



**Kaberia & 3 others v Mutisya & 2 others (Environment and Land Appeal E001 of 2024) [2024] KEELC 1119 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1119 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E001 OF 2024  
CK NZILI, J  
FEBRUARY 28, 2024**

**BETWEEN**

**JOSEPH KABERIA ..... 1<sup>ST</sup> APPLICANT  
CHARLES GITONGA M'IMWENDA ..... 2<sup>ND</sup> APPLICANT  
ELIZABETH KATHAO ..... 3<sup>RD</sup> APPLICANT  
DIOCESE OF MERU TRUSTEE REGISTERED ..... 4<sup>TH</sup> APPLICANT**

**AND**

**ZACHARY MUTISYA ..... 1<sup>ST</sup> RESPONDENT  
KABERIA MUTUMA ..... 2<sup>ND</sup> RESPONDENT  
NELLY NKIROTE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The court, by an application dated 8.1.2024, is asked to stay the execution of a decree in Maua CMCC No 27 of 2017 pending the hearing and determination of this appeal. The reasons are contained on the face of the application and a supporting affidavit of Fr. Joseph Kaberia sworn on 8.1.2024.
2. Briefly, the applicants aver that judgment was delivered on 6.12.2023 in favor of the respondents and a temporary stay of execution of 30 days was granted, which, unfortunately, the respondents did not honor but instead embarked on wanton destruction of the appellants' water infrastructure, disrupted the water flowing an attempt to execute the decree.
3. The applicants also aver that they made a report at Maua Police Station as per OB extract marked J.K. "2". Further, the applicants aver they have an arguable appeal as per the annexed memorandum of appeal marked J.K. "3" and were likely to suffer substantial loss since the 3<sup>rd</sup> appellant, who is elderly and sickly, would be displaced from the ancestral land she has occupied for 60 years.



4. Further, it was averred that the beneficiaries of the subject matter are institutions benefitting from the water infrastructure namely; St. Paul Day & boarding, Fr. Soldati Girls, Maua Catholic Dispensary and the Catholic church if cut off from water supply will be risky considering that schools have reopened for the first term. The learners will be exposed to untold suffering and hardship on account of water.
5. The applicants aver the application was filed timeously before the interim stay was granted and lapsed and were willing and able to offer security or abide by any conditions set if the orders sought are granted. Further, the applicants aver they have heavily invested in their properties and therefore have a stake to protect in a pending appeal.
6. The respondents opposed the application by a replying affidavit sworn on their behalf by Zachary Mutisya, the 1<sup>st</sup> respondent, on 22.1.2024. It is averred that after the judgment was delivered, the applicants hired goons who tampered with, destroyed and disconnected water pipes in the glare of the public who were not even members of the project so as to raise grounds and basis for the filing of this application and to delay justice as they are in full use of the project to further their illegal activities on the said project which is detrimental to them.
7. The respondents averred that despite the dispute having been going on for five years, there was never an instance of any vandalism of the project; therefore, one wonders why they would destroy the project, which they defended in court at an imminence expense to the extent of succeeding.
8. Additionally, the respondents averred that the lower court judgment was reasoned, fair, just and had benefitted all the parties, including the applicants who have been the sole beneficiaries of the community project at the expense of the respondents and the whole community of over 5,000 people and with their animals yet the project was installed out of their expenses.
9. The respondents averred that they and the community at large needed a fundamental constitutional right to access safe water for long and an order of stay would only help the applicants to exploit them further. Similarly, the respondents averred that if indeed the applicants were out in the best interest of justice for all, the honorable thing they could have done was to agree to the sharing of the project with them and the community at large pending the appeal; otherwise, the respondents will continue to suffer.
10. The respondents averred that the applicants were on a rampage to frustrate them by filing endless and conflicting applications in both courts as one dated 10.1.2024 at the lower court attached herein as annexure 24 "2," which is res judicata since there is a possibility of conflicting rulings and cause chaos.
11. The respondents denied the alleged vandalism using goons, for it was the applicants who had hired them, causing aggrieved members of the public to intervene and stop them, which almost turned chaotic, but they stayed away and watched the goons cause the destruction. The deponent averred that he contacted the officials of the Rwaene water project who met at the scene of the destruction whose plea to the hired goons to stop was ignored. The respondents averred that they were not fools enough to destroy their project put under much expense, noting that they had just succeeded in court.
12. Further, the respondents averred that the applicants have had a habit of destroying the water pipes every time the respondents were about to benefit from the same, especially with the positive development of the lower court judgment to divert the attention of the respondents and the general public, dependent on the water and to stop them from following up the implementation of the judgment.
13. The respondents also averred that there was nothing to stay as the decree was for all the parties to access and consume the water. Otherwise, if the stay orders were granted, over 5000 people or respondents of Maua town would be denied access to water and be subjected to an irreparable humanitarian crisis.



14. Moreso, the respondents averred that the architect of violence and impunity has been the 4<sup>th</sup> applicant who has bought every government officer in the locality and commands security institutions around there using bribes to cause immense suffering to the residents and their animals. The respondents urged the court to be mindful of the public interest and not a few selfish and individualistic interests to cause near-death suffering to the community.
15. The respondents further averred that at the onset, they had applied for an ex parte injunction since they were using more than ½ inch pipe to supply themselves with water, which eventually was by consent of parties granted. In this instance, the applicants wanted to completely stop them from accessing the water, which was tantamount to stopping a critical patient's supply of oxygen, as trivial issues were being sorted, hence exposing him to losing a life that cannot be replaced.
16. The respondents attached the lower court order as annexure 2K "3" and stated that before the judgment, the trial court made every effort to visit the water connection of the project, the water source, and confirmed that they were using the water which later was diverted by the appellant.
17. The applicants relied on written submissions dated 5.2.2024, while the respondents relied on written submissions dated 8.2.2024. It is submitted by the applicants that the applications pending at the lower court were for contempt of court and not similar to the instant application.
18. On the reliefs sought, the applicants submitted that they had met the conditions for the grant of stay under Order 42 Rule 6 (1) *Civil Procedure Rules*. Reliance was placed on *Antoine Ndiaye v African Virtual University* [2015] eKLR, *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, and *Public Service Commission and others v Okiya Omtata & others* [2021] eKLR.
19. The respondents submitted that the central issue of content was that the applicants were laying claim on LR No Igembe/Amwathi/Maua/3241, a water point and water belonging to Rwaene water project whose membership is under its respondent and 4<sup>th</sup> applicant. It was submitted that the applicant had fenced the water source or point for their exclusive use and had diverted the water to the 4<sup>th</sup> applicant's institution, thus excluding them and the public at large from using or gaining access to the water point.
20. The respondents submitted that the orders granted by the lower court were not harmful to the party for each has to consume the water. In this case, it was submitted that no sufficient cause or substantial loss has been satisfied given the applications have no proprietary rights to the water project and the suit land for it belongs to the Rwaene water project going by ownership documents from the gathering stage, demarcation and A/R stages. Reliance was placed on *Stephen Wanjohi vs Central Glass Industries Ltd* NRB HCCC No 6726 of 1991.
21. Further, the respondents submitted that the effect of the illegal activities of the applicants were to deny the respondents and the county significant fundamental human rights protected by the *Constitution*, which this court should protect; otherwise, members of the public will feel the authorities are not apprehensive about their suffering. Reliance was placed on *Charles Wabome Getbi v Angela Wairimu Getbi* (2008) eKLR.
22. Similarly, the respondents submitted that this application was filed after the lapse of stay at the lower court and that the ability of the applicants to furnish security should not give them an unfair advantage for their right to equality for all persons before the law under Article 27 (1) of the *Constitution*.
23. The respondents urged the court to be alive to the history of LR No Amwathi/Maua/3241, measuring 0.25 acres, whose origin was out of pooled percentage cuts or contribution by members of the public giving birth to Kamurani Water spring run by Rwaene water project at its collection point and primary



source of water demarcated as public land held by the defunct Nyambene county council now Meru County Government in trust of the Rwaene Water project.

24. Adding on to the respondent's submitted that, unfortunately, the applicants manipulated land maps and superimposed the 3<sup>rd</sup> appellant's parcel LR No 3343 on LR No 3241 so as to claim ownership over the intake point and water project, arbitrarily.
25. The respondents submitted Rwaene water project was duly registered with the Water Resources Management Authority (WARMA) as a compliant entity under the *Water Act* 2002, with licenses, levies, and permits to operate legally, unlike the applicants who have public interest superseding the narrow private and personal interests of the applicants.
26. A party seeking for stay of execution has to demonstrate substantial loss, offer security for the due performance of the decree move the court without unreasonable delay and lastly, establish that it is in the interest of justice to grant the orders sought.
27. Substantial loss is what is to be prevented from happening; otherwise, the substratum of the appeal would dissipate. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the court observed that it is not enough to allege substantial loss without substantiation of the same through tangible and cogent evidence. The court said an applicant must establish other factors showing that the execution will create a state of affairs that will irreparably affect or negate the essential core of the applicant as a successful party in the appeal. The court further observed that substantial loss was what had to be prevented by preserving the status quo because a loss would render the appeal nugatory.
28. In *RWW v EKW* [2019] eKLR, the court said the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant, who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. The court said it had to balance this right with that of the successful litigant who should not be deprived of the fruits of his judgment. Further, the court said it must ensure that no party is prejudiced more than it can be compensated with costs.
29. The applicants also have said that the lower court decree favors the respondents who, after the judgment and while there was a temporary stay, hired goons to destroy, vandalize, and or disrupt the water flow to their institutions of learning and utilities, hence exposing learners and patients to untold suffering and hardship on account of lack of water.
30. The applicants aver that the respondents took the law unto themselves and purported to execute the decree using unorthodox means.
31. On the other hand, the respondents, while admitting there was a standoff, wanton destruction, vandalism, and disruption of water flow after the judgment accuse the applicants as the ones who employed goons to undertake the vandalism. The respondents admit witnessing the destruction, which they say almost turned into war. They say the hired goons destroyed and disconnected the water connection pipes in the glare of the public, who were not even members of the project. Further, that the applicants did that so as to raise a ground and basis for filing this application to delay justice as they entirely use the water.
32. The respondents aver the lower court decree was favorable to all the sides and that it would not have been possible or logical for them to vandalize their project which they have installed at an immense expense. Similarly, the respondents avers that the applicants have a habit of tampering with the water project and blaming them for the same to ensure that the respondents do not benefit from the project.



33. In addition, respondents aver that if stay is granted, they and over 5,000 residents of Maua Town would be denied a constitutional right to access water by being subjected to an irreparable humanitarian crisis at the expense of selfish and individualistic interests by the applicants who have diverted water.
34. The decree sought to be stayed was issued on 4.1.2024. The trial court made a declaration that the Rwaene Water Project Association the 4<sup>th</sup> appellant and its institutions are the rightful owners of the water project. The appellants were restrained from blocking the water project, pipes and illegally increasing water supply to its members and themselves, or interfering with the water project diversions. A declaration was also issued that parcel LR No 3241 was a water source, and any occupation by or developments by anyone else other than the County Government of Meru or on behalf of the Rwaene water project was null and void with the members of the project being granted unlimited ingress and egress to it.
35. Further, the trial court issued an order for the correction of the map Amwathi/Adjudication Section to retain the ground position of Parcel No 3241 on the part where a continuation collection chamber encircles a spring.
36. The bottom line of the dispute before the trial court and now appealed against in this court is who between the 4<sup>th</sup> applicant and the respondents owns the water project, the name of the water project, whether the water point is situated on Parcel No 3241 and if there was tampering with parcel No 3241 and 3243 in the area map and if Parcel No 3343 is private or public land and lastly; whether the project is Rwaene or Kamurani spring water project as alleged began by the 4<sup>th</sup> applicant in 1980's.
37. Both parties urge the court to find that they have water user rights that are being tampered with by the other and that the grant or refusal of a stay of the lower court decree would have profound implications for their right to access and use water. The respondents at the lower court had averred that they were a duly registered water project with WARMA under the Water Act 2002 (now repealed) operating legally and lawfully.
38. The respondents had contended that the appellants had fenced off the water point to their exclusive use and diverted water to the 4<sup>th</sup> applicant's institutions, thus excluding the respondents and other members of the public from using water.
39. The jurisdiction to determine appeals concerning matters that arise out of the Water Act lies with the Water Appeals Board under Sections 82 and 85 of the Water Act.
40. It is the water board licensees and water services providers who can enter into customers' premises to disconnect water under Section 92 (2) (b) thereof and for any aggrieved party to appeal to the board for interlocutory orders. Article 159 of the Constitution provides that courts have to give room to alternative dispute resolution mechanisms as the first port of call in dispute resolution.
41. In Augustin Michael Mulandi & 2 others v Nol Turesh Water and Sanitation Co. Ltd [2020] eKLR, the High Court had declined to issue interim orders for reconnection and supply of water within Sultan Hamud. The respondents alleged a breach of constitutional rights to equal protection before the law and the right to a fair trial. The disconnection of water had been termed unreasonable and detrimental to many schools and for domestic use.
42. The respondent had contended the appellant had, contrary to the contract of supply of water for domestic use, resorted to commercial use outside their plots contrary to the Water Act. The trial court had declined jurisdiction since the contract for water supply was governed by Sections 119 and 121 of the Water Act. The Court of Appeal held that the trial court had jurisdiction since the dispute revolved and Article 165 (3) (5) of the Constitution.



43. On whether the trial court should have granted interim orders the court of appeal said the veracity of the assertion and counter-assertion on the circumstances of the disconnection, terms and conditions of the contracts and issuance of notice before disconnection needed determination in the main hearing. The court said that particulars of the alleged loss to the school's and details of irreparable loss ought to have been supplied. The court said that since the water had already been disconnected and since the case would go either way, the court found it was not expedient to order a reconnection and that prudence demanded that the reconnection await the outcome of the substantive hearing. The court maintained the status quo, pending the hearing and determination of the appeal.
44. In this application, each of the parties has narrated facts by way of written submissions, which are missing in their respective affidavits on the history of the two projects. Unfortunately, parties and their advocates are resorting to the adduction of facts through written submissions instead of affidavits. Written submissions do not amount to evidence. See *Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi & another* [2014] eKLR.
45. The appeal by the applicants has raised several arguable points. The court notes that water officers, the County Government of Meru, and the national land commission at the lower court were missing, yet their input on the water point ownership, water infrastructure ownership the water point and water infrastructure regulation was crucial.
46. To this end, given the impact of the decree regarding declaratory orders and correction of the area map over the ownership and the locality of the two parcels of land, I find substantial loss has been demonstrated. There will be irreversible loss and damage if the decree is executed by the land adjudication offices. The impact of the decree is beyond access to water by the respondents.
47. The application was filed without unreasonable delay. The applicants have also offered security for the due realization of the decree should the appeal succeed.
48. The OB report attached shows that the 1<sup>st</sup> respondent was identified as among the persons who vandalized or disconnected the water pipes. Instead of addressing himself to the allegations in the OB extract, the deponent for the respondents has sensationally claimed that it was the applicants who had hired the goons. If the respondents saw and witnessed the vandals and the goons, the easiest thing would have been to make a formal report to the police, the water officer and the Warma offices for action against the applicants.
49. Further, if the applicants have been interfering with the respondents' water permits and licenses or the water source or the water infrastructure, at the very least, the respondents would have lodged a formal complaint under the WarmaRules. The respondents have also not denied that the applicants represent other equally deserving water users such as schools, hospitals, dispensaries, and churchgoers.
50. The upshot is that I find the application merited. The same is allowed in interim prayer number 3 on the stay of execution of the decree in Maua CMCC 27 of 2017 pending the hearing and determination of this appeal. The applicants shall deposit Kshs 250,000/= security for costs within seven days from the date hereof and then fast-track the hearing of the appeal on a priority basis.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 28<sup>TH</sup> DAY OF FEBRUARY 2024**

**HON. CK NZILI**

**JUDGE**



In presence of

C.A Kananu

Miss Asuma for Mutembei for the respondents

Ireri for appellants/applicants

