



**Mucheke & 5 others v Kinyua (Environment & Land Case
E060 of 2022) [2024] KEELC 4330 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E060 OF 2022**

CK NZILI, J

MAY 22, 2024

BETWEEN

HAWO ABDI MUCHEKE 1ST APPELLANT
RUKIA ABDII M'MUCHEKE 2ND APPELLANT
HASSAN ABDI 3RD APPELLANT
NURIA ABDI 4TH APPELLANT
JAMILA ABDI 5TH APPELLANT
EZEKIAH ABDI 6TH APPELLANT

AND

OBADIAH MUGAMBI KINYUA RESPONDENT

RULING

1. The court is asked to stay the execution of the judgment delivered by this court on 7.2.2024. The reasons are contained on the face of the application dated 20.2.2024 and a supporting affidavit of Jamila Abdi of the even date. The applicants aver that they have preferred an appeal against the judgment and there is a need to preserve the subject matter of the appeal; otherwise, the appeal would be rendered nugatory, land is emotive in Kenya and they could be evicted from the land where they have resided for decades. There is tension and likely ugly scenes, and that in the interest of justice, the orders sought should be granted.
2. The application is opposed through a replying affidavit sworn by Obadiah Mugambi Kinyua on 27.2.2024 for lack of merits, abuse of court process, and lack of jurisdiction. The respondent avers that no notice of appeal has been filed, a request for typed proceedings has not been made, the court is functus officio, the application offends Rules 6, 75, and 77 of the *Court of Appeal Rules*, for inordinate



- delay, orders sought can only be granted by the Court of Appeal, it is brought in bad faith, it is incompetent and that the ingredients to grant a stay of execution have not been met.
3. With leave of court, parties were directed to file written submissions by 6.3.2024. The applicants relied on written submissions dated 28.2.2024, isolating four issues for determination. Regarding substantial loss, the applicants submitted that they were likely to be evicted from the suit land. Reliance was placed on *Century Oil Trading Co. Ltd vs Kenya Shell Ltd* NRB Milimani HCMCA No. 1561 of 2007, James Wangalwa & another vs. Agnes Naliaka Cheseto (2012) eKLR, *RWW vs EKW* (2019) eKLR, *Kenya Women Microfinance Ltd vs Martha Wangari Kamau* (2020) eKLR, *NIC Bank Ltd vs Aquinas Francis Wasike & another* C.A 238 of 2005 and *Arun C vs Sharma vs Ashava Raikundalia t/a Raikundalia & Co. Advocate & 2 others* (2014) eKLR.
 4. Order 9 Rule 9 of the *Civil Procedure Rules* provides that a party intending to be represented by another counsel after entry of judgment shall seek leave of court to do so. In this suit, judgment was entered on 7.2.2024. As of the filing of this application on 22.2.2024, there was no notice of change of advocates or notice of appointment by the firm of Mabonga & Co. Advocates to come on record for the applicants. At the same time, the applicants are at liberty to be represented by a new law firm at the appeal stage in the court of appeal.
 5. For the firm of Mabonga & Co. Advocates to be heard on this application they had to adhere to the law. The filing of a notice of appeal alone without complying with Order 9 Rule 9 of the Civil Procedure Rules did not give the said law firm the capacity to apply. Leave to deem the application as properly filed does not cure the anomaly. It is not enough to file a consent to come on record under Order 9 Rule 9 of the *Civil Procedure Rules* without seeking leave of court and serving the application upon the rest of the parties.
 6. For a party to be entitled to stay of execution pending appeal to a higher court from the court where the decree was made, he or she has to bring the application timeously, demonstrate substantial loss, offer security for the due realization of the decree should the appeal not succeed and lastly; establish that it is in the interest of justice to grant the orders sought.
 7. In *Antoine Ndiaye vs African Virtual University* (2015) eKLR, the court cited *Kenya Shell Ltd vs. Karuga & another* (1982 – 1988) KAR 1018, that substantial loss must be substantiated through evidence and *Wangalwa vs Cheseto* (*supra*), that the applicant must show factors other than merely alleging, which show that 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.
 8. Further, the court cited *Machira t/a Machira & Co. Advocates vs. East African Standard Ltd* (2002) KLR 63 that an applicant must prove specific details and particulars, and where no pecuniary or tangible loss is shown, a court will not grant a stay.
 9. In this application, the affidavit in support is sworn by Jamilla Abdi on behalf of the rest of the applicants. No authority to depone and plead has been attached to the affidavit. The particulars and specific details of the status of the subject matter, who is on the land, what developments are there, and the nature of the likely loss and damage have all been left out. The court cannot guess or speculate. Written submissions, however forceful or detailed, cannot replace evidence or amount to or replace pleadings.
 10. Substantial loss has to be demonstrated through cogent and tangible evidence, as held in *Wangalwa vs Cheseto* (*supra*). It is through a supporting affidavit, which is evidence in law, that an applicant paints the vivid nature, status of his developments and particulars of the likely loss or damage. It is through affidavit evidence and annexures of documentary evidence that a party can prove as held in *Machira*



vs East African Standard Ltd (*supra*) what is likely to be lost or damaged if the suit property is not preserved so as to render the appeal nugatory.

11. Casting aspersions that land is emotive; the elderly mother has nowhere to move, that tension is building up, and ugly scenes will result in paragraphs 5,6 & 7 of the supporting affidavit is not enough. As indicated by the court in *Mwinyi Hassan Ali vs Attorney General & Philemon Mwaisaka* Civil Appeal No. 135 of 1997, a court is a court of law but not of sympathy. Courts do not succumb to pressure such that there will be chaos if they rule one way or the other. Courts are there to uphold the rule of law without fear or favor, influence or otherwise from any quarter, including the parties.
12. Courts take oaths to uphold the constitution, laws, and the rule of law without fear, favor, or influence from any quarter. Parties must learn to plead to facts and evidence but not emotions. This court determined the appeal and made several findings, among them the legality and capacity of the applicants to file the defense and counterclaim dated 1.4.2019 and the evidence they had tendered to sustain, regarding L.R No's 2290 and 551 and their history in relation to the claim by the respondent based on trespass by the appellants to L.R No. 2290.
13. The trial court had made a finding that as of 11.7.2019, there was a ruling by the High Court on the rights of the respondent over the suit land. So, the issue of who has been occupying or is entitled to occupy the suit land and where the appellants are supposed to occupy was settled by the court since L.R No. Antubetwe Njoune/2290 and 551 are distinct and separate as per P. Exh No. 3. There cannot, therefore, be any chaos or tension and or substantial loss or damage as alleged or at all if parties abide by the rule of law and follow court orders.
14. The rights of a successful litigant who is entitled to the fruits of his judgment are equally important. They must be balanced with those of the unsuccessful litigant who has an undoubted right of appeal as held in *RMM vs EKW* (*supra*).
15. None should be left to be prejudiced in balancing them; on whether to grant a stay or not. The eviction process is legal under Section 152A of the *Land Act*. There is no evidence that the applicants have been served with an intended eviction notice. As indicated above, the two parcels of land in dispute, according to the evidence on record, are distinct and separate from where the applicants occupy.
16. The applicants have brought no evidence that any of their buildings are on the decreed land to the respondent, which is at risk of demolition or destruction. Mere assertions through written submission on paragraphs 3.2, 3.5, 3.7, 3.8, 3.10, 3, 10.3, 4.1, 4.1, 4.3, 6.2 & 7.1 of the written submissions dated 28.2.2024 are not evidence. See *Daniel Toroitich Arap Moi vs Stephen Murithi & another* (2014) eKLR.
17. The upshot is that I find the application both incompetent and lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 22ND DAY OF MAY, 2024

In presence of

C.A Kananu

Mabonya for the applicant

Gikonyo for the respondent

HON. C K NZILI



JUDGE

