



**Matisi v Opolu & 2 others (Land Case Appeal E013 of 2023)  
[2024] KEELC 5570 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5570 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
LAND CASE APPEAL E013 OF 2023**

**SM KIBUNJA, J  
JULY 24, 2024**

**BETWEEN**

**JOHN MATISI ..... APPLICANT**

**AND**

**CHARLES OPULU ..... 1<sup>ST</sup> RESPONDENT**

**SHANZU WAYANI MULTIPURPOSES CO-OPERATIVE SOCIETY .... 2<sup>ND</sup>  
RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant filed the notice of motion dated the 18<sup>th</sup> August 2023, seeking for stay of execution of the judgement and decree dated the 7<sup>th</sup> July 2023, and all consequential orders issued in Mombasa ELC No. 78 of 2018, *Charles Opolu versus John Matisi & 2 Othes* and costs. The application is based on the ten (10) grounds on its face and supported by the affidavit of John Matisi, applicant, sworn on the 17<sup>th</sup> August 2023, in which he among others deposed that he has lodged an appeal against the lower court’s decision that was delivered on 7<sup>th</sup> July 2023, in favour of 1<sup>st</sup> respondent; that he had purchased the suit property in 2009 and had been in possession since, running Shanzu Josma Junior School, with over 300 pupils; that sometimes on the 24<sup>th</sup> March 2018, some classrooms, washrooms and other amenities were unlawfully demolished occasioning him substantial loss and damage; that on inquiry, he established that the 1<sup>st</sup> respondent, who claimed ownership of the part he believed was his pursuant to a purported sale agreement of 2012, was responsible for the destruction; that the 1<sup>st</sup> respondent then instituted the suit for vacant possession in the lower court, subject matter of this appeal.
2. The application is opposed by the 1<sup>st</sup> respondent through the replying affidavit of Charles Opolu, sworn on the 5<sup>th</sup> November 2023, inter alia deposing that the suit was heard and determined on merit and the appellant’s intentions are to deny him the fruits of his judgement; that the trial suit visited



the locus and established that the school operated by the applicant is situated on plot No. 205B, and therefore outside the disputed plot No. 173/3552, [original MN/1/2921/1]; that the applicant failed to produce the sale agreement in support of his claim and has failed to demonstrate any substantial loss; that execution has not commenced and there is nothing to stay.

3. On the 18<sup>th</sup> September 2023 and 20<sup>th</sup> February 2024, the court gave directions on filing and exchanging submissions. The learned counsel the applicant and 1<sup>st</sup> respondent filed theirs dated the 14<sup>th</sup> February 2024 and 6<sup>th</sup> March 2024 respectively, that the court has considered.

4. The following are the issues for the court's determinations:

- a. Whether the applicant has met the threshold for stay of execution order pending hearing and determination of the appeal to issue.
- b. Who pays the costs?

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by the two parties, submissions by the learned counsel, superior court's decisions cited thereon and come to the following conclusions:

- a. The applicant commenced the appeal herein over the judgement delivered on the 7<sup>th</sup> July 2023 by Hon. J. B. Kalo, CM, in Mombasa CMELC No. 78 of 2018 vide the memorandum of appeal dated the 3<sup>rd</sup> August 2023. The application subject matter of this ruling seeks for stay of execution of the judgement and decree issued by the trial court pending the hearing and determination of the appeal.
- b. Applications for stay of executions are guided by Order 42 Rule 6 of the [Civil Procedure Rules](#) that provides that:

“6(1) 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 any 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.”

From the above provision, the applicant in this application need to satisfy the court that:

- i. his application was filed without unreasonable delay;
- ii. he will suffer substantial loss if the stay order is not granted; and



- iii. he has tendered or ready to offer security for the due performance of the decree.
- a. The applicant has been using the structures on the disputed land as part of a school. He has at paragraph 12 of his replying affidavit deposed that “unless the orders sought are granted, I will suffer loss and damage which loss may extend to third parties in form of pupils whose learning will be adversely affected.” In his response, the 1<sup>st</sup> respondent deposed at paragraph 9 of the replying affidavit inter alia that “The execution proceedings have not yet commenced. The orders sought herein by the applicant are unwarranted. There is no urgency or risk of execution which make the application urgent. There is nothing for the court to stay.” That I have perused the orders issued by the trial court vide pages 10 and 11 of the judgement delivered on 7<sup>th</sup> July 2023. The orders includes eviction of the appellant from the suit property, which entails demolition and removal of the structures constructed thereon. If the order was to be executed, it would definitely mean the learning activities that may be taking place in the structures thereon would be interfered with, and this would translate to a loss not just to the appellant, but also to the affected pupils and their guardians. Indeed, that loss by its nature would be substantial.
- b. That it is not disputed that the trial court’s judgement was delivered on the 7<sup>th</sup> July 2023. The appeal herein was filed on the 4<sup>th</sup> August 2023, while the application dated the 18<sup>th</sup> August 2023, was filed on the 30<sup>th</sup> August 2023. While the applicant has not explained why the application was not filed contemporaneously with the appeal, I find the delay was not unreasonable.
- c. On the issue of security for due performance of the decree, the applicant at ground 9 of the notice of motion and paragraph 14 of the supporting affidavit undertook to “abide by any condition that this honourable court may deem just.” I take that to be sufficient expression of his preparedness to tender or offer security should the court direct him to do so.
- d. That the facts so far presented to the court show that the applicant has been in possession of the contested portion of the land in dispute from the time of filing the suit before the trial court. The respondent has waited this long before execution of the judgement of 7<sup>th</sup> July 2023, and a little more delay as the appeal is heard, and determined, will not make much difference.
- e. Having concluded that the applicant has established that his application has merit, and even though under section 27 of Civil Procedure Act chapter 21 of Laws of Kenya, costs should follow the events unless otherwise directed for good cause, I am of the view the justice of this matter demands that costs abide the outcome of the appeal.
6. In view of the above determinations, the court finds and orders as follows:
- a. That the applicant’s notice of motion dated the 18<sup>th</sup> August 2023 has merit and is allowed in terms of prayer 4.
- b. The costs abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF JULY 2024.**

S. M. Kibunja, J.

ELC Mombasa.

In The Presence of:



Applicant : Mr. Simiyu

Respondents : M/s Nduku

Leakey – Court Assistant.

S. M. Kibunja, J.

ELC Mombasa.

