



**Laban & another v Francis (Environment and Land Appeal
E020 of 2024) [2024] KEELC 4593 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E020 OF 2024**

CK NZILI, J

JUNE 6, 2024

BETWEEN

OBADIAH MWITI LABAN 1ST APPLICANT

MARY RIMAA M'MUGAMBI 2ND APPLICANT

AND

CAROLINE NDUMBA FRANCIS RESPONDENT

RULING

1. By an application dated 18.3.2024 the court is asked to stay the execution of the judgment delivered on 21.2.2024 and its decree pending hearing and determination of this appeal. The grounds are contained on the face of the application and the supporting affidavit of Mary Rimaa M'Mugambi sworn on 18.3.2024. The applicant states that the effect of the decree was to cancel the deponents' title. The deponent avers that the decree has been extracted, and the decree-holder was moving with speed to execute it.
2. The 2nd applicant says that they will suffer substantial loss since she expended substantial resources to the tune of Kshs.1,250,000/= with effect from 2014 in purchasing the land. It is averred that the suit land would be exposed to adverse dealings by the respondent, including its disposal to third parties, hence rendering the appeal nugatory, if the orders sought are not granted.
3. The applicants state that there was a need to preserve the subject land pending the hearing of this appeal, said to have a high chance of success. It is stated that the applicants are willing to post such security as the court may impose and that there will be no prejudice to the respondent if the orders sought were granted.
4. The applicants filed written submissions dated 29.4.2024. Reliance was placed on Halal & another v Thorton & Turpin [1963] Ltd [1990] eKLR N.M v EMN [2019] eKLR Rhoda Mukuma v John Abuoga [1988] eKLR. It is submitted that the supporting affidavit has demonstrated substantial loss,



- that the application was filed timeously, that is within less than a month after the judgment was delivered, and that they were willing to furnish security before the court just like they did within seven days on 25.3.2024. Reliance was placed on *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. advocates & others* [2014] eKLR, and *Butt v Rent Restriction Tribunal* [1979] eKLR.
5. The application is opposed through a replying affidavit sworn by Caroline Ndumba Francis on 27.3.2024 and supported by written submissions dated 2.5.2024. The respondent terms the application as incompetent, for it is filed by a law firm improperly on record for the applicant. Reliance was placed on *Stephen M'Ikiamba & others vs John Kiramana Ekabu & others Meru ELC Appeal NO. E008 of 2020*.
 6. The respondent holds the view that substantial loss has not been demonstrated, there was prolonged delay, security has not been provided for, and the appeal has no reasonable grounds to justify a stay. Reliance was placed on Sections 107 – 112 of the *Evidence Act*, *Jennifer Nkirote & another Meru ELC No. 172 of 2016*, and *Samvir Trustee Ltd v Guardian Bank Ltd* [2007] eKLR.
 7. The power to grant a stay is a discretionary one to be used judiciously. In *Cabinet Secretary Ministry of Health vs Arun & others (Civil Application E583 of 2023)* [2024] KECA 2 (KLR) (19th January 2024) (Ruling), the court said that the jurisdiction to grant stay lies at the discretion of the court and is to be exercised on the basis of sound and settled principles; not arbitrarily, or capriciously, or whimsically, or in consideration of any extraneous matters.
 8. The court said that the guiding consideration should be whether the applicant has an arguable appeal which is likely to be rendered nugatory if the orders sought were not granted. On the nugatory aspect, the court cited *Bank Ltd v Norlake Investment Ltd* [2002] E. A 227, that it means causing hardship, which is out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined.
 9. In *Kuko & another v Ali and another Robinson (interested party) Civil Application E023 of 2023* [2024] KECA 305 (KLR) 22nd March 2024) (Ruling), the court said that it is trite law a court will aid the vigilant and not the indolent, that an application for stay does not require typed proceedings to be filed hence the explanation for the delay in obtaining typed proceedings was lacking in merits. The court declined to grant a stay for lack of demonstration of substantial loss if the property in question was divided among the beneficiaries of the estate, as each was likely to receive their equitable share of the estate of the deceased. The court found no hardship or prejudice to be occasioned to the applicants in the circumstances.
 10. In this application, the effect of the decree dated 21.2.2024 is to cancel the 2nd applicant's name from the title register and for retransfer of the land to the respondent. The applicants were also permanently enjoined from entering or interfering with the respondent's quiet possession of the land. An inhibition on the title was also to be lifted.
 11. The applicants state that if the execution proceeds, they would suffer a loss, for they had paid Kshs.1,250,000/= for the suit property, which would be exposed for disposal to third parties. The applicants have expressed their desire to post security and have already done so as ordered by the court.
 12. Starting with the issue raised on Order 9 Rule 9 of the Civil Procedure Rules, the case law of *Joseph Kithinji Gitonga vs Jennifer Nkirote & another* (supra) is distinguishable as the application sought a stay pending the hearing of an appeal at the Court of Appeal, brought by a law firm which was not on record at the court in which the judgment intended to be appealed against was. The law is that a party is at liberty to engage a counsel of his choice before the appellate court. Order 9 Rule 9 of the Civil



Procedure Rules apply only where a law firm wishes to replace a previous one after judgment and in the same court. The applicants are, therefore, properly represented before this court.

13. As to substantial loss, in *James Wangalwa v Agnes Naliaka Cheseto* [2012] eKLR, the court observed that an execution process put into motion does not amount to substantial loss since it was a legal process and a party must show through tangible and cogent evidence of what may affect or negate the essential core or substratum of an appeal. In *Samvir Trustee Ltd v United Bank Ltd* [2007] eKLR, the court said it would not put unnecessary hindrance to the enjoyment of the right of appeal, more so, if there are exceptional circumstances to sway the court's discretion while balancing the two competing rights and ensuring that the successful party does not suffer prejudice in waiting to enjoy the success of his litigation, where a definite conclusion has upheld his rights. The court said that their allegation or assertions of substantial loss withholding empirical or documentary evidence was not enough.
14. In *Iban & 73 others vs Langata Development Co. Ltd & another (Civil Application E453 of 2023)* KECA 240 (KLR) (8th March 2024) (Ruling), at issue was a claim by the applicants that they were rightful owners of the suit properties by way of purchase faced with eviction. The court said only a positive order could be stayed. The court declined to grant an injunction pending appeal for the applicant had bought the properties in violation of a pending court order and contrary to the doctrine of *lis pendens*, and to grant such an order would be to give a seal of approval of their mischief.
15. Turning to this application while alive to the guiding principles, the respondent has not denied the implications of the execution would be profound. There is no assurance that once the inhibition is lifted and the transfers are effected, the respondent will not transfer the same to third parties. The respondent has not denied the expense of Kshs.1,250,000/= that the applicants state they have used in the suit property. The applicants are also willing to deposit security for the due performance of the decree should their appeal not succeed.
16. The application was also filed timeously. The upshot is that I find the application with merits. I stay the execution of the lower court decree for one year only. The applicants will enhance the security by depositing the title deed to the Deputy Registrar of this court within 14 days; otherwise, the order shall lapse. Lower court file be availed.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 6TH DAY OF JUNE, 2024

In presence of

C.A Kananu

Parties

Mawira for the respondent

Muthomi for applicants

HON. C K NZILI

JUDGE

