



REPUBLIC OF KENYA



**Kigea & another v Mailanyi (Environment and Land Appeal
E026 of 2023) [2024] KEELC 4817 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4817 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E026 OF 2023**

**CK NZILI, J
JUNE 12, 2024**

BETWEEN

GERVASIO MURIIRA KIGEA 1ST APPELLANT

JUSTER NCULUBI MBIRITHIA 2ND APPELLANT

AND

NAHASHON MWETERI MAILANYI RESPONDENT

RULING

1. What the court is asked to grant is a stay of execution of the decree or judgment issued on 6.3.2024. The reasons are contained on the face of the application and a supporting affidavit of Nahashon Mweteri Mailanyi sworn on 20.3.2024.
2. It is averred that the effect of the judgment is that the applicant will be evicted from the suit land and lose the developments thereon of over 18 years, going by the photographs attached as annexures NMM “2” & “3”, including a school.
3. The applicant urges the court to maintain the status quo as has been maintained throughout the trial and up to the judgment of this court. The applicant avers that he will be willing to abide by any terms imposed by the court as well as to prosecute his appeal diligently. Further, the applicant avers that the respondent is not likely to suffer any prejudice should the application be allowed.
4. The applicant relied on written submissions dated 27.4.2024. The application is opposed through a replying affidavit of Gervasio Muriira Kigea sworn on 29/4/2024 and through written submissions dated 29/4/2024.
5. The effect of the judgment dated 6.3.2024 is to cancel the transfer of Parcel No. 6964 Antuamburi Adjudication Section to the applicant and reinstate it in the name of the respondent. A permanent



injunction was also issued restraining the applicant from interfering with the suit land measuring 0.20 acres.

6. What was decreed to the respondents is 0.20 acres. The applicant has not displayed his title deed or offered to surrender it before the court. Similarly, other than photographs, the applicant has not told the court the value of his developments on the land. At the trial, the portions in dispute were under crops and fruit trees. How and when the buildings displayed in the photographs were constructed is not clear yet there were interim orders issued on 14.3.2016.
7. Under Order 42 Rule 6 of the Civil Procedure Rules sufficient cause must be shown why the court appealed should order a stay of execution. The principles to apply include if the application is made without unreasonable delay; substantial loss be demonstrated and provisions for security for the due performance of the decree be made. See *Noor said v Mary Mwawasi Manga* [2022] eKLR.
8. In *RWW v EKW* [2019] eKLR, the court held that the purpose of a stay pending appeal is to preserve the subject matter in dispute so that the rights of the appellant are safeguarded, for if successful, it is not rendered nugatory. The court said that the right of appeal is to be weighed against the success of a litigant who should not be deprived of the fruits of his judgment. Similarly, the court said that it must ensure that no party suffers prejudice that an award of costs cannot compensate.
9. In *Absalom Dova v Tarbo Transporters* [2013] eKLR, the court held that the discretionary relief of stay pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court such that the order does not introduce any disadvantage but administers the justice that the case deserves, hence the court would be reconciling the two competency rights.
10. In exercising that discretion, the court in *Bhatt v Rent Restriction Tribunal* [1979] eKLR, observed that so long as there are reasonable grounds, the court should not refuse a stay as long as there are exceptional or unique circumstances. See *Javier Pioneer v General Assurance Society Ltd* [1999] KLR.
11. Applying the preceding case law, the substantial loss must be demonstrated with tangible and cogent evidence. There is no evidence that the applicant has been served with a notice of eviction under Section 152 A – F of the *Land Act*.
12. Similarly, there is no evidence that the decree has been presented before the land registrar for the cancellation of the title. The applicant has not offered to surrender it to court or mention what commensurate security he was offering to avail before the court. The nature and extent of the developments on the decree portion have not been quantified through a valuation report. It is not enough, as held in *Wangalwa v Agnes Naliaka Cheseto* [2012] eKLR, to state execution is due without substantiation of the same, for execution being a legal process per se does not amount to substantial loss.
13. The rights of the respondents as the successful litigants must be weighed against the undoubted rights of the unsuccessful party. The hardship likely to be suffered by the applicants as opposed to the respondent has not been substantiated at all.
14. The upshot is that I find the application lacking merits. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 12TH DAY OF JUNE, 2024**

In presence of

C.A Kananu



No appearance
HON. C K NZILI
JUDGE

