



**Suheil & another v Kadenge & 9 others (Environment & Land Case 36 of 2019) [2024] KEELC 5591 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5591 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 36 OF 2019  
FM NJOROGE, J  
JULY 31, 2024**

**BETWEEN**

**AHMED SUHEIL ..... 1<sup>ST</sup> PLAINTIFF**

**MOHAMED MAHFUDHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KAHINDI CHENGO KADENGE ..... 1<sup>ST</sup> DEFENDANT**

**CHARO KADHENGI ..... 2<sup>ND</sup> DEFENDANT**

**CHRISTOPHER KENGA MUTOI ..... 3<sup>RD</sup> DEFENDANT**

**SAMSON KAINGU KADHENGI ..... 4<sup>TH</sup> DEFENDANT**

**DAVID KAINGU KADENGE ..... 5<sup>TH</sup> DEFENDANT**

**KAINGU KADHENGI ..... 6<sup>TH</sup> DEFENDANT**

**SHUKRAN CHENGO KADENGE ..... 7<sup>TH</sup> DEFENDANT**

**KAHINDI KADHENGI KAINGU ..... 8<sup>TH</sup> DEFENDANT**

**KAHINDI KENGA MUTOI ..... 9<sup>TH</sup> DEFENDANT**

**CHENGO KADENGE KAINGU ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of the Notice of Motion Application dated 16<sup>th</sup> April, 2024 filed by the defendants and is expressed to be brought under Section 1A, 3A, 63(e), of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#), Article 159(2) (d) of Constitution of Kenya 2010 which sought the following orders:



1. ....Spent;
  2. That pending the hearing and determination of this application inter partes, the Honourable Court be pleased to order a temporary stay of execution of the judgment and decree herein delivered on 27<sup>th</sup> March 2024 and all consequential orders therefrom;
  3. That pending the hearing and determination of the intended appeal the Honourable Court be pleased to stay execution of the Judgment and decree delivered herein on 27<sup>th</sup> March, 2024 and all consequential therefrom;
  4. That costs of this application be in the cause.
2. The application is premised on the following grounds: the defendants intend to file an appeal against the judgment of this court; that the proposed appeal is arguable and would be rendered nugatory unless the orders of stay of execution are issued; no stay orders were granted to the defendants in the judgment and there is a high likelihood of execution issuing against the defendants which may have the effect of leaving the defendants homeless; the application has been made timeously. The application is supported by the sworn affidavit of Samson Kaingu Kadenge, the 4<sup>th</sup> defendant in which he annexes a notice of appeal, a draft memorandum of appeal. In the affidavit, he reiterates the grounds at the foot of the application.
  3. In response to the application, the plaintiffs filed the 2<sup>nd</sup> plaintiff's replying affidavit dated 9/5/2024. The grounds the plaintiffs rely on are as follows:
    1. That the application is an abuse of the court process;
    2. The plaintiffs are not aware of any appeal lodged against the court's judgment in the present case as they have not been served with any notice of appeal;
    3. That this court can not decide on whether the intended appeal has high chances of success or not and the application ought to have been filed in the Court of Appeal;
    4. That the Plaintiffs have never enjoyed the fruits of ownership of the suit property due to the applicant's occupation.
  4. Both parties filed their submissions on the motion and I have considered those submissions in the preparation of the present ruling.

**Determination.**

5. The main issue arising from the application is whether a stay of execution pending appeal ought to issue in the present matter.
6. Stay of execution is governed by Order 42 Rule 6 of the [Civil Procedure Rules](#). Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) as follows: -

“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.”

7. Rule 6 (2) further provides: -

“No order for stay of execution shall be made under sub-rule (1) unless—

1.

“(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

2.

“(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.”

8. The principles governing an application for stay of execution are therefore as follows:

1. Whether there is an appeal in place;
2. Whether the applicant may sustain substantial loss if the orders of stay are not granted;
3. Whether the application has been brought without inordinate delay;
4. Whether security has been availed.

9. The above grounds are to be construed conjunctively and not disjunctively.

10. I have noted that the applicants filed a request for certified copies of proceedings and judgment vide a letter dated 2/4/2024. A Notice of appeal was filed in the matter on 5/4/2024. Therefore, for the purposes of Order 42 Rule 6(1) there is an appeal in place. This court in this application is not the proper forum for determination as to whether or not that notice of appeal is valid on the basis of non-service or otherwise.

11. The second issue to consider is if substantial loss would result unless the order sought is granted.

12. The applicants aver that the judgment may lead to execution against them. Evidence to support this ground ought to be in the affidavit in support of the application. I have examined the affidavit in question and I have found it wanting.

13. Other than state that the appeal may be rendered nugatory the affidavit is bare of any details as to the loss or damage that may occur if the order sought is not granted. Much as the applicants state that the court has unfettered powers that oblige it to balance between the rights of the decree holder and those of the applicants and which position is correct, evidence of substantial loss is the pivot upon which such exercise of that discretion turns; as there is no evidence of possibility of any substantial loss or damage demonstrated and I find that the instant application is fatally flawed.

14. The next issue is whether the application was presented to this court timeously. In that regard the judgment was delivered on 27/3/2024 and the present application was filed on 17/4/2024. Upon consideration, I find that there is no inordinate delay in the filing of the application. However, since the applicants have failed to establish that substantial loss may occur if the orders sought are not granted, the present application ought to fail and therefore this court needs not determine the issue of whether or not security has been or should be offered.



15. The outcome of the foregoing analysis is that the application dated 21/3/2023 lacks merit and the same is hereby dismissed with costs to the respondents.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

