



REPUBLIC OF KENYA



**Makenzi & another v Mutua & another (Environment & Land Case
E23 of 2020) [2024] KEELC 5557 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E23 OF 2020
CA OCHIENG, J
JULY 29, 2024**

BETWEEN

FIDELIS NDONYE MAKENZI 1ST PLAINTIFF

JOHN NDONYE MISI 2ND PLAINTIFF

AND

GEOFFREY MISI MUTUA 1ST DEFENDANT

MBULA MBILIKA 2ND DEFENDANT

RULING

1. What is before Court for determination is the Defendants' Notice of Motion Application dated the 9th February, 2024 brought pursuant to Order 40 Rule 1, 2, 3 and 4 and Order 42 Rule 6 of the [Civil Procedure Rules](#) as well as Sections 1A, 1B and 3A of the [Civil Procedure Act](#). The Defendants' seek the following Orders:-
 - a. Spent.
 - b. Spent.
 - c. An order of stay do issue staying the enforcement/implementation of the judgement of this Honourable Court dated and delivered on 31st January, 2024, pending the hearing and determination of the Appeal herein.
 - d. An order of injunction do issue restraining the Respondents from constructing, disposing, leasing, cultivating, working on and or in any other manner interfering with land parcel No Mavoko Town Block 3/3523 and Mavoko Town Block 3/2640 Commercial Plot No 161 and 87.
 - e. Costs be provided for.



2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Geoffrey Misi Mutua where he deposes that they are aggrieved with the entire Judgment of this court dated the 31st January, 2014 and have instructed their advocate to prefer an Appeal against it. Further, they have promptly filed a Notice of Appeal and a draft Memorandum of Appeal. He contends that the instant Application has been brought without inordinate delay. He reiterates that it is imperative to grant the order sought because as it stands the Estate of the deceased stands to lose over 60 acres of prime land and two commercial plots which as a fact by itself is substantial loss. He avers that together with his siblings they stand to lose irreparably and would want to ventilate the Appeal before the Court of Appeal. He is ready and willing to comply with such orders as to security of costs as the Court may order. He insists that the Appeal raises pertinent legal issues which the Court of Appeal ought to put to rest. Further, that the 2nd Defendant is their stepmother who has settled on land parcel number Mavoko Town Block 3/3523 together with her family having settled thereon during the lifetime of the deceased Jonathan Mutua Misi who died on 23rd April, 1993. He argues that the allegations that the 2nd Plaintiff is in occupation of the suit land is false and misleading. He claims the 1st Plaintiff only encroached on the suit land upon his release from prison and has not settled thereon as he alleges. He reaffirms that the Appeal challenges the finding of the trial court on existence of trust whereas evidence available, points to the contrary.
3. The Plaintiffs opposed the instant Application by filing a Replying Affidavit sworn by the 2nd Plaintiff John Ndonge Misi who deposes that the said Application is devoid of merit and is meant to frustrate them and ensure they do not enjoy the fruits of the Judgment being sharing of the family properties, that are held in trust for them by their deceased brother Jonathan Mutua Misi. He confirms that the 1st Plaintiff has actually been using one of the suit properties and has constructed a home where he still resides on and conducts farming activities. He insists that the Defendants' will not suffer any prejudice and irreparable loss if the orders sought herein are not issued. He reiterates that the instant Application is frivolous, vexatious, an abuse of court process, lacks merit and the same ought to be dismissed. He reaffirms that the Defendants' have not demonstrated to court what substantial loss, they stand to suffer, if the orders sought herein are not granted.
4. The Defendants filed written submissions to canvass the instant Application but the Plaintiffs failed to do so.

Analysis and Determination

5. Upon consideration of the Notice of Motion Application dated the 9th February, 2024 including the respective affidavits and Defendants'/Applicants' submissions', the only issue for determination is whether the Court should grant a stay of execution of the Judgment dated the 31st January, 2024, pending the determination of the Appeal.
6. The Applicants in their submissions reiterated their averments as per the Supporting Affidavit, confirmed having filed an Appeal and contended that they will suffer substantial loss if the orders sought are not granted. They have relied on Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* as well as the following decisions: *Butt Rent Restriction Tribunal* (1982) KLR 417 *MFI Document Solutions Ltd v Pareto Printing Works Limited* (2021) eKLR and *Jaber Mohson Ali & another v Priscilla Buit & another* Eldoret ELC No 20 of 2012.



7. I wish to highlight various legal provisions governing stay pending Appeal. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides that:-

“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.”

8. Further, Rule 5(2) (b) of the *Court of Appeal Rules (Appellate Jurisdiction Act)* provides that:-

“..... in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

9. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an issue of stay of execution pending appeal held inter alia:-

“ 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.”

10. In this instance, this Court delivered its Judgment on 31st January, 2024. The Defendants’ being dissatisfied with the whole of the said Judgment, lodged a Notice of Appeal on 2nd February, 2024. On 11th April, 2024, the Defendants’ Counsel informed Court that they had filed a substantive Appeal being No E234 of 2024. From the averments in the Supporting Affidavit, the Defendants’ have not indicated what directions the Court of Appeal has issued in respect to the substantive Appeal. I opine that since the Defendants’ have already lodged a substantive Appeal in the Court of Appeal, the instant Application for stay should have been filed in the Court of Appeal.

11. I note in the impugned Judgment sought to be stayed, this Court simply referred the distribution of the deceased Estate to the Machakos High Court where the Succession Cause is pending. It is my considered view that the Applicants’ have not demonstrated what substantial loss they stand to suffer if the orders sought herein are not granted. I opine that the Applicants have not satisfied the conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules*, on granting of stay.

12. In the circumstances, I find that the Defendants’ have failed to meet the threshold set for granting stay of execution pending Appeal and will decline to grant the said orders as sought.

13. It is against the foregoing that I find the Defendants’ Notice of Motion Application dated the 9th February, 2024 unmerited and will proceed to dismiss it with no order as to costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JULY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Musyimi holding brief for D.M. Mutinda for Plaintiffs/Respondents

No appearance for Defendants/Applicants

Court Assistant – Simon/Ashley

