



**Mwangi & 3 others v Kiu-Kenda Co. Ltd & 4 others (Environment and Land Case Civil Suit E196 & 120 of 2014 (Consolidated)) [2024] KEELC 3452 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3452 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E196 & 120 OF 2014 (CONSOLIDATED)**

**AA OMOLLO, J**

**APRIL 24, 2024**

**BETWEEN**

**FRANCIS NDEGWA MWANGI ..... 1<sup>ST</sup> APPLICANT  
MARGARET MUTHONI MAINA ..... 2<sup>ND</sup> APPLICANT  
ERUSTUS KARIUKI WAWERE ..... 3<sup>RD</sup> APPLICANT**

**AND**

**KIU-KENDA CO. LTD ..... 1<sup>ST</sup> DEFENDANT  
WAVERLEY ESTATE LIMITED ..... 2<sup>ND</sup> DEFENDANT  
IBRAHIM MUNG'ARA KAMAU ..... 3<sup>RD</sup> DEFENDANT  
KIU KENDA SOCIETY (SUING THROUGH SAMUEL KARIUKI  
(CHAIRMAN), SAMUEL NJOROGE (SECRETARY) AND JORAM KAGOMBE  
(TREASURER) ..... 4<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND CASE CIVIL SUIT 120 OF 2014**

**BETWEEN**

**IBRAHIM MUNGARA KAMAU ..... PLAINTIFF**

**AND**

**FRANCIS NDEGWA MWANGI ..... DEFENDANT**



## RULING

1. The Applicants have filed a notice of motion dated 24<sup>th</sup> October 2023 seeking for the following orders;
  1. Spent
  2. Spent
  3. Spent
  4. That there be a stay of execution of the judgment delivered herein on 12<sup>th</sup> October 2023, pending the lodging, hearing and determination of the Respondent's intended appeal to the court of Appeal against the said judgement delivered on 12<sup>th</sup> October,2023.
  5. That costs of this application be provided for.
2. The grounds of the application were stated on the application, supporting affidavit and further affidavit both sworn by Francis Ndegwa Mwangi on 24<sup>th</sup> October 2024 and 3<sup>rd</sup> November 2023 respectively. The Applicants stated that they are aggrieved by the judgment which was delivered on 12<sup>th</sup> October 2023 and intend to appeal to the Court of Appeal against it. That they have already applied for proceedings and judgment and also filed a notice of appeal.
3. They posited that the 1<sup>st</sup> Plaintiff's matrimonial home is situated on the suit properties, namely, Kamiti/Anmer Block 4/139 and L.R. No. Kamiti/Anmer/Block 4/140 where he resides with his wife and children. They added that from the judgement, they were restrained from interfering with the suit properties, ordered to remove their building and reinstate the suit property to its original state before encroachment. In default, the 3<sup>rd</sup> Defendant evicts him from his home.
4. That the cumulative effect of the orders referred above will deprive the 1<sup>st</sup> plaintiff, his wife and children of their home, which they have known since 2013. Unless stayed, the 3<sup>rd</sup> Defendant will execute the judgement and their right of appeal will be rendered nugatory. Further, that the disputed boundary, divides the house in the middle and if the orders are executed the bedrooms, the kitchen, part of the living, dinning and the boundary wall that offers security will be demolished.
5. The Applicants stated that the court has discretion to make orders to stay execution and that in the interest of justice should grant it so as to preserve the suit property. The Applicants contended that Article 48 of *the Constitution*, provides for the right to access to justice for all persons, protects their right to appeal and in the circumstances of their case, there is great probability that the judgment delivered on 12<sup>th</sup> October 2023, will be set aside in its entirety.
6. That a party who has lost a case in a court of law is entitled to have the execution of the judgment stayed pending the hearing and determination of its intended appeal. They argued that in order for this Court to grant a stay of execution pending appeal to the Court of Appeal, they must satisfy the court that they will suffer substantial loss unless the order is made, the application was made without unreasonable delay and such security as the court orders for the due performance of the decree or order is furnished and as such they are ready and willing to furnish security in the event it is required.
7. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants/Respondents filed their replying affidavit sworn by Joram Kagombe on 6<sup>th</sup> November 2023 and the 3<sup>rd</sup> Defendant/Respondent filed an affidavit sworn by Ibrahim Mungara Kamau on 1<sup>st</sup> November 2023 in opposition to the motion filed. In summary, they contended that the



- application is frivolous, vexatious, bad in law, meritless, and an abuse of the court process as it is meant only to frustrate them and delay them from enjoying a validly and lawfully obtained judgment.
8. They aver that the 1<sup>st</sup> plaintiff/Applicant did not in any way at trial prove that he constructed the house at the suit property and resides there with his family or indeed that he does not have alternative property where he can reside on. They further contended that the photographs and his oral testimony is not sufficient to infer occupation. The Respondents stated that the court determined that the annexation of the 3<sup>rd</sup> Defendant's land by the 1<sup>st</sup> plaintiff was illegal thus he should not be allowed to continue benefitting off an illegal act. That if the orders sought are granted, the 3<sup>rd</sup> Defendant will continue to suffer unnecessarily at the hands of the 1<sup>st</sup> plaintiff.
  9. The Respondents stated that parties should have equal footing and no party should have undue advantage over the other and as such the court by allowing the orders sought, the same would amount to shifting the footing of the parties to the advantage of the applicants.
  10. Mr. Ibrahim contended that he is 69 years old and had acquired a plot on the suit properties in the year 2004 intending to construct his family residence but the Plaintiff has been in deliberate, open and unashamedly trespassing onto the said plot far beyond the presently accrued 14 years and in the process denied him its use.
  11. He argued that from onset the 1<sup>st</sup> Plaintiff deliberately sought unrecognised and undisclosed survey services that altered his physical boundary unprocedurally/illegally so as to artificially enlarge his occupied area to 0.209 Ha or 0.5164 acres and extend it into his plots (Land Title No. Kamiti/Anmer Block 4/139 and 140) and proceeded to fence off part of it. That the orders granted by the Honourable Court in the judgement do not seek to dispossess the 1<sup>st</sup> Plaintiff his rightful share thus he will suffer not loss whatsoever for simply undoing his trespass which he undertook with such impunity.
  12. Mr. Ibrahim added that the 1<sup>st</sup> Plaintiff will be rendered homeless for he has his true entitlement on Land Title No. Kamiti/Anmer Block 4/138 of 0.135 Ha or 0.3336 acres on which he has constructed on and or can construct on and has not demonstrated in any way that compliance with the judgement would occasion substantial loss.

### **Submissions**

13. In support of their application, the Applicants filed submissions dated 16<sup>th</sup> November 2023 and in opposition of the application, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents and the 3<sup>rd</sup> Defendant filed submissions dated 5<sup>th</sup> December 2023 and 6<sup>th</sup> December 2023 respectively. The Applicants submitted that this court has jurisdiction to preserve the subject matter of the Applicants' intended appeal and in support relied on the case of *Madhupaper International Ltd v Kerr* infra, *African Safari Club v Safe Rentals Ltd* infra, *Asanand v Petit* [1989] KLR 241, *Mombasa High Court Civil Case No 274 of 2009: Emma Muthoni Wambaa and Edwin Wambaa Regeru v Joseph Kibaara Kariuki and Others, Purity Gathoni Githae and Another v Ocean freight Transport Company Ltd* [2012] eKLR among others.
14. They further submitted that the 1<sup>st</sup> Plaintiff has established that his family will suffer substantial loss as they stand to lose their home if the orders sought are not granted. That the Respondents' opposition of the application is based on an arrogant view that the intended appeal will not succeed and in support cited the case of *Charles Mbembe 0100 v Kenya Posts and Telecommunications Corporation* (1982-1988) 1 KAR 655 and *Gitobu Manyara and 2 Others v Attorney General*.
15. The Applicants submitted that the court, in granting the orders sought should be on the proposition enunciated by Justice Megarry in *Erinford Properties v Cheshire County Homes* (1974) 2 ALL ER 448 where he said that he did not see any inconsistency in refusing an injunction on application for



injunctions and in granting one to preserve the subject matter of the suit after the loser exercised the right of appeal. That this Court will bear in mind the fact that right as it may consider the decision appealed against, the Court of Appeal may express a different opinion as the Applicants contend should happen.

16. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents submitted that the conditions for grant of a stay of execution are well set out in the Order 42 where the Applicant must satisfy to court substantial loss unless stay of execution is granted, has deposited security as pre- satisfaction of the Decree / security for due performance of the Decree, the appeal will be rendered nugatory if the stay of execution is not granted and the appeal has arguable grounds with high chances of success.
17. The Respondents submitted that the nature of the prayer is in such a way that it seeks to continue excluding the 3<sup>rd</sup> Respondent from the use of his land and further facilitating the 1<sup>st</sup> Applicant in continuous trespass of the suit property. That the Applicant claims that his family will be evicted and he would be rendered homeless but this does not tally with the evidence at trial as the 1<sup>st</sup> Plaintiff did not prove sufficiently that his family resides on the suit property and also there was no evidence whatsoever to show that he does not have any other properties save for the suit land.
18. It is their argument that the 1<sup>st</sup> Applicant has not displayed how and what loss or damage would occasion from satisfaction the Decree by the Respondents and being the author of his own misfortune, he should not be allowed to use his negligent actions to support his wavering claim that there would be loss occasioned. They cited the case of Kenya Shell Limited vs Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018.
19. They also relied in the case of James Wangaliwa & Another v Agnes Naliaka Cheseto [2012] eKLR to submit that there is no sufficient cause demonstrated and the Applicants may not suffer any loss, let alone substantial loss. This is because the execution can only be executed against the 1<sup>st</sup> Respondent, who by his own pleadings, testimony and evidence has admitted that he deliberately and with impunity created the circumstances that he now alleges would give rise to substantial loss hence the application is an abuse of the court process.
20. That as a consequence of the 1<sup>st</sup> Applicant's acts, he illegally occupied part of 3<sup>rd</sup> Respondent's land and persists to do so, despite admittedly not having any genuine claim hence using legal process to prolong his illegal encroachment. That a stay of execution would serve no other purpose as the acreage and location of the 3<sup>rd</sup> Respondent's land will not change.
21. The 3<sup>rd</sup> Respondent submitted that the loss he will incur if the stay of execution is granted may be estimated in terms of loss of use and income and what it may require him to remove the trespass and restore his land if the Applicants' appeal doesn't succeed as well as take judicial notice of the exponential inflationary the trend thus a sum of Kshs. 10,000,000 would be sufficient security.
22. That the Applicants are simply a litigious entity and the appeal herein is by all standards a desperate attempt to rob the Respondents more so the 3<sup>rd</sup> Respondent of the fruits if his judgement dragging him through a long and tiring litigation. In support relied in the reasoning in Machira t/a Machira & Co Advocates v East African Standard as quoted in Masisi Mwita v Damaris Wanjiku [2016] eKLR;

“to be obsessed with the protection of an appellant or the intending appellant in total disregard or flitting 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 judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage.”



23. The Respondents further submitted that Applicants have failed to demonstrate any of the limbs required to consider an application of this nature as stated by the Court of Appeal in *Chris Munga N. Bichage -Vs- Richard Nyagaka Tongi & 2 Others Eklr.*

**Determination:**

24. This is an application for stay of execution by the Applicants on the grounds that they intend to appeal the judgment rendered against them. The 1<sup>st</sup> Applicant particularly has argued that his family home is situate on the suit property and execution of the orders given will demolish it rendering them homeless. However, he stated that he is willing and ready to commit security for the execution of the decree.
25. The Respondents opposed the Applicants’ motion stating that the Applicants have failed to meet the threshold for grant of stay of execution pending appeal. They argued that at the trial stage the 1<sup>st</sup> Applicant did not establish that he had a family home on the suit property and that he has land where he has constructed and or can construct to settle his family. That the 1<sup>st</sup> Applicant has been using the legal process to continually encroach on the suit property that he admitted to have deliberately created the circumstances to change the boundary of his plot.
26. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”
27. It is trite that the power of a court to grant stay of execution is discretionary but the said discretionary power must be exercised judiciously and not capriciously. The discretion should be applied in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court’s decision.



28. As was held in *Butt v Rent Restriction Tribunal* (1979) eKLR, Madan JA and relied on in *JMK v KK & LNK* [2019] eKLR :

“The litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.”

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59.”

29. Being guided by the above provision and case law, it is correct to state that a stay of execution is not given as a matter of right but with the discretion of the court in consideration of the circumstances of the case. The law requires an Applicant seeking orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.
30. The 3<sup>rd</sup> Respondent has argued that he is of old age and that granting the stay of execution will keep from enjoying the fruits of the judgement. It is my view that, the mere fact that the decree holder is of old age does not necessarily justify him from benefiting from the fruits of his judgement.
31. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In *Machira T/A Machira & Co Advocates vs. East African Standard* (No 2) [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting 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 judgement 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.”

32. It has been established that it is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention and this means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.
33. To show that the 1<sup>st</sup> Plaintiff had established his home in the suit property, he relied on the photographs produced at trial and cited court proceedings on 21<sup>st</sup> June 2021 where the 1<sup>st</sup> Plaintiff testified that;

“There is a building on the suit property. I can see the photographs at pages 79-81 of my bundle. This is the house a put up on the suit property. I have completed the construction- I am living in the house with my family.”
34. In balancing the scales of justice by ensuring that the Applicant’s appeal is not rendered nugatory while at the same time ensuring that the Respondents are not impeded from the enjoyment of the fruits of his judgement, it is my view that in consideration of the circumstances of the case, the family house in the suit property should be preserved pending determination of the appeal.
35. As with regard to deposit of security of the execution of the decree, the 1<sup>st</sup> Applicant expressed his willingness to comply. In the case of E. Muiiru Kamau and Another —vs.- National Bank of Kenya Ltd (2009) eKLR it was held;

“21. I am convinced that in arriving at this decision, it is imperative for this court to balance the interests of the parties before me. Whilst the Applicants are to be courtioned against suffering substantial loss, the Respondent must also be assured of the safety of its judgment. If the appeal succeeds, the effect of the receiving order may not be easily reversed. Applying the principle of proportionality, I am of the view that the security offered be increased to a reasonable sum considering the amount the Respondent urged to have been due as at January, 2011. Further, having the amount deposited in court does not make any commercial sense.”
36. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful Plaintiff, I find the circumstances meet the threshold for granting a stay of execution. However, the stay is conditional that the 1<sup>st</sup> Applicant shall deposit the amount decreed as damages in the sum of Kshs.250,000 in a joint interest earning account (to opened forthwith in names of their advocates) within 30 days from the date of this ruling. In default the stay orders shall stand vacated. Costs of the application to the Respondents in any event.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2024**

**A. OMOLLO**

**JUDGE**

