



**Mailu (Suing as the legal representative of the Estate of Mailu Mulinge (Deceased) v Deputy County Commissioner Mukaa Sub County & 2 others; Kikole (Interested Party) (Environment and Land Judicial Review Case E007 of 2021) [2024] KEELC 3806 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3806 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E007 OF 2021**

**TW MURIGI, J  
APRIL 24, 2024**

**BETWEEN**

**MUTUA MAILU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MAILU MULINGE (DECEASED)) ..... APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER MUKAA SUB COUNTY .... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR MAKUENI COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JOHN MUTISO KIKOLE ..... INTERESTED PARTY**

**RULING**

1. Before me for determination is the Notice of Motion dated 24<sup>th</sup> January 2023 brought under Order 22 Rule 22 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law in which the Applicant seeks the following orders:-

1. Spent.
2. THAT there be a temporal stay of execution of the orders in the matter pending the hearing and determination of this application.
3. THAT there be a temporal stay of execution of the orders in this matter pending the hearing and determination of the intended appeal.
4. THAT the costs of this application be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Mutua Mailu sworn on even date.

### **The Applicant's Case**

3. It is the Applicant's case that he filed a Notice of Appeal to challenge the ruling delivered by this court on 19<sup>th</sup> October 2022. He averred that he will suffer enormous loss if the Respondents execute the judgment, as his family land will be merged and subdivided and hence his appeal will be rendered nugatory.
4. He argued that his appeal is arguable and has high chances of success. In urging the court to allow the application, the Applicant contended that the Respondents will not suffer any prejudice if the orders sought are granted.

### **The Interested Party's Case**

5. The Interested Party filed a replying affidavit in opposition to the application. He averred that the application is an abuse of the court process meant to deny him the fruits of his judgment. He argued that the Applicant has not satisfied the conditions for the grant of stay of execution pending appeal.
6. He asserted that the Applicant has not demonstrated the loss that he is likely to suffer if the orders sought are not granted nor has he provided any security for costs.
7. Though duly served, the Respondents did not file any response to the application.
8. The parties were directed to canvass the application by way of written submissions.

### **The Applicant's Submissions**

9. The Applicant filed his submissions on 12<sup>th</sup> April 2023. The Applicant relied on the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) to submit that he has met the threshold for the grant of stay of execution pending appeal. He argued that the appeal has high chances of success and it will be rendered nugatory if stay of execution is not granted. The Applicant contended that he will suffer irreparable harm as the land in question will be shared between two families notwithstanding the fact one family is not a beneficiary. To buttress his submissions, the Applicant relied on the case of [Jami Bora Bank Limited & Another v Samuel Wambugu Ndirangu](#) (2022) eKLR.

### **Interested Party's Submissions**

10. The Interested Party's submissions were filed on 6<sup>th</sup> April 2023. On his behalf, Counsel submitted that the application is an abuse of the court process meant to deny the Interested Party the fruits of his judgment. Counsel further submitted that the Applicant has not satisfied the conditions for the grant of stay of execution pending appeal.
11. Counsel contended that the application and the Notice of Appeal are incompetent for want of compliance with the mandatory provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#).
12. Counsel further submitted that the jurisdiction of this court has been improperly invoked as the application is premised on the wrong provisions of the law.
13. Counsel further submitted that the Applicant has not offered security for costs nor demonstrated the loss that he is likely to suffer if the orders sought are not granted.



## Analysis And Determination

14. Having considered the application, the respective affidavits and the rival submissions, the only issue for determination is whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal.
15. Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) outlines the guiding principles governing stay of execution pending appeal and provides that;
  - 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.
  - 6(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 of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
16. The record shows that vide a Notice of Motion dated 10/09/2021 the Applicant sought the following orders:-
  - a. That the Applicant be and is hereby granted an order of Certiorari quashing the decision of 1<sup>st</sup> Respondent sitting on behalf of the 2<sup>nd</sup> Respondent, that the title deed to Plots No.1661, 1662, 1663 and 335 be revoked and the same be merged and be subdivided among sons of Mailu Mulinge and John Mutiso.
  - b. That the Applicant be and is hereby granted an order of MANDAMUS that compels the 1<sup>st</sup> Respondent to review its decision and remits the same for reconsideration.
  - c. That the Applicant be and is hereby granted an order for Prohibition restraining the 3<sup>rd</sup> Respondent, his agent and or servants from acting on the decision of the 1<sup>st</sup> Respondent until the application herein is finalized.
  - d. That the leave so granted to institute Judicial Review applications in the nature of Certiorari, Mandamus and Prohibition do operate as an order staying the 1<sup>st</sup> Respondent's decision made on the 14<sup>th</sup> day of June, 2021 revoking the title deeds for plots No.1661, 1662, 1663 and 335 Kiou Adjudication Section.
  - e. That any other, further or alternative orders be made as the court may deem just and expedient.
  - f. That the costs of this application be borne by the Respondents.
16. The judicial review application was canvassed by way of written submissions. The application was dismissed vide the ruling delivered on 19<sup>th</sup> October 2022 with an order that each party bears its costs. It is the above dismissal order that the Applicant herein seeks to challenge vide the Notice of Appeal.



17. The issue for determination is whether there is any positive order for implementation capable of being stayed pending appeal.

18. In the case of *Peter Mueria Ole Munya & 4 Others vs Principal Magistrate Narok & 6 others* the court held that:-

“If a judicial Review application is dismissed, the court does not make a positive order which is capable of being executed and which may in turn be stayed.....Accordingly the orders of stay under order 42 Rule 6 of the *Civil Procedure Rules* cannot be granted by this court.....Even if the orders of stay of execution were available to the Applicants, I find that they have not satisfied the conditions for the grant of stay of execution under Order 42 Rule 6 of the *Civil Procedure Rules*”.

16. In the case of *Western College Farts and Applied Sciences Vs Oranga & Others* (1976) KLR 63, the Court whilst considering whether an order for stay can be granted in respect of a negative order stated as follows;

“But what is there to be executed under the judgment, the subject of the intended appeal the high court has merely dismissed the suit with costs. An execution can only lie in respect of costs.....”

16. Similarly, in the case of *Kausbik Panchamatia & 3 others Vs Prime Bank* the court stated and I fully adopt;

“....that a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed by the applicants”. The Court of appeal made it clear that a negative order is not capable of being stayed for costs.”

16. This Court notes that the order sought to be stayed is a decision that dismissed the Judicial Review application. The court did not grant any positive order in favour of the Respondents which is capable of execution. It is therefore a negative order. A negative order is incapable of being stayed. The Court did not order any of the parties to do anything or refrain from doing anything.

17. Accordingly, there is nothing to stay in the present application. In the end I find that the application dated 24<sup>th</sup> January 2023 is devoid of merit and the same is hereby dismissed with costs to the Interested Party.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF APRIL, 2024.**

**HON. T. MURIGI**

**JUDGE**

In The Presence Of:

Court assistant Alfred.

In the absence of the parties.

