



REPUBLIC OF KENYA



**Isika & 2 others v Molo & 2 others (Environment and Land Appeal
23 of 2023) [2024] KEELC 4693 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 23 OF 2023
CA OCHIENG, J
JUNE 13, 2024**

BETWEEN

**MUYA ISIKA 1ST APPELLANT
ANTONY MUTINDA 2ND APPELLANT
PIUS MUSYOKI 3RD APPELLANT**

AND

**MICHAEL KYULE MOLO 1ST RESPONDENT
NDUKU MUSEMBI MUTISO 2ND RESPONDENT
KATELEMBO ATHIANI MUVUTI FARMING & RANCHING CO-OPERATIVE
SOCIETY LTD 3RD RESPONDENT**

RULING

1. What is before Court for determination is the Appellants' Notice of Motion Application dated the 2nd June, 2023, where they seek the following Orders:-
 - a. Spent
 - b. Spent
 - c. That pending of the hearing and determination of the Appeal on Orders of stay be issued as against the Judgement issued on 11th April, 2023, restraining the Respondent from transferring to himself or other person, charging or selling Plot No. 2960 at Katelembo.
 - d. That costs abide outcome of the Application.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Muya Isika, Antony Mutinda and Pius Musyoki where they depose that Judgment was made in favour of the



Respondent on 11th April, 2023. They confirm that the subject matter being Plot No. 2960 is registered in the name of their grandfather Mbivye Kaia (deceased).

3. They claim the trial court determined and ordered that the suit land be registered in the name of the Respondent in the absence of the registered owner or his legal representative. Further, that the Respondent is likely to transfer the suit land. They reiterate that they have preferred a meritorious Appeal which will be rendered useless if the suit land is transferred. They insist that the entire proceedings before the trial court were incompetent and had no legal effect.
4. The 1st Respondent opposed the instant Application by filing a Replying Affidavit sworn by Michael Kyule Molo, where he deposes that the said Application is frivolous, vexatious, an abuse of the court process and should be dismissed forthwith. He confirms filing Machakos CM ELC No. 60 of 2018 on 4th September, 2018. Further, that on 11th April, 2023, the trial Court delivered Judgment in his favour.
5. He insists that the Court relied on the evidence presented that he had resided on the suit land for over eighteen (18) years and constructed a permanent residential house thereon. He avers that the Appellants' were all along aware that their deceased father through Katelembo Athiani Muvuti Farming & Ranching Cooperative Society Limited had transferred the suit land to him. He reiterates that the Appellants' have not satisfied the conditions for granting of stay of execution of the judgement pending appeal. Further, they have failed to satisfy a security or demonstrate what prejudice they stand to suffer.
6. The Appellants' filed a Supplementary Affidavit sworn by Muya Isika where he reiterates that the instant application is seeking the preservation of the subject matter pending determination of the Appeal. Further, that it is not in dispute that at the time of the Judgement on 11th April, 2023, the suit land being Plot No. 2960 was registered in the name of Mbivye Kaia (deceased). Further, that no succession had been commenced in respect to his estate.
7. The Application was canvassed by way of written submissions.

Analysis and Determination

8. Upon consideration of the instant Notice of Motion Application including the respective Affidavits as well as the rivalling submissions, the only issue for determination is whether the court should issue an order of stay of execution of the Judgment delivered on 11th April, 2023, pending the outcome of the Appeal.
9. The Appellants' have sought for stay of execution of the impugned Judgment pending Appeal. They seek for orders to restrain the 1st Respondent from transferring to himself or other person, charging or selling Plot No. 2960 at Katelembo.
10. It is not in dispute that the 1st Respondent had filed Machakos CM ELC No. 60 of 2018 on 4th September, 2018 and Judgment was entered in his favour on 11th April, 2023. The Court declared the 1st Respondent as the owner of the suit land and permanently restrained the Appellants' including their agents, therefrom. The Appellants being aggrieved with the impugned Judgment lodged a Memorandum of Appeal dated the 5th May, 2023. I have had a chance to peruse the Judgment and note the trial court found that the 1st Respondent had been on the suit land from 2005 and built a permanent house thereon.



11. On stay of execution pending Appeal, Order 42 Rule 6(1) of the *Civil Procedure Rules* states that:-

“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.

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.”

12. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal provided parameters on how a Court should deal with an application for stay of execution pending Appeal and stated that: -

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.”

13. The Court of Appeal in *UAP Insurance Company Ltd vs Michael John Beckett* [2004] eKLR was of the considered view that all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

14. While in the case of *James Wangalwa & Another Vs Agnes Naliaka Cheseto* (2012) eKLR it was held that:-

“An Applicant must establish 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 a successful party.”



15. From perusal of the impugned Judgment including Memorandum of Appeal, I opine that the Appeal raises triable issues and is arguable. Since it is not disputed that the 1st Respondent is on the suit land and the main contention is his registration as its owner, I find that the Appeal will be rendered nugatory if the Judgment of the trial court is implemented before the said Appeal is determined.
16. In the circumstances while relying on the legal provisions cited as well as associating myself with the decisions quoted, I find that the Appellants' have met the threshold for granting an order of stay of execution, pending Appeal.
17. In the foregoing, I find the Notice of Motion Application dated the 2nd June, 2023 merited and will allow it but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF JUNE, 2024.

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms. Muli holding brief for Munyao for 1st Respondent

Tamata for Applicant

Court Assistant – Simon/Ashley

