



**Dae v Mude (Environment and Land Appeal E001 of 2024)
[2024] KEELC 5605 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

**CK NZILI, J
JULY 31, 2024**

BETWEEN

AMINA UME DAE APPLICANT

AND

ABDIA OSHE MUDE RESPONDENT

RULING

1. What is before the court is the application dated 14.2.2024, seeking for stay of execution of the decree of the lower court issued pursuant to a judgment delivered on 7.2.2024. The grounds are contained on the face of the application and in the supporting affidavit of Amina Ume Dae, sworn on the even date. Briefly, the applicant avers that the effect of the decree is that the respondent has been granted an injunction prohibiting her and her family from fencing, alienating, tilling, or developing a portion of Plot No. 218, which she has occupied with her family for over 40 years, undertaking cultivation of seasonal crops.
2. The applicant avers that on 9th & 10th February 2024, the respondent and her agents attempted to occupy the land and she was apprehensive that they may return to do so even though they have not obtained the necessary court papers to enforce the lower court decree.
3. The applicant avers that the respondent has never occupied the suit land and hence would suffer no prejudice if the application is granted. Further, the applicant avers that unless the orders sought were granted, she stands to suffer grave loss and damage, and his appeal is rendered nugatory. She urges the court to find that it was in the interest of justice to grant the orders sought.
4. The application is opposed by a replying affidavit of Abdia Oshe Mude sworn on 11.3.2024. It is averred that the applicant has failed to demonstrate the existence of any plot identified as Plot No. 218, which belongs to her; hence, this is a new claim being introduced at the appeal stage without the necessary leave being sought. The respondents averred that the applicant abused the generosity of her



husband and was recently trying to occupy a piece of land more extensive than what was donated to her husband after his death despite the applicant's husband remaining within his portion throughout his life. Again, the respondent avers the suit land was not the estate of the applicant's late husband that was sued as the action leading to the case before the trial court over acts that were committed personally by the applicant, way after her late husband passed on; thus there was never a dispute between herself and the applicant's late husband.

5. Moreso, the respondent avers that the appeal has no arguable ground or chance of success. The respondent averred further that the applicant had testified that she did not know the size of her plot and was not aware of its registration number. In addition, the respondent avers that the applicant was trying to introduce a land registration number on appeal, which was new evidence without leave of court, a demonstration that her appeal has no chance of success as one cannot lay a claim over a property whose registration and size is unknown to him and expect to succeed on appeal.
6. The respondent avers that should the application be allowed; the applicant should be ordered to provide adequate security commensurate to the value of the suit property, estimated at Kshs.2,000,000/=; otherwise, the application was intended to delay or frustrate her from enjoying the fruits of the judgment.
7. The respondent avers that she has always been in occupation of the disputed portion of land and enjoying quiet possession thereof until the applicant removed the boundary fence, attempting to grab the land that was never hers; hence, there were no exceptional circumstances to warrant granting a stay order. With leave of court, parties filed written submissions which the court has considered.
8. A party seeking stay orders of execution must apply without inordinate delay, demonstrate that there will be substantial loss and damage if the application is not allowed, offer security for the due realization of the decree should the appeal not succeed, and lastly, establish that it was in the interest of justice to grant the orders sought.
9. In *Teachers Service Commission & another vs Mutisya* Civil Application E091 of 2023 (2024) KECA 80 (KLR) (9th February 2024), the court observed that an appeal would be rendered nugatory if what is sought to be forestalled would not be reversed or can only be reversed at great expense or cannot be adequately compensated with damages.
10. In *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another* (2014) eKLR, the court observed that there was no set rule as to what constitutes delay. It depends on the circumstances of each case and that it depends on the conduct of the applicant, length of the delay, reasons for the delay, if it was deliberate or ought to deliberately delay the cause of justice if there was indolence or sleeping on one's rights. Substantial loss refers to any loss, great or small, that is of actual worth or value as distinguished from a loss without value or a loss that is merely nominal. See *Tropical Commodities Supplies Ltd & others vs International Credit Bank Ltd (in liquidation)* 2004 2 EA 331.
11. In *James Wangalwa & others vs Agnes Naliaka Cheseto* (2012) eKLR, the court observed that execution was a legal process that by itself was not a substantial loss. An applicant must establish other factors that show that the execution will create a state of affairs that will irreparably affect or negate the essential core of the applicant as the successful party in the appeal and that it was what has to be prevented by preserving the status quo, because such loss would render the appeal nugatory.
12. Regarding security, it must be one that will achieve due performance of the decree. In *Gianfranco Manenti & another vs Amaco Ltd* (2019) eKLR, the court said that a winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment if the appeal fails. The court said that security was never intended to filter the right of appeal and is put in place to



- ensure that courts do not assist litigants in delaying the execution of decree through filing vexatious and frivolous appeals. The court said that the issue of the report of security for the due performance of the decree was not a matter of willingness by the applicant but for the court to determine.
13. In *Arun C. Sharma vs Ashana Raikundlaia t/a Raikundalia & C advocate & others* (2014) eKLR, the court observed that the purpose of security under Order 42 of the *Civil Procedure Rules* was to guarantee the due performance of such decree or order but not to punish the judgment debtor since in civil process, a judgment was like a debt hence applicant becomes a judgment debtor in relation to the respondent.
 14. Applying the preceding principles, has the applicant met the threshold to be entitled to the orders sought? The judgment at the lower court was delivered on 7.2.2024, while this application was filed on 14.2.2024. I find that the application was filed without an unreasonable delay. Regarding substantial loss, the contestation at the lower court was over a disputed part marked "x" of Plot No. 645, which the respondent was seeking to be declared the owner and for a permanent injunction to stop the appellant from fencing, alienating, selling, tilling or developing the land situated in Manyatta location Moyale sub-county.
 15. The appellant had filed a defense and a counterclaim. The entry of the appellant on the disputed portion was said to have been part as a result of permission from the respondent's late husband. It was not in the contest. What the respondent was complaining of was an encroachment and removal of a fence. The trial court made a finding that there was an encroachment as per the sketch map, rent payment receipt and clearance letter from the county dated 19.10.2020 showing registration in the name of the respondent.
 16. In this application, the applicant avers that the injunction issued prohibits her from fencing, alienating, tilling or developing a portion of Plot No. 218 in her occupation adjacent to Plot No. 645, which has never been part of Plot No. 645. The appellant has not attached copies of ownership of Plot No. 218, a sketch for its locality and boundaries with Plot No. 645, which was the subject of the judgment and which is before this court on appeal.
 17. The applicant terms the execution of the decree as amounting to forceful occupation of Plot No. 218 which would be an extra-judicial means without the necessary court application. The applicant has not disclosed the source of ownership documents to Plot No. 218. Substantial loss is what has to be prevented from happening that will negate the very essential core of the substratum of the appeal.
 18. At the lower court judgment, there is no mention of Plot No. 218 as the disputed portions "x" neighbouring Plot No. 645. An applicant must prove substantial loss through tangible and cogent evidence, as held in *James Wangalwa vs Naliaka Cheseto* (supra). The applicant says that she cultivates seasonal crops on the suit land. The loss or damage, if any, is quantifiable and may be compensated by way of damages. There are no developments on the disputed land belonging to the appellant, which may be destroyed if the land is taken up on exerts. The size and value of the substratum of the appeal has not been given up on exerts. All these facts are what the court would have used to assess what substantial loss, the applicant was likely to lose and would cause her appeal to be rendered nugatory.
 19. Additionally, the applicant has not offered any security for the due realization of the decree should the appeal not succeed. The last issue the court has to consider is whether it is in the interest of justice to preserve the status quo pending the hearing of the appeal. The court notes that what the respondent had alleged at the lower court was encroachment and removal of her fence by the appellant, whose entry to the land was permissive from her late husband.



20. A report from the physical planner or county land surveyor was not availed before the trial court. The applicant has not attached copies of such reports on top of her ownership documents to show justification for being on the disputed land. Be that as it may, I find that it would be in the interest of justice to maintain the status quo obtaining on the disputed land until the appeal is heard and determined for the avoidance of doubt, there shall be no permanent developments, disposal of the plot, or utilization of the same by any party for a period of one year.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 31st DAY OF JULY, 2024**

In presence of

C.A Kananu/Mukami

Heyi for the appellant

HON. C K NZILI

JUDGE

