



**Mutinda & another (Suing as the legal representatives of the Estate of Ndumi Mutinda - (Deceased)) v Kimotho & 2 others (Land Case Appeal E008 of 2023) [2024] KEELC 5686 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5686 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
LAND CASE APPEAL E008 OF 2023**

**LG KIMANI, J  
JULY 22, 2024**

**BETWEEN**

**MUSEE MUTINDA ..... 1<sup>ST</sup> APPELLANT  
JACKSON WAMBUA MUTINDA ..... 2<sup>ND</sup> APPELLANT  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF NDUMI  
MUTINDA - (DECEASED)**

**AND**

**FREDRICK MAKAU KIMOTHO ..... 1<sup>ST</sup> RESPONDENT  
THE DISTRICT LAND REGISTRAR, KITUI ..... 2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Appellants/Applicants filed the Notice of Motion dated 18<sup>th</sup> September 2023 seeking the following orders:
  1. Spent
  2. Spent.
  3. That this Honourable Court be pleased to issue an order for stay of execution of the Judgment delivered in CMELC No.51 of 2019-Kitui by Hon. D.W Mburu on 17/8/2023 and all consequential orders and proceedings thereto pending the hearing and determination of this Appeal.
  4. That the costs of this application be provided for.



2. The application is supported by the affidavit of the 1<sup>st</sup> Appellant/Applicant and is founded on the grounds that judgment was entered at the Chief Magistrate's Court at Kitui in CMELC No.51 of 2019-Kitui by Hon. D.W Mburu on 17<sup>th</sup> August 2023. The applicant claims that unless the orders of stay of execution are issued, the respondent will proceed and extract a decree and proceed with execution and might dispose of the suit land. If that happens the appeal herein will remain an academic exercise.
3. The 1<sup>st</sup> Applicant deposed that their late mother filed the suit in the lower court which was fully heard and judgment was delivered on 17<sup>th</sup> August 2023. Being dissatisfied with the trial court's judgement, they instructed their lawyers to file this appeal and have already applied for certified copies of the proceedings and judgment to enable the compilation of the record of appeal.
4. The 1<sup>st</sup> Applicant deposes that the 1<sup>st</sup> Respondent herein has threatened to extract a decree and proceed with execution, especially since he already has possession of the title to the suit property. Their view is that unless a stay of execution is granted, the appeal will be rendered nugatory and an academic exercise and state that the 1<sup>st</sup> Respondent will suffer no prejudice if this application is allowed.

### **The 1st Respondent's Replying Affidavit**

5. The 1<sup>st</sup> Respondent filed a replying affidavit sworn on 12<sup>th</sup> October 2023 deposing that he has been in possession and occupation of the suit property from the year 1992 when he bought the same from the appellants' deceased parents and has enjoyed quiet possession since then until 2011 when trespassers under the instructions of the appellants' mother Ndumi Mutinda (Deceased) entered onto the land but he was able to remove them from the land.
6. He further stated that there is no basis for granting orders of stay of execution since he has held title to the suit property since 1992 when it was transferred to him by the parents of the appellants.
7. Further, the 1<sup>st</sup> Respondent pointed out that the appellants have not offered to furnish security for due performance of the decree if the stay is granted. Having incurred costs in defending his rights to the suit property the 1<sup>st</sup> Respondent urged the court to dismiss the instant application with costs to him.

### **The Appellants/Applicants' Written Submissions**

8. Counsel for the Applicants submitted that the application is premised on Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* and relied on the holding in the cases of *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR and *Mbeneka v Kioko & another* (ELC appeal E014 of 2023) (2023) KEELC 19423 (KLR) (24<sup>th</sup> July 2023) (Ruling) on the criteria of issuance of stay orders.
9. The Appellant is apprehensive that the 1<sup>st</sup> Respondent has the custody of the title deed and can deal with the suit land in the manner he wishes, therefore if the stay orders are granted the appeal will be rendered nugatory and a mere academic exercise.

### **The 1st Respondent's Submissions**

10. Counsel for the 1<sup>st</sup> respondent submitted on the conditions necessary for the grant of stay of execution according to Order 42 Rule 6 of the *Civil Procedure Rules* (2010). They relied on the holding in the case of *Vishram Ravji Halai v Thornton & Turpin* (1990)KLR 265, where the court held that its jurisdiction to grant stay orders is fettered by these three conditions provided by the rules.
11. The Respondent submits that under the transfer effected in 1992 by the Appellant's parents, the 1<sup>st</sup> Respondent is the registered proprietor of the suit property and the Appellants have never used the



land. It is therefore their submission that the application is devoid of merit and they relied on the authority in the case of *Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo*[2022]eKLR where the court found that a party must explain in what way the appeal would be rendered nugatory. The 1<sup>st</sup> Respondent's position is that the Appellants have not satisfied the provisions of Order 42 rule 6(1) and (2) and therefore the application cannot prevail.

### Analysis and Determination

12. The instant application for a stay of execution is premised on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* [2010] 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.
  - (3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”
13. Therefore an application for stay of execution pending appeal must meet the above three criteria. The purpose of stay orders is to preserve the subject matter of the appeal to not render it nugatory. In the famous case of *Butt v Rent Restriction Tribunal* [1979]eKLR, the Court of Appeal set out considerations for determining whether to grant or refuse a stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
14. In the present case, the court has looked at the judgement of the trial court dated 1<sup>st</sup> August 2023. The court found as follows; "In a nutshell, I find the plaintiffs have failed to prove their cost against the defendants on a balance of probability therefore the prayers sought are not available to them. The suit is dismissed with costs to the 1<sup>st</sup> defendant.”
15. The Trial Court thus issued a dismissal order, the parties were not ordered to do anything or to refrain from doing anything. There is therefore no order on record capable of being stayed as there is no positive order that is capable of execution.



16. The Court of Appeal in the case of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR in a similar case held that:

“With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated 30th July 2020, merely dismissed the applicant’s case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus: “What is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.

Similarly, in *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus: “The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...” Consequently, the prayer for stay of execution must fall by the wayside and the same is hereby dismissed.”

17. This court is therefore unable to issue the stay of execution orders as prayed by the applicant since as there is no positive order issued by the trial court capable of execution. The instant application therefore stands dismissed with costs to the 1<sup>st</sup> Respondent.

**DELIVERED, DATED AND SIGNED AT KITUI ON THIS 22ND DAY OF JULY, 2024.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

**Ruling read in open court and virtually in the presence of-**

**J. Musyoki - Court Assistant**

**M/S Kiama for 1<sup>st</sup> Respondent**

**M/S Mbilo holding brief for Mulu for Appellants**

