



Kinyanjui & another v Nyambura & 2 others (Environment and Land Appeal 07 of 2024) [2024] KEELC 5456 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 07 OF 2024**

LN GACHERU, J

JULY 25, 2024

BETWEEN

FRANCIS D. KINYANJUI 1ST APPELLANT

JOSEPH WAIRACHU KINYANJUI 2ND APPELLANT

AND

AGNES NYAMBURA 1ST RESPONDENT

MAINA KINYANJUI 2ND RESPONDENT

MUCHINA KAMAU 3RD RESPONDENT

RULING

1. This Notice of Motion Application dated 31st January 2024, is premised on Article 159(2) (d) of the [Constitution](#), Order 42 Rule 6, Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#) and Sections 1A, 1B, 3A, 79G and 95 of the [Civil Procedure Act](#). The Appellants/Applicants sought for the following Orders; -
 1. That this Court be pleased to grant a stay of execution of the whole Judgement and decree entered and delivered on 23rd March 2022, at Kandara Principal Magistrate’s Court Case No.22 of 2028;- Francis D. Kinyanjui & Another versus Agnes Nyambura & 2 others, and all consequential orders thereto pending hearing and determination of this application.
 2. That this Court be pleased to grant a stay of execution of the whole judgment and decree entered and delivered on 23rd March 2022 at Kandara Principal Magistrate’s Court Case No.22 of 2028;- Francis D. Kinyanjui & Another versus Agnes Nyambura & 2 others and all consequential orders thereto pending hearing and determination of the Appeal.
 3. That costs of this Application be provided for.



2. The Application is premised on the grounds enumerated thereon and on the Supporting Affidavit sworn jointly by Francis D. Kinyanjui And Joseph Wairachu Kinyanjui, the Appellants/ Applicants herein, dated 31st January, 2024.
3. The Appellants/Applicants averred that they are the originators of Kandara Principal Magistrate's Court Case No.22 of 2028: Francis D. Kinyanjui & Another versus Agnes Nyambura & 2 others, through a Complaint dated 3rd January, 2018, wherein, the Court delivered a Judgment on 23rd March 2022, in favour of the Respondents.
4. Further, that they were dissatisfied with the said Judgment, but their Advocate on record omitted to apply for a stay of execution on 23rd March 2022. Further, that they applied for a stay of execution in respect of the said Judgment before the trial Court which in a decision dated 19th April 2023, granted a conditional stay of execution that was operative for a period of 45 days. that the court directed the Appellants/ Applicants to seek a further stay before the High Court.
5. The Appellants/Applicants averred that the stated 45-days period allowed by the trial Court has since lapsed, and it is necessary to protect the suit properties from interference pending the hearing of the intended appeal.
6. They further averred that they appealed against the trial Court's Judgment dated 23rd March 2022, via a Memorandum of Appeal dated 2nd October 2023, filed before this Court.
7. It is the Appellants/Applicants contention that upon visiting the Lands Office at Murang'a on 14th March, 2023, and on being presented with the Green Card in respect of land parcel number Loc. 4/Gakarara/401, they discovered that the 1st Applicant's late mother's name had been cancelled, and replaced with the name of Fredrick Kinyanjui Kimani reportedly pursuant to the decision of the trial Court dated 23rd March 2022.
8. Further, the Applicants contended that the said Fredrick Kinyanjui Kimani died in year 1994, and the Respondents have breached procedure by causing the Land Registry to register a deceased person as the owner of land parcel number LOC. 4/Gakarara/401.
9. It was the Applicants' further contention that they are apprehensive that the Respondents may effect changes in ownership on other properties that is, land parcel numbers LOC.3/Githumu/568, and LOC.4/Kaguthi/532, as they have done with land parcel number LOC. 4/Gakarara/401, thereby, rendering the intended Appeal nugatory.
10. The Applicants alleged that they are willing to provide security to safeguard the outcome of both the intended Appeal and the Judgment of the trial Court. Further, that the Respondents will not be adversely affected should the stay be granted as the stay of execution will be limited only to ensuring that the suit properties are preserved against transfer and/or disposal which would render the intended appeal nugatory.
11. The instant Application was opposed by the 3rd Respondent through the Replying Affidavit of Muchina Kamau, sworn on 15th March, 2024. He averred that this Application amounts to an abuse of the due process of the Court as the Orders sought have been overtaken by events because the execution sought to be stayed took place on 26th May, 2022.
12. The deponent annexed a copy of the Green card in respect of land parcel number LOC. 4/Gakarara/401, showing the cancellation of entry number 1 in the name of "Charity KanyI", a further cancellation of entry number 2, which is a Caution registered in favour of Fredrick Kinyanjui, both of which were replaced by entry number 3 being the registration of the Court order issued in Civil



- Case no.22 of 2018 PMC Kandara. Entry number 4 of the aforesaid Green Card shows that Fredrick Kinyanjui Kimani, was registered as the proprietor of land parcel number LOC. 4/Gakarara/401 on 26th May, 2022.
13. The 3rd Respondent alleged that the execution of the trial Court's Judgment resulting in the registration of Fredrick Kinyanjui Kimani, as the proprietor of land parcel number LOC. 4/Gakarara/401 on 26th May, 2022, was lawful as there was no stay in force at that point.
 14. Further, the 3rd Respondent stated that with regard to Plot number 52 situate at Kandara Market, the relevant Court Order was served upon the County Government of Murang'a on 1st February, 2024, as attested to by the 3rd Respondent's annexure "MK2" and the necessary transfer was subsequently effected.
 15. With respect to land parcel numbers LOC.3/Githumu/568, and LOC.4/Kaguthi/532, the 3rd Respondent contended that the trial Court in its decision dated 23rd March, 2022, did not make any declaration concerning the said parcel of land; and therefore, it was unclear what the Applicants are seeking to be stayed in respect of the same.
 16. The 3rd Respondent contended that the instant Application was brought with unreasonable delay, considering that the Judgment sought to be stayed was delivered on 23rd March, 2022.
 17. Further, it was contended that as the two properties in contention have reverted to the name of the Applicants' father: Fredrick Kinyanjui Kimani (deceased), therefore, the Appellants/ Applicants are unlikely to suffer substantial loss because they now have a chance to participate in the succession proceedings in respect of the estate of their late father.
 18. The Application was canvassed by way of written submissions.
 19. The Appellants/Applicants filed their written submissions on 5th April 2024, through the Law Firm of Daniel Henry & Co. Advocates, and reiterated the averments contained in the Supporting Affidavit sworn jointly by the Appellants/ Applicants dated 31st January, 2024.
 20. Further, the Applicants submitted that following delivery of the decision of the trial Court dated 23rd March 2022, they made a change of Advocates, and sought for stay of execution and leave to file Appeal out of time before the trial Court. That they were granted a conditional stay of execution on 19th April, 2023, to subsist for 45 days.
 21. Further, that they filed a Miscellaneous Application dated 9th May, 2023, before the High Court seeking stay of execution for the reason that the 45- days-conditional stay granted by the trial Court was about to lapse.
 22. They contended that the High Court thereupon issued directions that it could not allow an application for stay under a miscellaneous file, and allowed the Applicants leave to file an Appeal out of time following which an application for stay of execution would be pursued.
 23. The Applicants contended that they were desirous of filing the Record of Appeal, but they discovered that the relevant Decree was not available. They also submitted that they began to follow up on the missing Decree, which was issued on 22nd September 2023, consequent to which they filed their Record of Appeal on 2nd October, 2023.
 24. The Appellants/Applicants' further submitted that between the lapse of the 45 -days period granted by the trial Court and the filing of the Record of Appeal on 2nd October, 2023, the Respondents took advantage of the lacuna and began transferring the properties in question hence the instant Application



25. Further, the Appellants/Applicants identified a single issue for determination, being; whether the instant Application is merited.
26. The Appellants/Applicants relied on the cases of *Rhoda Mukuma v John Abuonga* [1988] eKLR; and, *James Wangalwa & Another versus Agnes Naliaka Chesoni* [2012] eKLR, on the parameters that an Applicant seeking a stay of execution pending Appeal must meet.
27. On the question of “substantial loss”, reliance was placed in the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR. The Applicants submitted that in the event that the stay of execution sought is not granted, the ownership of the parcels of land in dispute will change hands thereby, doing away with the subject matter of the intended appeal.
28. The Applicants also submitted that the suit properties were registered in the name of the Applicants’ mother (now deceased), therefore, the same should devolve to her estate, and if the stay sought is not granted, her estate will be disenfranchised because the Respondents will not be in a position to reimburse the Applicants and other beneficiaries of the deceased’s estate if the intended Appeal is allowed. Further, that the said loss if visited upon the Applicants cannot be mitigated by costs in damages.
29. Concerning the arguability of the intended Appeal, the Applicants relied on the case of *Bernard Thiga v Peter Kibiu Ng’ang’a & Another* [2020] eKLR, in support of the proposition that an arguable appeal is not one which must succeed, but one which is not frivolous.
30. Further they relied on the case of *Dennis Mogambi Mang’are v Attorney-General & 3 others* [2013] eKLR, to anchor the argument that the arguability of an appeal is not assessed on its possible success or lack thereof, but on whether the Appeal in question raises points of law. It was submitted that the initial Memorandum of Appeal, which was filed as Miscellaneous file in year 2022, and the current Record of Appeal and Memorandum of Appeal, do raise questions of law.
31. Regarding the issue of inordinate delay, it was submitted that this Application is a consequence of the lapse of the 45-days stay granted by the trial Court, and that they approached the High Court on 9th May, 2023, seeking an extension of the stay granted by the trial Court.
32. Further that the trial Court’s file was misplaced and the Decree sought to be appealed against could not be located until 22nd September 2023, when it was issued. That the delay in question was beyond the Applicants’ control and they urged the Court to find that they have provided sufficient reasons in explanation for the delay and relied on the decision of the Court in the case of *Ibrahim Mohamed Leo & Another v Hussein Mohamed Leo & 4 others* [2020] eKLR.
33. On the issue of security, the Applicants cited the holding of the Court in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, to buttress the argument that it is a requirement that an Appellant/Applicant should offer security in the event of a stay of execution.
34. The Respondents filed written submissions dated 30th April, 2024, through the Law Firm of C.W. Macharia & Associates Advocates., and submitted that the decision of the trial Court dated 23rd March, 2022, affected two properties namely: land parcel no. LOC.4/gakarara/401, and Plot. No. 52, to the exclusion of any other property.
35. Further, that the Respondents proceeded to register the decision of the trial Court dated 23rd March, 2022, at the Lands office in respect of land parcel no. LOC.4/Gakarara/401, which was registered on 26th May, 2022, as entry number 3 on the Green Card thereof.



36. The Respondents also submitted that there was no stay order in place as at 26th May, 2022, preventing the registration of the orders issued by the trial Court on 23rd March, 2022.
37. It was the Respondents' further submission that the Applicants went to slumber following the trial Court's Judgment dated 23rd March, 2022, and only applied for a stay of execution on 19th April, 2023, which Application was heard in chambers, and the Court granted the Applicants a 45-days stay of execution.
38. That in the proceedings leading to the High Court's decision dated 19th April, 2023, the Applicants failed to disclose to the Court that the trial Court's decision had already been implemented.
39. The Respondents identified two issues for resolution by the Court as follows:
 - a. Have orders for stay of execution been overtaken by events?
 - b. Will substantial loss be suffered by the Applicants if the stay is denied?
40. The Respondents submitted that the title of the two properties in contention have been cancelled, and the title reverted to the name of Fredrick Kinyanjui Kimani I (deceased), the father to the parties' herein; Therefore, this Application has been overtaken by events.
41. Further that the Applicants have failed to establish that they stand to suffer substantial loss if the Application for stay of execution is not allowed. The Respondents cited the decision of the Court in the case of *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR to bolster the proposition that it is not enough for Applicants seeking a stay of execution to say that they reside on the suit land and stand to suffer substantial loss, but they need to go further and demonstrate the substantial loss that will be visited upon them if the Decree in question is executed.
42. Having considered the instant Notice of Motion, the rival written submissions, and the relevant provisions of law, the court finds the issues for determination are:
 - I. Whether the orders sought in the instant Application have been overtaken by events?
 - II. Whether the Applicants are entitled to the Orders sought?
 - III. Who shall bear the costs of the Application?

I). Whether the orders sought in the Application have been overtaken by events?

43. Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* provides as follows:
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred may apply to the appellate court to have such order set aside.
 2. 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.”

44. In the case of *Selestica Limited v Gold Rock Development Ltd* [2015], the Court held as follows:

“On the issue of whether stay of execution pending appeal should be granted or the same has been overtaken by events, the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

45. Further, in the case of *James Wangalwa & Anor v Agnes Naliaka* [2012], the Court stated that;

“No doubt, in law, the fact that the process of execution has been put in motion or is likely to be put in motion by itself does not amount to substantial loss...the Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party in the Appeal.”

46. Again in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court declared inter alia that:

- a. The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal
- b. The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”

47. In the case of *M/S Portreitz Maternity v James Karanga Kabia* Civil Appeal No. 63 of 1997 the Court held that:

“That right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right...”

48. Citing the decision in *Antoine Ndiaye v African Virtual University* [2015] eKLR, the Court in the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR declared as follows:

“... an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given”.

49. Further, the Court of Appeal in *Absalom Dova v. Tarbo Transporters* [2013] eKLR, reasoned as follows:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition



that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

50. The Applicants contended that it amounts to a breach of procedure to bestow ownership of land upon a dead person. However, this Court does not subscribe to the said position. In the case of *Njoki v Pussy* (Environment and Land Appeal E006 of 2022) [2023] KEELC 945 (KLR) (16 February 2023) (Judgment), the Court interpreted the meaning and import of Section 45 of the *Law of Succession Act* has follows:

“Section 45 prohibits any person from taking possession or disposing of, or otherwise intermeddling with the free property of a deceased person except where it is authorised by law or by a grant of representation under that Act. A person who contravenes that provision is guilty of an offence besides being answerable to the rightful executor to the extent of the assets which he has intermeddled with.”

51. It is the finding and holding of this Court that there is nothing un-procedural or illegal for a Court of law to declare a deceased person the rightful owner of a parcel of land or any other asset. Where a deceased person is declared the owner of a parcel of land, the meaning and import of the said declaration is to vest the property in question to the estate of the deceased for subsequent distribution to the deceased’s beneficiaries.
52. The Court has perused, reviewed and critically considered the pleadings, evidence and rival written submissions of the parties herein. The Court too has considered the copy of the Green Card in respect of land parcel no. LOC.4/Gakarara/401, annexed to the Replying Affidavit of the 3rd Respondent dated 15th March, 2024. It is evident from the foregoing extract marked “MK1” that ownership of land parcel no. LOC.4/Gakarara/401, now vests in the name of Fredrick Kinyanjui Kimani (deceased).
53. Consequently, the Court holds and finds that a stay of execution cannot be allowed in respect of the same registration because it has been overtaken by events.
54. With respect to Plot no. 52, situate at Kandara Market, the 3rd Respondent in his Replying Affidavit dated 15th March, 2024, averred that on 1st February, 2024, he transmitted the Order of the trial Court dated 23rd March, 2022, to the County Government of Murang’a, as attested to by his annexure “MK2” bearing the receiving stamp and signature of the “Revenue Coordinator- Murang’a County Government-Kandara Sub-County”.
55. It was the 3rd Respondent’s claim that the ownership of Plot No. 52, has similarly reverted to Fredrick Kinyanjui Kimani (deceased). The Applicants did not controvert the 3rd Respondent’s claim to the effect that the Plot No. 52, is currently registered in the name of Fredrick Kinyanjui Kimani (deceased).
56. Without any evidence to the contrary, the Court is satisfied that the ownership of Plot No. 52, situate at Kandara Market, now vests in the deceased, name Fredrick Kinyanjui Kimani.
57. The Court is cognizant of the fact that the present dispute involves the children of the late Fredrick Kinyanjui Kimani, from his two wives. The Applicants’ primary concern in mounting the instant Application is that the Respondents will occasion changes in ownership in respect of land parcel no. LOC.4/Gakarara/401, and Plot No. 52 situate at Kandara Market.
58. However, this Court holds and finds that the registration of the aforementioned parcels of land in the name Fredrick Kinyanjui Kimani (deceased), will not occasion substantial loss to the Applicants



as they will have an opportunity to participate in the succession proceedings in respect of their late father's estate.

59. Further, the Court is satisfied that the land parcel no. LOC.4/Gakarara/401, and Plot No. 52 situate at Kandara Market cannot lawfully change hands from the name of the deceased without the Succession Court pronouncing itself in respect of the said estate. Consequently, this Court holds and finds that the Applicants' intended Appeal will not be rendered nugatory if a stay of execution is not granted.
60. With respect to land parcel numbers LOC.3/Githumu/568, and LOC.4/Kaguthi/532, the Court has perused the Judgment of the trial Court delivered on 23rd March 2022, and it is satisfied that the two parcels of land did not form part of that decision. For the avoidance of doubt, Clause (b) of the final Orders of the trial Court provides as follows:
- (b) There is no declaration with respect to LOC.3/Githumu/568, and LOC.4/Kaguthi/532".
61. Having carefully considered the instant Notice of Motion Application dated 31st January 2024, this Court finds and holds that said the Application is not merited and it is accordingly dismissed entirely. Since the suit herein involves members of the same family, the court directs each party to bear its own costs.
62. For the avoidance of doubt, any orders in place for stay of execution are hereby vacated and further the court directs that this Appeal should be heard and determined expeditiously.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 25TH DAY OF JULY 2024.

L. GACHERU

JUDGE

25/07/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

M/s Nyamu for the Appellants/Applicants

N/A for the Respondents

L. GACHERU

JUDGE

25/07/2024

