



REPUBLIC OF KENYA



**Mululu & 4 others v Barasa & 2 others (Environment and Land Appeal  
3 of 2023) [2024] KEELC 1080 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1080 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 3 OF 2023  
EC CHERONO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**DUNCAN BARASA MULULU ..... 1<sup>ST</sup> APPELLANT  
HELLEN MAKHUMA MULULU ..... 2<sup>ND</sup> APPELLANT  
ANNAH NANJALA WALUNYWA ..... 3<sup>RD</sup> APPELLANT  
JONES NAMUKURU WANYAMA ..... 4<sup>TH</sup> APPELLANT  
KEVIN SIMIYU ..... 5<sup>TH</sup> APPELLANT**

**AND**

**HENRY KIKWAMETI BARASA ..... 1<sup>ST</sup> RESPONDENT  
GAMALIEL N. WATILA ..... 2<sup>ND</sup> RESPONDENT  
JOHN KHAPESI WAKOLI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me for determination is a the Notice of Motion application dated 25<sup>th</sup> July,2023 brought under Section 3 & 3 (a) of the [Civil procedure Act](#) and Order 42 Rule 6(1) & (2) of the [Civil Procedure Rules](#) and all other enabling provisions of the law where the Applicant seeks for orders of stay of execution of the decree passed on 19<sup>th</sup> July 2023 in Bungoma CMC ELC No. 3 of 2023 with a view to preserving the suit land LR No. E. Bukusu/n.kanduyi/630, pending the hearing and determination of his Appeal.
2. The Application is based on grounds set on the face of the said application and the supporting affidavit of Duncan Barasa Mululu the Applicant herein, sworn on 25<sup>th</sup> July,2023.
3. The said Application is opposed vide a Replying Affidavit sworn on 17<sup>th</sup> July, 2020 in which the Respondent seeks for dismissal of the same on the grounds that the execution process has not started



and that the applicant has not met the requisite conditions for stay of execution pending the hearing and determination of the intended Appeal.

4. When the said application came up for directions, the parties agreed to dispose of the same by way oral arguments where the applicant argued that if the orders sought are not granted, they stand to suffer irreparable losses as the land in question belongs to a deceased person and it is at the risk of being disposed of to third parties. It was further argued that the person who sold the suit land intermeddled with the estate of a deceased person as he had no authority to sell to the purchasers. It was argued that the application was made in a timely manner and no undue delay was occasioned. They relied on ELCA No.e017 Of 2022 *George Masibayi Wafula (Suing as the personal and legal representative of the estate of the late Henry Wafula Masibayi-dcd) v Richard Wafula Masinde*
5. The respondent on the other hand submitted that the applicants are trying to stay a decree on costs which cannot be stayed. It was further submitted that the applicants herein were not beneficiaries or administrators of the estate of the deceased and therefore had no capacity to file the current application since they were removed from the grant.
6. In response to the oral submissions by the respondents, the applicants submitted that they were sued by the respondents in the lower court in their capacity as beneficiaries and if the argument by the respondent as above is anything to go by, the lower court case was therefore a nullity. They also added that the current application does not only seek to stay execution for costs but the entire judgment of the trial court.
7. I have considered the Applicant's application for stay of execution of the decree in Bungoma CMC ELC No. E062 OF 2021 pending the hearing and determination of his intended appeal. I have also considered the authorities, as well as the arguments for and against the grant of the orders sought in the said application.
8. The law governing stay of execution pending appeal is found in Order 42 Rule 6 of the *Civil Procedure Rules* which stipulates 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 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 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.

- (2) No order for stay of execution shall be made under sub rule (1) unless—
  - (a) the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant.
9. Under Order 42 Rule 6 (2) of the *Civil Procedure Rules*, there are three conditions for granting of stay order pending Appeal to wit;



- a. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
  - b. The application is brought without undue delay and
  - c. 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.
10. In my considered view, the issues that commend for determination in this application are:
- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
  - ii. Who bears the costs of this application?
11. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine. v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
12. . The Applicants in the present application contend that they would suffer substantial loss if stay is not granted because the suit property is at the risk of being disposed off to third parties and the beneficiaries of the estate of the proprietor shall be disinherited should the appeal succeed. I have had the chance to peruse the orders of the trial court in impugned judgment and I note that order (b) is for cancellation of the title deed and transfer of the same to the respondents. From the evidence adduced, the suit property land parcel No.e.bukusu/n.kanduyi/630 is registered in the name of Mark Mululu Walunywa who is deceased. I find that the interest of justice demands that there is need to preserve the suit property as the applicants are likely to suffer substantial loss in the event the appeal succeeds.
13. . In the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988)KAR 1018 the Court of Appeal pronounced itself to the effect follows:
- 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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
14. In determining applications such as before me, the Court has to balance the interests of the Applicant who is seeking to preserve the substratum of the suit pending the hearing of the Appeal so that the Appeal is not rendered nugatory on one hand and the interest of the Respondent who is seeking to enjoy the fruits of his judgment on the other hand. In other words, the Court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who could be denied the fruits of his Judgment. In *Machira T/A Machira & Co. Advocates v East African Standard* (No 2) [2002] KLR 63, Kuloba J held thus;
- to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and



normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

15. On the second condition, I find that it is not in dispute that the impugned judgment was delivered on the 19<sup>th</sup> July, 2023 while the present application was filed on the 25<sup>th</sup> July, 2023 which was after a period of about 6 days. In my view, I find a delay for six (6) days is not inordinate and that the said application was brought without undue delay.

16. On the last condition, Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* stipulates that the third condition a party must satisfy the court before stay is granted pending Appeal is to furnish security. I note that the applicants have not offered anything or shown willingness to deposit security pending determination of the appeal. In the case of *Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* the court held that:

The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

17. In view of the matters aforesaid, this court is cognizant of the fact that the grant of stay remains a discretionary order which the court must balance with the rights of a successful litigant who must not be denied the fruits of his judgment. Such discretion is equally to be exercised judiciously to ensure the ends of justice are met without undue delay. See *Butt v Rent Restriction Tribunal* [1982] KLR 41

18. Having considered the application, the supporting affidavit and the rival submissions, I find the Notice of Motion dated 25<sup>th</sup> July 2023 merited and the same is hereby allowed in the following terms;

- (i) A stay of execution of the judgment/decree issued in CMC-ELC No. 62 of 2021 is hereby issued pending hearing and determination of the Applicants’ intended Appeal.
- (ii) The Appellant/Applicant shall compile, file and serve his record of Appeal within 30 days from the date hereof.
- (iii) Mention on 11/4/2024 for directions.
- (iv) Costs shall abide the intended appeal.

19. It is so ordered.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....  
**HON.E.C CHERONO**

**JUDGE**

In the presence of;



1. Mr. Nabibia H/B Sichangi for Respondent
2. Mr. Wekesa H/B Were for Appellant/applicant
3. Bett C/A.

