Wanyama (Suing for and on Behalf of the Estate of the Late Henry Khaemba Wanyama - Deceased) v Mulaya & 2 others (Environment & Land Case 120 & 119 of 2014 (Consolidated)) [2024] KEELC 1277 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1277 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 120 & 119 OF 2014 (CONSOLIDATED)

FO NYAGAKA, J

MARCH 8, 2024

BETWEEN

EDGAR CHILANDE WANYAMA (SUING FOR AND ON BEHALF OF THE ESTATE OF THE LATE HENRY KHAEMBA WANYAMA - DECEASED) ..... PLAINTIFF

AND

EMILY KIVALI MULAYA ..... 1ST DEFENDANT

DAVID SIFUNA ..... 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, TRANS NZOIA COUNTY ..... 3RD DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 119 OF 2014

BETWEEN

EDGAR CHILANDE WANYAMA (SUING FOR AND ON BEHALF OF THE ESTATE OF THE LATE HENRY KHAEMBA WANYAMA - DECEASED) ..... PLAINTIFF

AND

EMILY KIVALI MULAYA ..... 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, TRANS NZOIA COUNTY ..... 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 20/12/2023. He bought it under Sections 1A, 1B & 3A of the Civil Procedure Rules, Order 42 Rule 6 of the Civil Procedure Rues, 2010 and all other enabling provision of the law. He sought orders:-

    1. ...spent.

    2. ...spent.

    3. That the Honourable Court be pleased to grant an order of stay of execution of the Judgment and Decree issued by the Honourable Court in this Suit on 5th December 2023 pending the hearing and determination of the Intended Appeal.

    4. That the Honourable Court be pleased such other orders and make such other directions at it may deem fit and appropriate in the circumstances.

    5. That the costs of this Application be provided for.

2. The Application was based on the grounds being that the Applicant sued on behalf the Estate of his deceased father Henry Wanyama Khaemba (deceased) who passed away in 2016, against the 1st and 2nd defendants in the respective suits, now consolidated, for reliefs he listed as sought in the pleadings. That this Court delivered judgment email of 05/12/2023. In the judgment the Court dismissed the suit. Therefore, the applicant had no opportunity to seek an order of stay of execution of the judgment pending the filing of a formal application under the provisions of Order 42 (6) (3) of the Civil Procedure Rules. He would be greatly prejudiced if execution was done because the 1st and 2nd Respondents would be at liberty to sell, alienate or otherwise transfer the suit properties thereby undermining and frustrating the Intended Appeal. That his mother Abigail Khayecha Standa who was the widow of the deceased, lived intermittently on one of the suit lands, being, parcel number Trans Nzoia/Liyavo/36 (herein parcel No. 36). That it was between the years 2000 and 2013, and permanently from 2014 to the date of the application. That the execution would result in her eviction thus rendering her homeless and destitute.

3. The further grounds were that the Applicant, his mother and brother Charles Butali Wanyama assisted the deceased in developing and invested in renewal of the upcountry home and farm. They would suffer substantial loss in the event of execution since the Respondents would demolish the structures on the parcel, alienate, sell and/or transfer it to a third party hence destroying the substratum of the Intended Appeal. The 1st Defendant had never occupied, resided on or farmed parcel No. 36. In regard to No. Trans Nzoia/ Kapomboi/193, even though the 2nd Defendant was in possession, he should be prohibited from alienating, transferring or selling it pending the hearing and determination of the Intended Appeal.

4. That the Applicant intended to an appeal against the entire judgment to overturn it. He had filed and served a Notice of Appeal and applied for typed and certified copies of the Judgment, Decree and proceedings for preparation of a Record of Appeal and had been notified that typing and certification of proceedings would take a while. He had an arguable appeal on the merits hence the need to preserve the substratum of the Intended Appeal pending the filing, hearing and determination thereof. Further, if the Appeal was successful it would be impossible to reverse the adverse actions of the execution of the decree (as explained earlier) and that would render it nugatory in the event of the execution it is

filed, heard and determined. The 1st and 2nd Defendants had taken steps to extract the decree for the purposes of execution. The Application had been filed without inordinate delay.

5. The Application was supported by Affidavits sworn by the Applicant, his mother and one Joab Samburuma. In his Affidavit sworn on 18/12/2023 he deponed pretty the same content of the grounds of the application and added that he had a Grant Ad Litem to the Estate of his late father. Further, that his mother and brother were dependants of the Estate of the late father.

6. Then he deponed on the matters that were in evidence in the suit and this Court needs not rehash the depositions thereof as they passed into and were part of the evidence already considered in the judgment. That his deceased father was not given opportunity to testify in the criminal proceedings which were now a subject of appeal in Kitale High Court Criminal Appeal No. E060 of 2023 between Republic and Emily Kivali Mulaya.

7. Further, he deponed about he, his mother and brother having assisted his late father to develop the property. He also added that they had improved the home by constructing it and fencing it with a chain link wire together with posts and barbed wire, erected two metal gates, one at the entrance of the farm and the homestead, installed an irrigation system and water tanks on the farm and farm house, and had established elaborate activities on the property. He estimated improvements from 2013 to be at the tune of Kshs. 12,000,000/=. He summed it that the 1st Defendant had demonstrated in word and deed that her only intention was to sell the property by using fraud and deception. He stated that it was in the interest of justice to stay the execution of the judgment and decree of the Court. His further deposition was that the Defendants would not be prejudiced in any way if the Application was allowed and that application had been brought without delay and he was ready to cooperate to ensure that the Intended Appeal is filed, heard and determined swiftly.

8. Although he annexed scanned copies of various documents he marked and identified as annextures ECW-1, ECW-2, ECW-3 and ECW-4 between pages 14 and 42 of the Application his Affidavit sworn before one Julius Anyoka, Commissioner for Oaths, does not in any paragraph refer to any of the documents so as to show that they were part of the deposition. I will address the import of that during the analysis of this ruling.

9. By a further Affidavit sworn on 18/12/2023 in support of the Application, one Abigail Khayecha Standa deponed that she was the Applicant's mother and widow of the late Henry Wanyama Khaemba Deceased). She deponed that she was aged 68 years and had ailments that impact on my mobility. She annexed as 'AKS-1 a copy of a Medical Report dated 16/12/2023. She too repeated depositions of matters that passed into evidence at the time of hearing the suit. Her depositions from paragraphs 3 to 27 were matters which were evidentiary in the nature of re-trying the Plaintiff's case afresh. Similarly, as was for the Affidavit sworn by the Applicant, this Court will not repeat a summary and consideration of such matters in relation to the instant Application.

10. Her further deposition was that since the year 2000 she and her two sons had substantially invested on the farm and homestead and established a farm enterprise. Her further deposition was that between 2014 and the time of application, she, her husband (now deceased), and her children completed the construction of the home on parcel No. 36. That they had upgraded the house, installed gutters, reinforced permanent structures, installed high powered security lights, a ceiling, put tiles on floors, painted the house, installed water tanks on the farm, installed electrical and plumbing works on the house, dug a bore hole, installed a hot water system, renovated two permanent stores, erected two permanent toilets two gates a cowshed, a visitors' shed and fenced the homestead with chicken wire, built a septic tank and put barbed wire fence. She annexed as 'AKS-2' true photographs of the developments made on the parcel No. 36. That she keeps and maintains domestic animals on the farm

including cows, sheep and chicken and established a hay plantation and a horticulture farm. Further, that she lived on the Liyavo Home as a home since the year 2014 hence the eviction, demolition, transfer or alienation by the 1st Defendant in execution would render her homeless and destitute and will result in irreparable and substantial loss. That she had hay on the farm and had a 1¾ acres of horticulture project on it. That the 1st Defendant had never lived on the farm or farmed it.

11. The deponent brought in an interesting dimension of the whole issue through her further deposition. It was that she was aware that the deceased husband had sold three acres to two different people and the same was excised from the Liyavo Home, and the buyers lived and settled since the year 2012. She annexed and marked as 'AKS-3' copies of the Agreements for Sale to Gladys Namalwa Simiyu and Maurice Khaemba Biketi. Her further deposition was that the two buyers had substantively (sic) developed their respective parcels of land by erecting their homes thereon. She annexed as 'AKS-4' copes of photographs showing the developments. She then deposed further that the said Purchasers were neither served nor joined in this matter but they were affected parties who would be subject to eviction and demolition of their homes in light of the Judgment and Decree of this Honourable Court.

12. The deponent stated that the Luhya Lufu ceremony was held at the deceased husband's home on parcel No. 36 and her husband's family discussed important family matters, and in the minutes of the said Meeting, listed the 1st Defendant as "second wife" and debtor, owing her husband's estate. She attached and marked as 'AKS - 5' the Minutes of the Lufu ceremony. Further, she deponed that all her household items and belongings were accommodated within the Liyavo Home hence her drastic eviction pending the hearing of the Intended Appeal would render her homeless and destitute and severely prejudice her given her age and present health condition.

13. One Joab Samburuma swore a further Affidavit on 18/12/2023. He deponed in it that he was the Chief of Kapsitwet Location, Trans Nzoia County. That he was aware that the late Henry Wanyama Khaemba (Deceased) was the owner of parcel No. 36 and had established his home thereon since the year 2000. That he lived on it prior to his demise. That the deceased had substantially developed the home and was carrying our farming activities on the land. Further, that the deceased lived on the land with his widow, Abigail Standa and her sons - the Applicant and Charles Butali Wanyama - whenever they visited the country.

14. He deponed further that in the year 2011, the Deceased sold portions of said property measuring one (1) acre and two (2) acres or thereabouts to Gladys Namalwa Simiyu and Maurice Khaemba Biketi respectively. He swore that he was a witness to the Agreements for Sale. He attached and marked as 'JS-1' copies of the Agreements for Sale, an Acknowledgement and Bank Deposit Slip. That he was aware that the Purchasers took possession of their respective subdivisions of land as pointed out by the Deceased and his surveyor and that they had erected homes and extensively developed the land. He too attached copies of photographs showing the development on the said subdivisions and mark them as 'JS-2'. He deponed that the Deceased was yet to formally subdivide and transfer the portions of land and issue individual and issue title Deeds for the two subdivisions to the Purchasers.

15. He deponed further that he was aware that the 2nd Defendant claimed to be a widow of the Deceased yet she neither participated in the burial preparations of the deceased at his home on parcel No. 36 nor attended the Lufu ceremony. He deponed further that the 2nd Defendant had never lived on or farmed the parcel No. 36. Further, that due to security threats emanating from the dispute over the ownership of the property with the 1st Defendant, the Deceased, his widow, Abigail and his two sons, had hired a private security on the farm.

16. The 1st Defendant opposed the suit vide a Replying Affidavit she swore on 16/01/2024. She deponed that the Court had made declarations that she and the 2nd Defendant were the lawful, indefeasible and

absolute owner of the parcel No.36 and Trans Nzoia/Kapomboi/193 respectively. That the judgment was made after she was acquitted of all charges in Kitale Chief Magistrate's Court in Criminal Case No. 3836 of 2014 in relation to conspiracy to defraud, stealing, making documents without authority and uttering false documents and thus, two courts with jurisdiction had thus far determined no wrongdoing or illegality in the property transfer.

17. Her further deposition was that while the 2nd Defendant/Respondent remained in occupation of the property since its transfer and even as this suit was filed and prosecuted, she (the 1st Defendant) had not used her property following a consent entered into by the parties sometime in 2016/2017 which disposed of interlocutory applications to pave way for the hearing of the substantive suit hence it was only fair and just that she be allowed to enjoy her property following this Honourable court's decision.

18. She opposed the justification of the orders for the continued occupation of the property by the Plaintiff's mother, Abigail Standa, on account of developments made by during the active prosecution of this case which actions, to her were, illegal and unconscionable. She deponed that the Applicant was prohibited by the doctrine of lis pendens from developing or dealing in any manner with the property during the pendency of the suit except under the authority of the Court. She swore further that whatever developments made they were for and at the Plaintiff's and his mother's convenience and both parties had been tilling parcel No. 36 to her exclusion.

19. Her further deposition was that from the annexed photos on the development it was that she and her husband built the house and completed it in 2005, long before the Applicant's mother returned in 2014 hence the developments, if any, were minimal and could not justify the Applicant's mother's continued stay since she was a trespasser. She deponed that the alleged value of improvements was sensational and unsubstantiated.

20. In countering the deposition of the Applicant and his mother that his mother lived in parcel No. 36 from 2000-2023 intermittently and subsequently settled there permanently from 2014, the deponent swore that in her testimony given in 2015 in Kitale Criminal Case no. 3836 of 2014, the Plaintiff's mother stated that was living in Milimani Estate, Kitale, and this was during the lifetime of the deceased husband. Further, that in her statement in the Succession Cause No. E758 of 2021 (Estate of Henry Khaemba), the said Abigail contradicted herself on when she moved to parcel No. 36. The deponent annexed as EKM-1 and EMK-2 copies of Abigail's testimony in the two matters respectively.

21. The deponent's further statement was the Plaintiff's mother could not claim that her interest parcel No. 36 as well as parcel No. 193 had not been represented since the Applicant ought to act in the interests of the estate of which she claims to be a member (sic).

22. In regard to the two alleged purchasers, she deponed that it was the Plaintiff's obligation to join them, having been aware of their existence but he chose not to. Further, that it was preposterous to claim that the deceased Henry Wanyama Khaemba was never given an opportunity to testify in either case yet no evidence was adduced over any hindrance to him to testify. That moreover, the criminal case was adjourned several times to give him and all witnesses an opportunity to testify, and even the civil case was ostensibly filed by him hence it his case to prosecute and the deponent could therefore not be blamed for that failure.

23. That the Applicant and his brother intermittently reside in the Liyavo property whenever they visit the country could not be a justification for the stay of execution of the Judgement delivered on 05/12/2023 owing to the fact that they were capable of making other arrangements pertaining to their stay whenever they visited the country. Further, that the allegation that she had threatened to evict the Plaintiff and his mother from the Liyavo property was not supported by any evidence or particulars. Further to that, she had to evict the Plaintiff and his mother from the property yet she had not taken

any action as would be interpreted as a threat but she was still pursuing the court for the issuance of the decree.

24. Further, that the Applicant and his mother had the option of moving to their ancestral home in Chesamis rather than using her home and property as their residence. That the Applicant's mother would not suffer irreparable loss if execution occurred as she was a trespasser on her property. Further, that she was aware and indicated in her testimony that she learnt of my late husband's disposal of two (2) acres to be hived off the suit property but now the Applicant claimed that they were three (3), with an agreement for sale of another one (1) acre. That she had confirmed from Fred Ngutuku, who we had employed as a farm hand, that indeed the deceased sold this additional acre hence she did not intend to contest their ownership to the said parcels and fully intended to carry out the proper subdivision and transfer of the said parcels at their cost.

25. She deponed that the Affidavit of Joab Sambaruma was full of village rumours and innuendo that could not be substantiated as the chief did not keep a record of marriages or dates when people constructed their homes or the occupants of those homes and none had been exhibited. Further, that contrary to the said chief's claims that she was a second wife the said chief wrote a letter to the court for succession purposes including my name as among the persons surviving the deceased Henry Khaemba and entitled to inherit him albeit wrongly as a second wife but she was not aware of any previous marriage that her husband had contracted. The dispute of whether or not Abigail was a widow of the deceased was pending before court. She annexed as EMK-3 a copy of the Chief's letter dated 25/04/2016. She deponed that although the Application was made without undue delay the Applicant had not demonstrated merited of the application by showing what substantial loss would result to him should the orders sought not be granted and he had not offered any security for the due performance of such decree or order as may be ultimately be binding on him.

26. She swore a Supplementary Affidavit on 22/01/2024. Hers was that Abigail (the deponent of a further affidavit to the Application) was keen to turn this into a family dispute. That Abigail had no clue as to how the two properties, parcel No. 36 and parcel No. 39 were purchased as she gave conflicting accounts of the same depending on which narrative is convenient because in the Kitale Criminal Case No. 3836 of 2014, she testified that the Liyavo Home was purchased in the year 1996. She further admitted that at the time of its purchase she was residing in Mountain View, Nairobi and was not aware who the vendor of the property was and did not take part as "Mzee" did not involve her in transactions of purchasing property" yet in the Further Affidavit she claimed to know the Vendor but changed the year of purchase to 1998.

27. Her deposition was that she and her husband (now deceased) bought with varied contributions several properties during their marriage all of which were matrimonial properties which included parcel No. 36 and 193.

28. That they began the acquisition of the Liyavo Home sometime in 1993 and the transaction was completed in 1998 or thereabout. At the time she surrendered as a down payment for this property a vehicle she used to use, being BMW 318 to Mr. Tirren, the then owner of the property. Subsequently, on 14/05/1998, she borrowed Kenya Shillings Six Hundred Thousand (Ksh. 600,000/=) from Barclays Bank and gave the money to my husband to pay as part of the purchase price of the property while her husband gave a title deed for L.R No. 209/9816 Nairobi as security for the loan while she single-handedly repaid the loan over the years. That her husband's contribution toward the purchase of parcel No. 36 was negligible and therefore he had no challenge or hesitation transferring the property to me. Further, that contrary to Abigail's deposition that after the acquisition of the property there was a semi-permanent iron sheet two-roomed house, temporary toilets and a grass thatched kitchen on it, there was a three (3) bedroom stone house built up to the end of the stone walling (awaiting roofing

and other finishes), a one-bedroom permanent house (where Mr. Tirren was living), two permanent toilets and an iron sheet kitchen and quarters for the caretaker. She annexed and marked as EMK-4 two photos taken at the property with my car and husband's deceased's car soon after they completed the purchase and were handed over possession. That she and her late husband completed the main house they would often reside there whenever they travelled upcountry until the Plaintiff moved the deceased to the house in 2014 and subsequently invited his mother Abigail to live there to her exclusion after branding her a fraudster and initiating criminal proceedings against me.

29. She deponed further that before 2014 Abigail had only visited the property once and this incident was captured in her e-mail of 21/10/2013 in which she among others admitted that she had been out of the picture for long to the extent that it seemed as if she did not exist; that Abigail was aware of how the deponent (Emily) behaved when she learnt that Abigail had been to Liyavo to visit Mzee (which confirms that she never lived there) and that she also needed money and loved farms and houses. She deponed then that the instant case was all about that - the desire by and attempt by Abigail to reap where she never planted. She annexed and marked as EMK-5 a copy of the email. That any developments purported to have been made on parcel No. 36 from the year 2014 during the active prosecution of this case are illegal as they were made without any court order or authority of this Honourable Court. She too repeated part of the evidence at the trial that she educated the Applicant and his brother. She deponed that she too was an even older senior citizen who recently turned 70 and she needed my home back after many years of fighting this matter in court.

30. The 2nd Defendant in ELC Case 120 of 2014 opposed the application through an affidavit sworn on 09/02/2024. He deponed that he was aware that the Plaintiff initiated an appeal against the judgment of this Court to the Court of Appeal at Eldoret being Civil Appeal No. E009 of 2024. He annexed and marked as DKS-1 is a copy of the Memorandum of Appeal served on him. He stated that under the Appeal, the Plaintiff had filed a replica application for stay of judgment and for injunctions orders as the Application before this Court. He annexed and marked as DKS-2 is a copy of the Notice of Motion he served with. He then deponed that for those two reasons it was the Court of Appeal which had jurisdiction to hear and determine the issues raised in the instant application.

Submissions

31. The Application was disposed of by way of written submissions. The Applicant filed his dated 01/02/2024 while the 1st Defendant filed hers dated 13/02/2024 and the 2nd Defendant in ELC No. 120 of 2014 filled his dated 09/02/2024. The Court shall consider the rival submissions and the authorities thereto as it analyses and determines the application.

Issue, Analysis and Determination

32. This Court has considered the application, the law, the submissions and authorities relied on. It is of the view that the issues to be determined herein are whether the Applicant has met conditions for the grant of an order of stay of execution pending appeal and who to bear the costs of the instant application.

33. Beginning with the first issue, which is, whether the Applicant has satisfied the requirements for grant of an order for stay of execution pending appeal. This Court will not purport to re-invent the law on the issue: it is now well settled. It will be guided and or persuaded by the decisions of my predecessors judges who have expressed themselves, ably and intelligently, over the matter.

34. The starting point of the legal analysis is the examination of the effect of one filing an appeal in regard to stay of execution of a decree or order or proceedings pending the hearing and determination of the appeal. Order 42 Rule 6(1) Civil Procedure Rules, 2010. The Sub-rule provides:

> "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."

35. Therefore, the applicant in any application of the nature of the instant one has to show sufficient cause order for such an order to be granted. Even then, the order is discretionary and the discretion must be excised judiciously. It also means that a stay of execution of a decree or order appealed from is not an automatic right. That, in my view is why Rule 2 of the Order was formulated to now give the conditions that an applicant ought to meet before being granted the prayer he seeks.

36. Sufficient cause means bona fide and more than inaction on the part of a party. In The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others the Court of Appeal in Tanzania expressed the difficulty in bringing out the clear meaning of the phrase "sufficient cause". However, in Parimal v. Veena, (2011) 3 SCC 545, the Supreme Court of India observed that:-

> "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".

37. This imports the idea of good faith, honesty, blamelessness and diligence in action. Thus, in Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal has held that:

> "....thus the superior court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay."

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:

> "In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory."

These two principles go hand in hand and failure to prove one dislodges the other."

38. Therefore, the Applicant herein has to show sufficient cause by demonstrating that he fulfilled the conditions Order 42 Rule 6(2) of the Civil Procedure Rules provide for. As he does so, it must be borne in mind that the intention and purpose of an order of stay of execution pending appeal being to preserve the subject matter as was stated in RWW vs EKW (2019) eKLR. The court held:-

> " .....the purpose of an application for stay of execution pending an 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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

39. Therefore, moving to the conditions to be fulfilled, for a party to urge successfully an application for an order of stay of execution in a court of this level when he/she/it intends to either to the Court of Appeal or urge an appeal from the subordinate Court, he/she/it ought to satisfy this Court that the parameters set out in Order 42 Rule 6(2) of the Civil Procedure Rules, have been met. The provision reads as follows:

> " No order for stay of execution shall be made under subrule (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.

40. It goes without saying that three main conditions ought to be satisfied, namely:

i. That substantial loss may result in case the order is not granted

ii. The application is brought without undue delay

iii. Security for due performance of the decree has been offered by the Applicant.

41. Courts have given further conditions which ought to be satisfied. But in my view, they all are subsumed in the first one. For instance, whether there is or is not an arguable appeal as well as whether if there is such an appeal it will be rendered nugatory point to one thing: substantial loss will result if such an arguable appeal is rendered nugatory yet the effects of the execution if not avoided through a stay of execution will be upon the successfully appellant. Even as I have said that the fulfillment of the additional conditions ought to be examined and considered separately from that of the one of loss. I will cite a number of such decided cases that lay the basis for grant of an order of stay of execution and

expound on the conditions to be satisfied. In Civil Appeal No.107 of 2015, Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR, the Court held that:-

> " The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs...Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-
>
> > "The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.
>
> In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-
>
> > "In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."
>
> These twin principles go hand in hand and failure to prove one dislodges the other"

42. The above are the requirements this Court proceeds to analyze whether or not the Applicants fulfilled. As to whether the Application was brought without unreasonable delay, this court notes that it was filed on the 20/12/2023, only fifteen (15) days after the delivery of the judgment on 05/12/2023. Since it was admitted by the 1st Respondent in her submissions that it was filed without undue delay and the 2nd Defendant in ELC No. 120 of 2014 did not submit on it in any other way. In addition, the Applicant submitted that he had taken all steps possible to ensure Application was filed and served expeditiously and that the Appeal is filed timeously and that it was done without unreasonable delay. I agree and find it was so done.

43. On substantial loss, which I have to decide on before I consider the other conditions, the applicant argued in summary that he, his mother and brother use parcel No 36 as their residence and that they had heavily invested in the property, to the tune of Kshs. 12,000,000/= from 2014. They gave an elaborate summary of the investment on and improvement of the property. The applicant and his mother, Abigail Standa also deponed that they and their brother had helped the deceased to do a few developments on the land before he died.

44. With regard to the said developments, the 1st Defendant responded by giving the history of how she and the deceased husband acquired the property and moved onto it and kept using it until sometime in 2013 when the Applicant's mother visited the land once and even wrote an email that she had been so quiet before to the extent of being seen as though she did not exist. This Court noted the content of the email which she wrote on 21/10/2013 and which was an annexture marked EMK-5 to the Supplementary Affidavit of the 1st Respondent. She deponed further that if there were any developments on the land after 2014, as was deponed by the Applicant and his mother Abigail Standa, and shown by annexture AKS-2, they were illegal and done in contravention of the doctrine of lis pendens, they were not authorized by the Court and the Court should not rely on them to grant a trespasser an order to be on her land.

45. In regard to this the Applicant submitted that whereas the reliefs (a), (c), (e) and (f) of the judgment were declaratory, those set out in (b) and (d) are positive orders which related to the removal of cautions

registered against the suit properties while also requiring the 3rd Defendant to deregister the same. He submitted that if they were not stayed there would be irreparable loss by way of the adverse effect of exposing the suit properties to alienation, transfer, disposition or charging thereby extinguishing the subject matter and the substratum of the Appeal.

46. Further, he argued that indeed that the 2nd Defendant had been in possession of parcel No. 193 since this suit was filed by the Deceased but an order of stay was important to preserve the status quo. Regarding the 1st Defendant occupation of the suit land Applicant had confirmed that she had never lived in Title Number Trans Nzoia/ Liyavo/ 36 and intended to take possession of the suit property from the Applicant, his brother Charles Butali Wanyama, and his mother, Abigail Khayecha Standa in execution of the Judgment and Decree. The process of execution would definitely entail eviction of the Plaintiff/ Applicant from the Suit Property and hence substantial loss would be occasioned to the Plaintiff/ Applicant and his family since the Plaintiff/ Applicant and his brother had intermittently lived on the Property since it was purchased by the Deceased in 1998 and it was their home any time they were in Kenya and that Abigail Khayecha Standa was in possession of the Suit Property and had lived there intermittently between the year 2000 and 2013 and thereafter permanently to date.

47. He relied on the decisions of Peter Nakupang Lowar v Nautu Lowar [2022] eKLR; Mohammed Jama Abdi v Jimmy Nyagaka & 3 others [2021] eKLR; Jilani Mongo Madzayo v John Nyagaka Osoro [2022] eKLR; and James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR; all of which the holdings of the learned judges this has considered, and I find that they are on point. The Applicant has to demonstrate substantial loss in the vent of execution of a decree or order before an appeal is heard and determined.

48. Has the Applicant herein demonstrated substantial loss? I am convinced beyond peradventure that he has not. The Affidavit of Job Sambruma about who the owner and occupier of parcel No 36 is neither here nor there as it is clear, from the evidence on record and the record itself as to how the Applicant and his mother moved onto the suit property. He cannot purport to be a better 'witness' to the events than the Applicant and mother. Further, since there is no evidence, other than unsubstantiated depositions, on the part of the Applicant and his mother as to how they contributed to the development of the property before moving in to occupy it after the deceased moved from Nairobi in 2013, it leaves this Court to consider whether the developments and investments, which they put at Kshs. 12,000,000/ =, which they assert by deposition that they have made on the property since 2014 is sufficient reason enough to demonstrate substantial loss if they are moved or evicted from the property.

49. I have carefully evaluated the deposition of the Applicant vis-à-vis the record and the fact of the matter that the suits herein were instituted before the developments and improvements were made. In my humble and considered view, any investment on or improvement of the property, however small or huge, which was made during the pendency of the suits and without the sanction or authority or permission of the Court was against the doctrine of lis pendens which prohibits anyone whatsoever from interfering with a subject matter before a court determines the issues relating thereto. If the Applicant relies on that as substantial loss it fails miserably since the court cannot sanction an illegality. They made the developments and improvements of the property at their own risk as to the loss therefrom. The Applicant was only granted permission to reside on the parcel of land and use it temporarily pending the determination of the suit. The determination is now made.

50. The other limb on loss being that there was a likelihood of the property, if the cautions have been removed, being alienated and sold, this Court is of the view that there is no loss demonstrated about the removal. All the applicant is saying both in deposition and submissions is that there is a likelihood of irreparable loss by way of the adverse effect of exposing the suit properties to alienation, transfer, disposition or charging thereby extinguishing the subject matter and the substratum of the Appeal.

This Court thinks not. Apprehension cannot be deemed as facts. Moreover, it is not demonstrated how that is likely to affect the appeal. Removal of a caution only leaves the title bearing the last of the entries lawfully entered thereon.

51. And I agree with the submissions by the 2nd Defendant in ELC No. 120 of 2014 relying on the case of Gichuhi S.C & 2 others v Data Protection Commissioner; Mathenge & Another (Interested Parties) (Judicial Review E028 of 2023) [2023] KEHC 18612 (KLR) (Judicial Review) (16 June 2023) (Ruling) where the Court held that;

> " The application for stay cannot be granted on the basis of speculation or unwarranted fear. The decision on whether or not to grant stay of proceedings pending an Appeal is discretionary. However, the discretion must be exercised judiciously."

52. As to whether there is an arguable appeal, it first depends on whether or not there is a Notice of Appeal lodged in against the judgment of this Court. The Applicant argued that there was one. I have carefully read and repeated perusing the supporting affidavit of the Applicant that was sworn on 18/12/2023. I find no paragraph that alludes to the fact of filing a Notice of Appeal in this matter. In terms of Rule 2(2) of the *Appellate Jurisdiction Act*/Court of Appeal Rules an "appeal", in relation to appeals to the Court, includes an intended appeal...". And as stated in Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, an appeal is deemed to have been filed once a notice thereof has been filed in the appropriate registry. And for purposes of an appeal from this Court, Order 42 Rule 6(4) of the Civil Procedure Rules provides that "(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given." To that extent, and for purposes of this Application, it means that there is no appeal that has been filed.

53. The applicant submitted that he had filed the Appeal at the Court of Appeal in Eldoret, being Eldoret Civil Appeal No. COACA/E007/2024 (Edgar Chilande Wanyama vs. Emily Kivali Mulaya and 2 Others) and is in the process of serving the Respondents with the Record of Appeal within the stipulated 7 days.

54. On the submission, this Court wishes to remind counsel and the whole world that submissions can never and will never constitute evidence. What the applicant did was to cleverly sneak in the evidence, by way of submissions, that there existed an appeal in Eldoret. This is against the law. He ought to have done so by way of affidavit. The Court cannot consider that as evidence of filing an appeal. As the Court of Appeal stated in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR;

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do."

55. I am alive to the fact that the 2nd Defendant swore an Affidavit stating that the Applicant had filed a similar Application in the Court of Appeal in Eldoret. That is the point at which the Court was made aware by way of evidence of the existence of an Appeal in this matter. He did so through annextures DKS-1 and DKS-2 to the Affidavit he swore on 09/02/2024. Thus, in terms of Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya, he who alleges the existence or otherwise of a fact must prove it except where the burden has been removed from him by law either by way of judicial

notice or shifting the same to another person. In the present application the application was for a stay of execution pending an intended appeal to the Court of Appeal. It was upon the Applicant to demonstrate one by bringing to the Court the fact of doing so, and not the other way round. He did not prove it.

56. As I make the above finding, I know from the perusal of the Application before me that the applicant attempted to bring the attention of the Court a number of serialized scanned documents in the manner of annextures ECW-1 - ECW-5. As I indicated at the beginning of the analysis of this ruling, the Affidavit of Edgar Chilande sworn on 18/12/2023 did not in any paragraph refer to any annexture. At the same time even if the Court were to assume that the set of documents attached were annextures to the Affidavit, the Court does not find any paragraph of the deposition that alludes to the filing of an appeal so as to compare the document marked as Annexture ECW-1, being the Notice of Appeal said to have been lodged on 06/12/2023, to it. Further, there is not even a draft of a memorandum of appeal annexed to the application to demonstrate the nature of appeal that is intended to be filed and whether it is arguable or not. Thus, contrary to the submissions by the Applicant that should execution issue it will destroy the substratum of the intended appeal there is none that this Court was given evidence of.

57. Before I conclude, I have two limbs of the issue that I must address. One is that the applicant called in the arsenal of the depositions by Abigail Standa and Job Sambruma that there were neighbours or persons who had purchased one and two acres of part of the property. That they had developed their properties and they are likely to be affected if execution proceeds. To this the 1st Respondent swore that although she was aware of the sale of two acres at the time of the hearing, even the sale of an extra acre would not be an issue since she would give the buyers what is rightly theirs.

58. This Court finds the Applicant's argument on behalf of other people likely to be affected to be a mischievous argument. He was the one who sued the Defendants, all along he knew of their being on the land. He knew that the decision of the court would affect them. He did not join them to the suit. He cannot be heard to voice concerns on their behalf when in the first place they have not complained, unless he is working in cahoots with them. Even then, the 1st Defendant has undertaken on oath to give to "Caesar what belongs to Caesar" when the opportune time comes: she will subdivide the portions and give to the buyers their shares. This cannot be a ground for stay of execution or substantial loss. The Applicants are trying to hang onto any reed to avoid sinking.

59. Lastly, the 2nd Defendant swore and evidenced it by way of annextures that the Applicant had moved the Court of Appeal in Eldoret Civil Appeal No. E007 of 2024 for a similar application as this one. This was a fact which the Applicant knew all along and intentionally kept it away from the knowledge of the Court. The 2nd Defendant submitted that for that reason this Court did not have jurisdiction. He relied on the Order 42 Rule 9 of the Civil Procedure Rules and the decision of Charles Mwangi Gitundu v. Charles Wanjohi Wathuku [2021] eKLR. He also relied on the case of Macharia T/A Macharia & Co. Advocates vs. East African Standard a (No 2) [2002] KLR 63.

60. I have carefully considered this fact and the submissions thereon. Indeed, I have been convinced by the deposition that the Applicant had preferred a similar application as this one in the Court of Appeal. I find the argument by the Applicant that he can pursue a similar application as this one simultaneously in the Court of Appeal and in a superior court extremely misleading and misconceived. Only one court can have jurisdiction of a subject matter at once. Two courts, whether of the same level or different ones cannot be seized of jurisdiction of a matter at the same time. To do so would bring confusion and anarchy and disrespect to the rule of law and precedent. It is either jurisdiction in one court or other. In the circumstances I find this Applicant an extreme abuse of the process of this Court as the instant issues are being determined by the Court of Appeal.

61. The totality of the analysis is that I need not consider whether the applicant has satisfied the requirement of security for due performance of the intended appeal. The best I can, which I hereby do, is to dismiss this application with costs to the Respondents who opposed it.

62. Order accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 8TH DAY OF MARCH, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE