



Chege & another v Mwangi & another (Environment & Land Case E014 of 2022) [2024] KEELC 5625 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E014 OF 2022
LN GACHERU, J
JULY 24, 2024**

BETWEEN

VIRGINIAH NJERI CHEGE 1ST PLAINTIFF

SAMUEL IRUNGU CHEGE 2ND PLAINTIFF

AND

MILLICENT RUGURU MWANGI 1ST DEFENDANT

SAMSON IRUNGU MWANGI 2ND DEFENDANT

RULING

1. The Plaintiffs/Applicants brought this Notice of Motion Application dated 26th July 2023, premised under Order 40, Rules 1 to 4, Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the [Civil Procedure Act](#); and sought for the following orders:
 - a. There be a stay of execution of the decree and Judgment of this Court issued on 13th July 2023, till this application is heard and determined and thereafter till the intended Appeal is heard and determined.
 - b. The status quo existing be maintained till the intended Appeal is heard and determined.
 - c. Any other order this Court may deem fit to grant.
 - d. Costs of this application be in the [cause]”.
2. The Application is supported by the three grounds stated thereon and on the Supporting Affidavit of SAMUEL IRUNGU CHEGE, (the 2nd Plaintiff/Applicant herein), sworn on 26th July, 2023.
3. The main suit concerns the ownership of land parcel number LOC.8/KAGAA/336, wherein the Court via a Judgment delivered on 13th July 2023, determined that the said land is the property of the Defendants/Respondents.



4. It is the Plaintiffs/Applicants case that they were dissatisfied with the Judgment of this Court rendered on 13th July, 2023, whereupon they instructed their advocates to lodge an Appeal against the said Judgment, as attested to by their annexure “SIC1” which is a copy of the Notice of Appeal filed before the Court of Appeal at Nyeri dated 20th July, 2023.
5. The Plaintiffs/Applicants further averred that they applied for and made the requisite payment for typed proceedings in respect of the current suit to enable them file a Record of Appeal and annexed a copy of the receipt thereto marked “SIC2”.
6. The Plaintiffs/Applicants contended that they are apprehensive that the suit property may be alienated or disposed of before their Appeal is heard; and therefore, they are seeking a stay of execution of the Judgment of this Court dated 13th July, 2023.
7. They further contended that they have made a “huge development” on the suit land and they stand to suffer great loss unless this court grants a stay of execution as prayed.
8. It was their further contention that they stand to suffer irreparable loss as they may be evicted from the suit property where they earn their daily subsistence. That the intended Appeal will be rendered nugatory if execution proceeds, as the suit land may be alienated and/or disposed of before the Appeal is heard and determined.
9. The Plaintiffs/Applicants argued that the intended Appeal has high chance of success, and they are ready to provide security and to fulfill any condition for stay as ordered by this Court.
10. Further, that the current Application was brought without delay and the dispute over the suit land is a family matter, which has resulted in acrimony between the parties herein.
11. The Application is opposed is by the 1st and 2nd Defendants/Respondents through the Replying Affidavit of J. MWANGI BEN Advocate, sworn on 3rd August, 2023, as the Advocate having the conduct of the present matter for the Defendants/ Respondents.
12. The Deponent described the Judgment of this Court dated 13th July, 2023, as fairest, sound, reasonable and beyond reproach. Further, he contended that the Plaintiffs/Applicants have not exhibited any draft Memorandum of Appeal on record with the result that the Plaintiffs/Applicants’ prayer for stay is not hinged on an existing appeal.
13. He contended that the law is clear that neither an Appeal nor an Intended Appeal can be a legal condition for stay of execution, and that this Court was rendered functus officio upon delivery of the impugned judgment. That it would be unreasonable for the Court to issue orders which it cannot supervise. He alleged that this Application is most frivolous, misconceived and incompetent.
14. The 2nd Plaintiff/Applicant filed a Further Affidavit dated 11th March, 2024, wherein he averred that during the filing of the present Application on 26th July, 2023, he had not lodged an Appeal against the Judgment of this Court delivered on 13th July, 2023. However, he lodged an application dated 15th January, 2024, before the Court of Appeal seeking leave to appeal out of time, as attested by his annexure marked “SIC1”.
15. He urged the court to grant a stay of execution until the intended appeal is heard and determined.
16. The instant Application was canvassed by way of written submissions.
17. The 2nd Plaintiff/Applicant filed his written submissions dated 28th March, 2024, under his own hand, and submitted that he has filed an Application before the Court of Appeal in Nyeri which was recorded



as Civil Application No. E002 of 2024 Virginia Njeri Chege & Another V Millicent Ruguru Mwangi & Another. Further that there exist three (3) principles governing the grant of stay of execution as follows:

- a. That substantial loss may result to the applicant unless the order is made.
- b. That the Application be brought without unreasonable delay.
- 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.”

18. Further, he submitted that the Plaintiffs/Applicants are apprehensive that the Respondents are likely to execute Judgment at any time; and, in view of the fact that the Applicants have settled on the suit property, to allow execution of the Judgment will result in the eviction of the Applicants from the suit land thereby, putting the Applicants in a precarious position as it would mean loss of control over the subject land registered in the name of the grandfather to both the Applicants and the Respondents, which registration means that the parties herein have an equal interest in the suit land.
19. They further submitted that there is a possibility that the substratum of the Appeal could be removed from the sphere of this Court to their detriment, unless the Court grants a stay of execution of the Judgment delivered on 13th July, 2023, as there would be nothing barring the Respondents from disposing off the suit property.
20. Reliance was placed on the case of *African Safari Club Vs Safe Rentals Ltd, CA at Nairobi Civil Appl. No. 53 of 2010*, to support the proposition that the Overriding Principles which was introduced in the amendments to the *Civil Procedure Act* and the *Appellate Jurisdiction Act* in 2009, have resulted in modification of the principles governing the granting of a stay of execution.
21. Further that the current Application was brought without unreasonable delay, having been filed on 27th July, 2023, which is fourteen (14) days after the delivery of the Judgment in question.
22. The 2nd Plaintiff/Applicant expressed regret and apologized to the Court for being unable to attend Court on 26th September, 2023, when his application was scheduled for hearing and consequently dismissed for non-attendance and later reinstated by the Court.
23. Further reliance was placed on the decision of the Court in the case of Mwaura Karuga T/A Limit Enterprises V Kenya Bus Services Ltd & 4 Others, on the question of the security which an applicant seeking a stay of execution needs to provide. He submitted that such security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant.
24. The Defendants/Respondents filed their written submissions dated 12th April, 2024, through the Law Firm of KIRUBI, MWANGI BEN & CO. ADVOCATES, and submitted that the instant Application seeks two (2) substantive prayers namely a stay order to the Judgment and decree of this Court as delivered in the matter pending appeal and a prayer seeking the maintenance of status quo.
25. The Defendants/Respondents submitted that it was unclear what exactly the Plaintiffs/Applicants meant by status quo as their Application does not disclose what the status quo in existence was at the filing of the instant Application.
26. It was Defendants/Respondents’ further submissions that the status quo on the ground is that the suit property is currently under their possession as they are in occupation of the same. Further, that the suit property is registered in the name of MWANGI SAMSON alias STEPHEN MWANGI KAMARA (deceased), who is husband to the 1st Respondent and father to the 2nd Respondent.



27. The Respondents reiterated that the Court was rendered functus officio, courtesy of the Judgment dated 13th July, 2023, and therefore, the court is not in a position to supervise any post-Judgment orders. Further, that the Court of Appeal is the most appropriate forum to grant the orders sought by the Applicants in the present Application.
28. The Respondents also submitted that as the Applicants had sought a declaration vide prayer (a) of their Complaint dated 24th May 2022, and a declaration is neither a positive order requiring the Respondents to partake any particular action nor a negative order restraining the Respondents from doing any act, and therefore, an order of stay is not legally available and is misconceived when sought in the context of declaratory reliefs.
29. Further, that the proceedings in Murang'a Chief Magistrate's Court Succession Cause no. E151 of 2022 (Estate of Stephen Mwangi Kamara), were stayed pending determination of the suit, which culminated in the Judgment of this Court dated 13th July, 2023. They argued that the foregoing suit has proceeded consequent to the said Judgment being issued, and an order has been issued requiring the Applicants to stop encroaching, trespassing or erecting any structures on the suit property.
30. The Respondents had annexed a copy of the said order dated 25th January 2024, and it was their submission that the present Application is a feeble, illegal and irregular attempt by the Applicants to derail and/or frustrate the hearing of Murang'a CMC Succession Cause No. E151 of 2022 (Estate of Stephen Mwangi Kamara). That this Application amounts to an attempt to circumvent the aforesaid order dated 25th January 2024.
31. The above being the Pleadings, annexures thereto and the rival written submissions, this court finds the issues for determination are: -
 - i. Whether this Court is functus officio in regard to the instant Application?
 - ii. Whether the Plaintiffs/Applicants are entitled to the Orders sought?

i. Whether this Court is functus officio in regard to the instant Application?

32. The Supreme Court of Kenya when expounding on the doctrine of functus officio in the Election Petitions Nos. 3, 4 & 5 Raila Odinga & others vs. IEBC & others [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in the following words-

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."
33. In the case of Jersey Evening Post Limited Vs Al Thani (2002) JLR, which case was cited by the Supreme Court of Kenya, in the case of Raila Odinga & 2 Others Vs Independent Electoral and Boundaries Commission & 3 Others 2013 eKLR, the Court held as follows: -

"...A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties.



Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available...”

34. In the case of *Telkom Kenya Limited Vs John Ochanda* (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) 2014 eKLR, the Court of Appeal observed as follows: -

“...Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century...”

35. Further, in the case of *Dickson Muricho Muriuki Vs Timothy Kangondu Muriuki & 6 Others* [2013] eKLR, the Court of Appeal declined to stay execution in the matter that it had determined with finality and held as follows:

“20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan courts is that there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts....

It is our considered view that subject to the Court of Appeal’s jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court; and only when leave or certification has been granted. The upshot of the foregoing is that we find that the application in the Notice of Motion under certificate of urgency dated 31st July, 2013 lacks merit and is hereby dismissed with costs to the respondents.”

36. It is trite law that the principles guiding the grant of Stay of execution pending appeal, are well settled. They are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 as follows;

“No order for stay of execution shall be made under sub rule (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.”

37. The instant Notice of Motion Applicant is premised inter alia on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which provides that:

- “(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 preferred 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”.

38. In the case of *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR, the Court declared as follows:

“It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein. It is my finding that the trial Court misdirected itself when it went ahead to hear the application on whether or not it had jurisdiction to entertain the suit which it had already rendered its judgment on. It is evident that the trial Court sat on an appeal of its own decision, a practice that is frowned upon by the law and is meant to be barred by the doctrine of *functus officio*”.

39. In the case of *Mombasa Bricks & Tiles Ltd & 5 Others vs. Arvind Shah & 7 Others* [2018] eKLR, the Court understood the doctrine of *functus officio* as follows:

“I understand the doctrine, like its sister, the *res judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court



delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.”

40. Further, in the case of *Osmond & 2 others (Suing as Administrators of the Estate of Keith Howard Osmond) v Banita Sisal Estates Limited (Civil Suit 77 of 2020)* [2024] KEHC 821 (KLR) (Civ) (31 January 2024) (Ruling), the Court declared as follows:

“under Order 42 of the CPR the Court is empowered to stay execution, including the recovery of costs arising from such judgment that is the subject of an appeal. The motion before the court does not invite this court to reconsider any aspects of its judgment beyond the staying of recovery of resultant costs granted therein. In the circumstances, the Respondent’s plea of *functus officio*, holds no water.

41. Furthermore, the Court in the case of *Chembe Katana Changi v Ministry of Lands & Settlement & 4 others* [2014] eKLR, held as follows:

“The law however allows the trial court to stay its Judgment pending appeal if it is satisfied that substantial loss may result to the Applicant unless the order is made and if the Application has been made without unreasonable delay. The Applicant is also supposed to offer security as the court may order for the due performance of such a decree”.

42. The Court has perused and critically considered the pleadings and rival written submissions of the parties. The Court is satisfied that the Applicants are not seeking for a merit-based decisional engagement in this Application. For the avoidance of doubt, the Applicants are seeking for a stay of execution of the judgment issued by this Court on 13th July, 2023, and for status quo to be maintained pending determination of the pending Appeal. Therefore, the Court finds and holds that it is not *functus officio* with respect to the present Application.

ii. Are the Plaintiffs/Applicants entitled to the reliefs sought?

43. In the case of *Chris Munga N. Bichage V Richard Nyagaka Tongi & 2 Others* [2013] eKLR, the Court set out the principles to be considered in an application for stay of execution as follows:

“...The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his Appeal or intended Appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the Appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

44. Further, in the case of *Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat*(2013) eKLR, the court stated 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 ...”



45. It is trite that the Courts retain residual powers to render justice in every case before them under Section 3A of the *Civil Procedure Act*. In the case of *Murtaza Hassan & Another v Ahmed Slad Kulmiye* [2020] eKLR, the Court cited Halsbury's Law of England, 4th Edition Volume 37 Paragraph 14, while addressing the inherent/residual powers of the Court:

“Is a virile and viable doctrine and has been defined as being the reserve or found powers, a residual source of powers which the court may draw upon as necessarily whenever, it is just or equitable to do so, in particular to ensure observance of due process of Law, to do justice between the parties and secure a fair trial between them.”

“As to the construction of Order 10 Rule 11 of the Civil Procedure Rules, where Judgment has been entered under this order the court may set aside it vary such Judgment and any consequential decree or order upon such terms as are just.”

46. The case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410, determined that the cornerstone consideration in a motion to stay execution is whether the applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. In the said case, the Court laid out the following three principles:

“(i) In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

(ii) In an application for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

(iii) In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

47. In the Plaintiffs/ Applicants suit, which was dismissed by this Court vide the Judgment dated 13th July, 2023, and resultant Decree issued on 19th September 2023, the Plaintiffs/Applicants had sought for the following orders:

A. A declaration that MWANGI SAMSON Alias SAMSON KAMARA MWANGI is the registered owner of land parcel number LOC.8/KAGAA/336.

B. Costs of the suit.

C. Interests of (a) and (b) at Court rates.

D. Any other or better relief this Court may deem fit to grant.

48. The Respondents argued and submitted that the orders which the Applicants are seeking to be stayed by the Court are neither positive nor negative orders, but are declaratory orders which, by nature, are not capable of forming the subject of an order for stay of execution.

49. In the case of *Unvendo Olinqo v Salim Chetechi Makokha & another* [2019] eKLR, the Court held as follows:

“We have carefully perused the record and submissions by counsel and the issue for our determination is whether the applicant has satisfied the laid down principles for grant of stay



of execution pending appeal. However, before we venture into those principles, we must first address the issue as to whether a negative court order is capable of being stayed. The applicant moved the ELC court seeking a declaration that he was the proprietor of the suit land. His claim was dismissed. The court did not order either party to do anything. It simply dismissed the appellant's case with costs. In the case of *George Ole Sangui v Kedong Ranch Limited CA NAI 55 OF 2015*, this Court while determining an application under Rule 5(2) (b) of this Court's rules which sought to stay an order of dismissal framed the issues for determination as follows:

"Has the applicant shown that (1) the appeal is arguable; (2) that the appeal if it succeeds will be rendered nugatory if stay is not granted; (3) that an order for dismissal of the suit can be stayed In considering these issues, we propose to deal with the last issue because the success or otherwise of the application reposes on it Can an order dismissing a suit be stayed under rule 5(2) (b)" If the answer is in the negative, that will dispose of the application. If it is in the affirmative, a consideration shall ensue of the twin principles regarding the arguability of the appeal and the nugatory effect of the appeal if it succeeds and stay is not granted. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted".

50. Further, in the case of *Kaushik Panchamatia & 3 others vs Prime Bank Limited & another* [2020] eKLR, the court held as follows:

"That a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants."

51. Moreover, in the case of *Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others* [2015] eKLR, the Court declared follows;

"The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court."

52. Further, the Court of Appeal in *Johana Nyokwonyo Buti v Walter Rasugu Omariba & 2 Others* [2011] eKLR, held thus:

"A declaration/declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force, that is, it does not require anyone to do anything."



53. In the Judgment of this court delivered on 13th July, 2023, the Court found and held that the Plaintiffs/Applicants failed to prove their case on a balance of probabilities in the Decree dated 19th September, 2023, this Court issued the following Order:

“ 1. . THAT the suit be and is hereby dismissed with an order that each party bear its own costs”.

54. Therefore, the Judgment of this Court dated 13th July, 2023, only dismissed the Plaintiffs/Applicants' suit. Therefore, it is inconsequential whether the said Judgment is stayed or not because the Judgment did not grant any directions to the Defendants/Respondents herein.

55. Having analyzed the instant Notice of Motion Application dated 26th July 2023, and the various decided cases on the issue of stay of execution, and where there are negative orders issued by the court, this court finds the instant Notice of Motion Application dated 26th July, 2023, brought by the Plaintiffs/applicants is not merited.

56. Consequently, said Application is hereby dismissed entirely with costs to the Respondents.

It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF JULY, 2024

L. GACHERU

JUDGE

24/07/2024

Delivered online in the presence of:

Absent - 1st Plaintiff/Applicant

Absent - 2nd Plaintiff/Applicant

1 }
1st Defendant/Respondent

Mwangi Ben for the

2nd Defendant/Respondent

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

24/07/2024

