



REPUBLIC OF KENYA



KENYA LAW
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**Mbithi v Ngumbi & 2 others (Environment and Land Appeal
4 of 2024) [2024] KEELC 5967 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5967 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 4 OF 2024
CA OCHIENG, J
SEPTEMBER 19, 2024**

BETWEEN

JOSEPH KIMEU MBITHI APPELLANT

AND

AUGUSTINE MUTISO NGUMBI 1ST RESPONDENT

ALEX WEKESA NABISWA 2ND RESPONDENT

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING CO-OPERATIVE
SOCIETY LTD 3RD RESPONDENT**

RULING

1. What is before Court for determination is the Appellant's Notice of Motion Application dated the 4th March, 2024 brought pursuant to Sections 3 and 3A of the *Civil Procedure Act* as well as Order 42 Rule 6 (1) of the Civil Procedure Rules. The Appellant seeks the following Orders:-
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the Appeal herein, there be a stay of execution of the Judgment delivered on 12th February, 2024 in CM ELC No. 56 of 2019 (Machakos) Joseph Kimeu Mbithi v Augustine Mutiso Ngumbi as Consolidated with ELC No. 79 of 2019 (Machakos) Alex Nabiswa Wekesa vs Joseph Kimeu Mbithi & Katelembo Athiani Muputi Farming & Ranching Cooperative Society Limited.
 4. That costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Joseph Kimeu Mbithi where he deposes that Judgment was entered against him on 12th February, 2024 in CM



ELC No. 56 of 2019 (Machakos) Joseph Kimeu Mbithi v Augustine Mutiso Ngumbi as Consolidated with ELC No. 79 of 2019 (Machakos) Alex Nabiswa Wekesa vs Joseph Kimeu Mbithi & Katelembo Athiani Muputi Farming & Ranching Cooperative Society Limited.

3. He contends that he was aggrieved with the aforementioned Judgment and filed an Appeal. He is willing to abide by any orders as to security as directed by the court. He claims the Appeal has high chances of success and will be rendered nugatory if the orders sought are not granted. Further, that he placed credible and sufficient evidence before court to prove he was the legal owner of land parcel number Machakos Town Block 3/1024.
4. He reiterates that he stands to suffer substantial loss if the stay of execution is denied as his title deed will be cancelled as per the Judgment against him. Further, neither the 1st nor 2nd Respondents are members of the 3rd Respondent (Katelembo Athiani Muputi Farming & Ranching Cooperative Society Limited).
5. The 2nd Respondent opposed the instant Application by filing a Replying Affidavit where he deposes that the said Application is baseless, scandalous, frivolous, vexatious and an abuse of the court process. He contends that the instant Application is fatally defective and an objection shall be raised to have the same struck out. Further, that it lacks supportive evidence and does not satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules. He explains that the Judgment being challenged in this Appeal was delivered in court in the presence of parties on 12th February, 2024, in his favour. Further, that the trial court arrived at the correct findings after evaluating the evidence and submissions from both sides and the Appellant's Appeal has no chances of success whatsoever. He insists that from the pleadings and Judgment, together with Agnes Nthenya Maithya, they are bona fide owners of land parcel number Machakos Town Block 3/1024 also known as Plot No. 2564 situated at Katelembo - Machakos as per the allotment slip issued to Titus Ndambuki Kitabu who sold the land to them vide a Sale Agreement dated the 12th June, 2014. He reiterates that if stay is granted, the Appellant would be allowed to continue with the acts complained of, in the lower court and he stands to suffer irreparable loss and harm since he has been utilizing the land since 2014 when he purchased it, and made serious developments thereon. He claims the Appellant has not demonstrated if the Appeal has high chances of success and the substantial loss he stands to suffer, if the stay is not granted. Further, the Appellant has not indicated the kind of security he is willing to provide as a condition for stay. He reaffirms that title deeds in respect of the property known as Machakos Town Block 3/1024 had not been processed by Katelembo Athiani Muputi Farming, Ranching and Cooperative Society Limited and as a result, he has initiated investigations to establish how the alleged title deed that the court ordered for cancellation was obtained.
6. The instant Application was canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and submissions, the only issue for determination is whether there should be a stay of execution of the Judgment in Machakos CM ELC No. 56 of 2019 pending the outcome of the Appeal.
8. The legal provisions governing stay of execution pending Appeal is contained under Order 42 Rule 6(2) of the Civil Procedure Rules that provides inter alia:-

“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.”

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. Further, in *James Wangalwa & Another Vs Agnes Naliaka Cheseto* (2012) eKLR the Court of Appeal held that:-

“ An Applicant must establish 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.”

11. From a perusal of the impugned Judgment sought to be appealed from, I note the Appellant is the registered proprietor of the suit land which is claimed by the Respondents. Further, that it is the Respondents in possession of the suit land. I opine that since the Respondents are in possession of the suit land, there is no prejudice if the Certificate of Title in the name of the Appellant is maintained until the Appeal is determined.

12. In the foregoing, while associating myself with the decisions I have cited, it is my considered view that the Appellant has demonstrated what substantial loss he stands to suffer if the stay order was declined. Further, if the title to the suit land is revoked pending Appeal, then the Appeal would be rendered nugatory. I opine that the Appellant has a Constitutional right to be heard before a Court or Tribunal in accordance with Article 50 of *the Constitution*.

13. It is against the foregoing, that I will allow the instant Notice of Motion application and direct that the Judgment in *Machakos CM ELC No. 56 of 2019 Joseph Kimeu Mbithi vs. Augustine Mutiso Ngumbi & Others* be and is hereby stayed pending the outcome of the Appeal.

14. Each party is directed to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ngolya for Appellant/Applicant



Ms. Makau for 3rd Respondent

No appearance for 1st Respondent

Ms. Muya for Kitindio for 2nd Respondent

Court Assistant – Simon/Ashley

