



**Vincent Migaliza Kenyagi v Kendi & another (Environment and Land Appeal E007 of 2023) [2024] KEELC 6 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 6 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**E ASATI, J**

**JANUARY 18, 2024**

**BETWEEN**

**VINCENT MIGALIZA KENYAGI ..... APPELLANT**

**AND**

**PAUL OSIDE KENDI ..... 1<sup>ST</sup> RESPONDENT**

**ELIZABETH MMOJI KENDI (ON BEHALF OF THE ESTATE OF SAMUEL MAHUNYA OKELLO) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of R. M. Ndombi PM in VIHIGA ELC NO. 037 OF 2023)*

**RULING**

1. The application before court for determination is the Notice of Motion dated 6<sup>th</sup> September 2023.
2. A brief background of the application is that the Applicant is the 1<sup>st</sup> Defendant in an on-going suit namely Vihiga SPM E & L Case No. 037 OF 2023 (the suit) where he has been sued jointly with the Land Registrar- Vihiga for a declaration that transfer and registration of land parcel No. Tiriki/Senende/258(the suit land herein) into his name was fraudulent and an order for cancellation of the registration, an order of eviction, an order of permanent injunction, special damages, mesne profits and costs of the suit. Together with the plaint, the plaintiffs (the Respondents herein) filed an application seeking for temporary injunction restraining the appellant herein from trespassing, entering, damaging, alienating, building any structures or otherwise dealing with the suit land pending the final determination of the suit. The trial court heard the application and allowed it on 31<sup>st</sup> August, 2023. The Applicant was dissatisfied with the ruling and preferred the present appeal and vide the application seeks stay of execution of the ruling pending the disposal of the appeal.
3. The grounds upon which the application is brought are that the applicant is the registered owner of the suit land and has been in possession thereof since 2017. That the court in granting a temporary injunction granted part of the claim in the plaint at an interlocutory stage and determined the suit



without hearing it. That the Applicant stands to suffer substantial loss from the orders of the court as strangers are vandalizing his property and destroying his trees and crops.

4. The application was supported by the Affidavit sworn by the Applicant on September 6, 2023 and the annexures thereto.
5. The application was opposed vide the replying affidavit sworn by the 1<sup>st</sup> respondent on October 11, 2023.
6. The application is brought pursuant to the provisions of order 42 rule 6 (1) [Civil Procedure Rules](#) 2010. The same provides that:

“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 of execution 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.”

7. The grounds for grant of orders of stay of execution of decrees, judgements and/or orders are provided for in order 42 rule 6(2) of the [Civil Procedure Rules](#) 2010 which provides as follows:

“No order for stay of execution may be made under sub rule (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.”

8. Firstly, the court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. Substantial loss was been defined in Dr. [Daniel Chebutuk Rotich -vs- Morgan Kimaset Chebutuk](#) Nakuru H.C.C.C No.368 of 2001 thus:

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”

9. The burden of proof lies with the Applicant to prove that substantial loss will result to him if the order sought is not granted. In the case of [Charles Wabome Gethi vs Angela Wairimu Gethi](#) [2008]eKLR the Court of Appeal held-

“...it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them”



In the case of *Shell Kenya Ltd vs Benjamin Karuga Kibiru & Another* [1986] eKLR 410 the court stated that:

“if it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.”

10. In the case of *Rhoda Mukuma vs John Abuoga* [1988] eKLR the court held that the issue of substantial loss is the cornerstone of both the jurisdiction under order 42 rule 6 *Civil Procedure Rules* and rule 5 of the *Court of Appeal of Appeal Rules*. That substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
11. The Applicant’s case is that he is the registered owner of the suit land, that he has been in possession of the suit land since 2017 and that strangers are taking advantage of the court orders appealed against to vandalize and destroy his property.
12. The Respondents on the other hand contend that the transfer of the suit land in favour of the Appellant was unlawful as succession is yet to be undertaken. That soon after the illegal transaction, the Appellant illegally moved into the suit land at night, demolished the Respondents’ father’s house, pit latrine and their brother’s house and begun to illegally construct a permanent house. The Respondents deny that the Applicant has been on the suit land since 2017. They contend that the Applicant begun constructing a semi-permanent house in the year 2017 which house remained unfinished and unoccupied until July 2023 when the appellant entered the land in defiance of the court orders of 14<sup>th</sup> June, 2023 and installed a caretaker on the property.
13. At the centre of the suit is the issue of the propriety of the Applicant’s title to and occupation of the suit land. The status quo as at the time of filing the suit was that the appellant had title and possession of the suit land. That is why the Plaintiffs (Respondent herein) filed the suit and sought for orders of his eviction and permanent injunction restraining him from interfering with the land. The suit is yet to be heard and determined. It is paramount that the status quo be maintained as the parties are heard and their rights determined. The present application seeks to stay execution of the orders of the court thus maintain the status quo.
14. On the basis of the foregoing reasons, I find that the application is merited and allow it by granting the following relief:
  - i. An order of stay of execution of the ruling dated 31<sup>st</sup> August, 2023 in Vihiga SPM ELC No 037 of 2023 is granted pending hearing and determination of the appeal herein.
  - ii. Costs of the application to the Respondents.

Orders accordingly.

**RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 18<sup>TH</sup> JANUARY, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Patricia - Court Assistant.

No appearance for the Appellant/Applicant.

No appearance for the Respondents.

