), Republic vs Kenya Revenue Authority**

ex parte Stanley Mombo Amuti(2018) eKLR and Butt vs Rent Restriction Tribunal(1982)KLR 417

15. On the issue of costs of the application, Counsel quoted section 27 of the Civil Procedure Act and **Republic vs Rosemary Wairimu Munene(ex parte applicant) vs. Ihururu Dairy Farmers Co-operative Society Ltd(2014)eKLR** as well as **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition no.4 of 2012(2014)eKLR**, submitting that costs follow the event.
16. Counsel for the Appellants concluded that they have substantiated all three conditions for the grant of stay orders and, as such, the instant application ought to be allowed.

Analysis and Determination

17. The issue for determination in the Appellants' application dated 14th March 2024 is whether the Court should grant an order of stay of execution of the Judgment delivered by the trial court in Nyeri MCELC No.111 of 2018 on 16th January 2024, dismissing his suit and allowing the Respondent's counterclaim with costs.
18. The Application is made under Order 42 Rule 6 of the Civil Procedure Rules, which provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.”

19. Counsel for the Appellants relied on the authority of **Mukuma vs. Abuoga [1988] KECA 107 (KLR)** in which the Court of Appeal broke down the conditions for the grant of stay as follows:

“...the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and

(b) The applicant has given security. The discretion under rule 5(2) (b) is at large, but as was pointed out in the Kenya Shell case, substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such a loss would render the appeal nugatory.”

20. The purpose of stay orders is to preserve the subject matter of the appeal so as not to render the appeal nugatory. In the case of **Butt vs. Rent Restriction Tribunal [1979] eKLR**, the Court of Appeal underscored the Court’s discretionary power in this matter. It was held that:

“It is in the discretion of the court to grant or refuse a stay, but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court, as a general rule, ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory.”

21. As to what substantial loss is, Counsel for the Appellants relied on **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**, where it was held that:

“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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

22. The Appellants submit that they stand to suffer substantial loss as they will be permanently restrained from accessing the suit property, which the 1st Appellant claims he paid consideration for. The court has considered the orders issued by the trial court which were as follows;

- A. *On the main suit, the court dismissed the Plaintiff's claim with costs to the defendants.*
- B. *On the Counterclaim, the court ordered as follows;*
 1. *A declaration be and is hereby made that the defendants are entitled to a portion of land measuring approximately 2.025 Ha to be used for education purposes, namely the development of Macharia Primary and Nursery school as approved by the Kieni East Land Control Board in 1982.*
 2. *A declaration be and is hereby made that the 1st defendant in the counterclaim holds a portion of 2.025 Ha in trust for Macharia Primary school.*
 3. *That the Plaintiff herein be and is hereby permanently restrained either by himself, his agents, servants or otherwise from entering upon and or doing anything on the said portion of land belonging to Macharia Primary and Nursery School measuring approximately 2.025 Ha.*
 4. *That the County Land Registrar and the County Surveyor shall cause a portion to be excised from the portions of land number 10846/57 and added to land parcel number 10846/58 to bring to a parcel measuring 2.025 Ha. As originally allocated by the*

original owner, and the same to be registered in the name of Macharia Primary and Nursery School.

5. *That the 1st Defendant in the counterclaim to transfer the excised portion of land to the said school within ninety (90) days of such subdivision.*
6. *That the costs of such subdivision and transfer shall be borne by the defendants in the main suit.*
7. *That the defendants in the counterclaim shall bear the costs of the suit and the counterclaim together with interest.*

23. From the foregoing, the court finds that the first order related to the main suit dismissing the Appellants' suit. This was a negative order incapable of execution; there can be no stay of execution of such an order. In **Kanwal Sarjlt Singh Dhiman vs Keshav vs Juvral 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, 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”.

24. Concerning orders number 1 and 2 on the counterclaim, the court observes that the said orders are declaratory in nature. The said declaratory orders are formal statements by the court pronouncing upon the existence of legal rights held by the Defendants in the main suit and plaintiffs in the counterclaim, on the suit parcel of land. It is to be contrasted with an executors and/or coercive order, which can be enforced by the courts.

25. With regard to order number 3, the Court observes that the portion of land in dispute is currently used as a Primary and Nursery school and has been so used since 1982. The Respondents stated that after the trial court's judgment, donors came to the school and demolished the old classrooms and built new classrooms. The portion of land under dispute is also used as a playground and for school administration. In the Court's view, the Applicants have not shown that any substantial loss would accrue to them if they remain restrained from entering upon and or doing anything on the portion of land under dispute currently occupied by Macharia Primary and Nursery School.
26. Indeed, the court finds that the school stands to suffer substantial loss if the particular order of the trial court is stayed, as the Appellants' entering onto the land will interfere with normal school processes.
27. The Court has considered order numbers 4, 5 and 6 in the counterclaim and is of the view that execution of the said orders would have far-reaching consequences and the Applicants are likely to be prejudiced and to suffer substantial loss if they are successful on appeal. Execution may also render the appeal nugatory if the appellants are successful. The Court is of the view that these orders ought to be stayed pending the hearing and determination of the appeal.
28. Having granted the order of stay of execution of part of the judgment and decree, it is prudent that prosecution of the appeal be expedited and timelines given for action to be taken by the Appellants, and the court proposes to make appropriate orders to oversee the timely conclusion of the appeal.
29. From the foregoing, the court makes the following orders;
- 1) **An order of stay of execution of the orders issued in favour of the defendants in the suit and the Plaintiffs in the counterclaim being orders number 4, 5, 6 and 7 of the judgment of the Trial court in Nyeri CMELC No. 111 of 2018 is hereby granted, pending hearing and final determination of the appeal herein.**

2) The Appellant is hereby directed to file and serve the Record of Appeal within 21 days of this ruling, in default of which the orders herein will automatically lapse.

3) Costs of this application shall abide the outcome of the appeal.

Dated, Signed and Delivered Virtually at Nyeri, this **28th** day of **October**, 2025

HON. LADY JUSTICE L. G. KIMANI

JUDGE

In the Presence of:-

C. Kendi: Court Assistant

M/s. Ndirangu holding brief for Mugambi for the Appellant/Applicant

M/s. Mumbi Kiarie. for the Respondents