



**Mukua & another v Kariuki & 2 others (Environment & Land Case 521 of 2017) [2024] KEELC 1561 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1561 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 521 OF 2017**

**JG KEMEI, J**

**MARCH 14, 2024**

**BETWEEN**

**JAMES MWANIKI MUKUA ..... 1<sup>ST</sup> PLAINTIFF**

**GEORGE MUNYUA MBIRA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MARK MUGEKENYI KARIUKI ..... 1<sup>ST</sup> DEFENDANT**

**CALVARY TEMPLE VICTORY CHURCH ..... 2<sup>ND</sup> DEFENDANT**

**BISHOP MUGEKENYI ACADEMY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiffs/Applicants filed the instant Motion dated 3/8/2022 expressed under Section 3A *Civil Procedure Act* and Order 42 Rule 1 & 2 *Civil Procedure Rules* seeking in the main an order of stay of execution of the Judgment delivered on 28/7/2022 pending the hearing and determination of their appeal in the Court of Appeal. They also pray for costs of the Application.
2. The gist of the Application and the Supporting Affidavit of even date sworn by James Mwaniki Mukua, the 1<sup>st</sup> Plaintiff, is that the Plaintiffs are aggrieved with this Court's Judgment and Ruling delivered on 28/7/2022 against them and have preferred an appeal vide a notice dated 28/7/2022 annexed as JNM1. That their appeal has high chances of success and unless the Application is granted, they are apprehensive that the Defendants will proceed to execute the decree whose effect is the cancellation of the suit land title in the 1<sup>st</sup> Plaintiff's name hence render their appeal nugatory.
3. Opposing the Application, the Defendants filed their Grounds of Opposition dated 23/8/2022 on grounds that the Application is vexatious, frivolous and an abuse of Court process; the Applicants have not disclosed the true material facts; intended appeal is not arguable, the Defendants should enjoy the



fruits of their Judgment and the Application violates the provisions of Order 42 Rule 6 and 19 of the Civil Procedure Rules.

4. The 1<sup>st</sup> Defendant, Mark Mugekenyi Kariuki swore her Replying Affidavit on 23/8/2022 reiterating the grounds in para 3 above.
5. On 8/5/2023 directions were taken to canvass the Application by way of submissions.
6. The Plaintiffs through the firm of Mungai Kalande & Co. Advocates filed submissions dated 10/5/2023. It was submitted that the purpose of an Application for stay of execution pending appeal is to preserve the subject matter and safeguard the Appellant's right of appeal. That if the instant Application is not allowed the appeal will be rendered nugatory upon execution of the decree. Reliance was placed on the case of *RWW Vs. EKW* [2019] eKLR to buttress that position. The Court was urged to exercise its discretion and allow the Application adding that the Plaintiffs are ready to abide by any conditions that the Court may set.
7. Similarly, the firm of Kahuthu & K. Advocates filed the Defendants' submissions dated 15/12/2022 and 7/6/2023. They submitted that the Plaintiffs' Application is vexatious, frivolous and an abuse of Court process and does not disclose any substantial loss. That the Defendants are in possession and have developed the property to a tune of over Kshs. 50M and the Plaintiffs are at liberty to seek damages as a remedy if they succeed on appeal. That there is no Memorandum of Appeal on record to demonstrate the success of the intended appeal; no offer for security has been given and the 1<sup>st</sup> Plaintiff has not availed any authority to plead or appear for the 2<sup>nd</sup> Plaintiff as well. Further that the 2<sup>nd</sup> Plaintiff being the main actor in the transaction has chosen to keep mum and not file any reply.
8. The main issue for determination is whether the Applicants are entitled to orders of stay of execution pending appeal.
9. The starting point is the legal provisions for stay of execution as provided for in Order 42 rule 6 of the *Civil Procedure Rules* that;

“6. Stay in case of appeal [Order 42, rule 6.]

- (1) 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 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.”

10. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss, timely filing of the Application and the furnishing of security. An order for stay of execution is discretionary upon proving sufficient cause by satisfying the said conditions.
11. The Plaintiffs have annexed a copy of their Notice of Appeal against the Judgment of this Hon Court delivered on 28/7/2022. They contend that should the Defendants proceed to execute the decree of the Judgment in their favor, then their appeal will be rendered nugatory. That should the Defendants proceed to pledge the suit land as security by way of a charge to a financial institution and further alienate the land, the title will be extinguished before their appeal is heard.
12. Have the Plaintiffs demonstrated any substantial loss that they are likely to suffer if an order of stay of execution is denied? Discussing the scope of execution viz proof of substantial loss, Gikonyo J described it as follows in *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* [2012] eKLR:-

“... the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss .... 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. That is what substantial loss would entail ....”
13. In addition, for one to succeed on the ground of substantial loss, the principles are articulated by Kuloba J (as he then was) in the case of *Machira T/A Machira & Company Advocates Vs. East African Standard* (No 2) 2002 2 KLR as follows: -

“If the Applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the Applicant’s business (e.g. appeal or intended appeal).”
14. The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence ... Another common factor in favour of the Applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the Appellant or intended Appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not granted, save in exceptional circumstances.”
15. It is trite therefore that execution by itself does not amount to substantial loss. The Applicants need to show the state of affairs that will be rendered irreversible if the same is not allowed. The Defendants have averred that they are in possession of the suit land with extensive developments. These averments



remain uncontroverted and, in my view, the Applicant has not demonstrated any danger of substantial loss that the Plaintiffs stand to suffer.

16. On the limb of timeous filing of the Application, the same was promptly filed noting the Application is dated the same date of the delivery of Judgment. Last but not least, the Applicants did not readily proffer any security for the due performance of the decree.
17. Having failed to establish substantial loss, it is my view that the Application is bereft of merit it is for dismissal with costs.
18. Orders accordingly

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Masinde HB Mungai for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

Kahuthu for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Court Assistants – Phyllis/Oliver

