



Kithinji & 2 others v M'Raji (Suing as the Legal Representative of the Estate of M'Raji Mirit i alias Miriti (Deceased)); Mbae (Interested Party) (Environment and Land Appeal E012 of 2024) [2024] KEELC 7148 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E012 OF 2024
CK YANO, J
OCTOBER 30, 2024**

BETWEEN

FREDRICK KITHINJI 1ST APPELLANT

ELIPHAS MBAE 2ND APPELLANT

IAN GITONGA KITHINJI 3RD APPELLANT

AND

NKINGA M'RAJI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'RAJI
MIRIT I ALIAS MIRITI (DECEASED)**

AND

IAN KABURU MBAE INTERESTED PARTY

RULING

1. For determination is the applicant's Notice of Motion application dated 17th July, 2024 brought under Order 42 rule 6, Order 51 rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the [Civil Procedure Act](#). The Applicant is seeking for orders that:
 - i. Spent
 - ii. That the Honourable Court be pleased to issue orders of stay of execution of the judgment dated 1st July, 2024 issued in Chuka CM ELC No. 171 of 2014 and all consequential orders pending the hearing and determination of this Application.



- iii. That this Honourable Court be pleased to issue orders of Stay of Execution of the of the judgment dated 1st July, 2024 issued in Chuka CM ELC No. 171 of 2014 and all consequential orders pending the hearing and determination of this Appeal.
 - iv. That costs of this Application be provided for.
2. The application is based on the grounds thereon and is supported by the affidavit of Fredrick Kithinji, the 1st applicant and sworn on 17th July, 2024 and a supplementary Affidavit dated 27/8/2024 on his behalf and the 2nd and 3rd applicants.
 3. The Applicants state that the respondent herein filed the suit in Chuka CM ELC No. 171 of 2014 against them over allegations of fraud and forgery in the transfer of Lr. Mwimbi/murugi/810 and subsequent registration of land parcel No. 3763, 3762, 3763 and 3764. That the matter was set in motion and judgment was delivered on 1st July, 2024 in favor of the Respondent as against the applicants. The Applicants annexed a copy of the judgment marked “FK1”.
 4. The Applicants aver that an order was issued directing the land registrar Meru South to cancel registers of land parcels LR. Mwimbi/Murugi/3763, 3762, 3765 and 3764 registered in the names of Fredrick Kithinji, Eliphaz Mbae, Ian Gitonga Kithinji and Ian Kaburu Mbae respectively and reinstate M’Raiji Miriti as the original proprietor of LR. Mwimbi/Murugi/810. That being dissatisfied with the said judgment, they intend to appeal against the said judgment thus the need for stay of execution. The Applicants annexed a copy of the memorandum of appeal marked “FK2.”
 5. The Applicants state that their late father personally subdivided his parcel of land in 2010 having applied for a consent to subdivide LR. No. Mwimbi/Murugi/810 on the 26th August, 2010. The applicants annexed a copy of the application from the Land Control Board to subdivide marked “FK-3”. That the application for the Land Control Board to subdivide was approved on 29th July, 2010 by the Chairman Meru South Land Board. The Applicants attached a letter of consent dated 29th July, 2010 marked “FK-4”.
 6. The Applicants aver that a mutation form was then subsequently issued for Mwimbi/Murugi/810 subdividing the land into four portions as approved by the Land Control Board being LR. Mwimbi/Murugi/3762, 3763, 3764 and 3765 dated 27th September, 2010. The Applicants annexed the mutation form marked “FK-5”. That the deceased thereafter made an application for consent to transfer the suit properties from the Land Control Board and the letters of consent duly issued on 27th January, 2011. The applicants annexed the Land Control Board application and letters of consent for LR. Nos. Mwimbi/Murugi/3762, 3763, 3764 and 3765 marked “FK-6a-h”.
 7. The Applicants state that the deceased was alive when the said applications for consent were made and died on 11th June, 2011. The applicants annexed a copy of the death certificate marked “FK-7.” That the Applicants thereafter had the deceased and themselves appear before an advocate for execution of transfer forms for the aforementioned parcels of land which were duly executed before an advocate, one Macharia Muraguri Advocate and the transfers were duly registered and the titles issued. The applicants annexed the transfer documents for LR. Nos. Mwimbi/Murugi/3762, 3763, 3764 and 3765 marked “FK-8(a-d)”.
 8. The Applicants aver that the trial court’s only conclusion of impropriety on their part was simply because the deceased inadvertently failed to thumb print the interested parties transfer in LR. No. Mwimbi/Murugi/3764 and the alterations by pen as she asserts of the transfer forms to read “1” from “2”, which alterations in the absence of an expert analysis being produced in court could not lead to a conclusion of fraud.



9. The Applicants state that if at all the Land Registrar and the advocate executed the documents regardless of the fact that one of the transfer documents was not thumb printed, that could not vitiate the entire transfer process which had been initiated by the deceased himself in 2010. That the transfer process of land does not pertain the execution of transfer forms and issuance of title as the same commences from the Land Control Board yet the trial magistrate clearly cancelled their titles without even any evidence from the committee members who issued consent letters to both the deceased to subdivide his land and the applicants to transfer the land from the deceased.
10. The Applicants aver that the perfection of their titles was not impeached by the respondent at the trial court as only her evidence by testimony could not alter the threshold required for fraud in Civil cases which is beyond reasonable doubt, the process having been carefully followed until they obtained their titles.
11. The Applicants state that if the orders for stay are not granted the intended appeal will be rendered nugatory occasioning substantial loss to the Applicants who have extensively developed the suit properties and farmed on the same. The applicants annexed photos of their houses marked “FK -9”.
12. The Applicants aver that it is in the interest of justice and preservation of good order that the motion is allowed as prayed, adding that the appeal raises triable issues with high chances of success. That failure to grant stay orders will render the appeal nugatory.
13. The respondent opposed the application vide a replying affidavit sworn by Nkinga M’RAIJI on 30th July, 2024 and a supplementary affidavit dated 18/9/2024. In the replying affidavit, the respondent has deposed inter alia, that applicants are not before the court with clean hands particularly noting that the applicants are seeking for equitable remedies. That despite the pendency of the primary suit leading to the appeal and the instant appeal itself, the named interested party, Ian Kaburu Mbae, chased him from his house standing on LR. Mwimbi/Murugi/3764, a subdivision of LR. Mwimbi/Murugi/810 and is now forced to rent a room in a nearby market known as Katharaka.
14. The respondent stated that the 1st, 2nd and 3rd appellant/applicants are in full support of the interested party forcibly ejecting the respondent from his house and his property on LR. Mwimbi/Murugi/3764 which is in the name of the interested party.
15. The respondent contends that the application is meant to punish him by rendering him homeless and stopping him from enjoying fruits of his successful litigation which has been going on in court since 2014, a period of about 10 years.
16. The respondent avers that looking at the affidavit in support of the instant application, the applicants stand to suffer no substantial damages as required under Order 42 (6) 2 (1) and that in any event, if the judgment of the subordinate court is implemented and the suit land LR. Mwimbi/Murugi/3763, 3762, 3764 and 3765 are cancelled and reversed to LR. Mwimbi/Murugi/8190 in the name of the deceased and later the appeal succeeds, the appellants have a remedy where upon the suit lands can be re-instated.
17. The respondent states that going by the provisions of Order 42 (2) (2) the appellants have not offered any amount of money as security for costs and if the court is inclined to grant the prayers for stay as prayed, the appellants should be ordered to deposit a substantial amount of money as security for costs.
18. The respondent avers that in considering the application, the court should consider the applicants who have lost a suit and now seek for stay of execution and a respondent who has succeeded in a protracted litigation and find that the respondent’s right should equally be protected under the law. The respondent contends that issuance of stay of execution by an appellate court is not as of right,



rather there are conditions that they meet before stay of execution can be issued as provided under Order 42 rule (6) (1). That it is clear that an appeal does not operate as a stay of execution.

19. The respondent avers that M'Raiji Miriti started ailing on or around 2009 and he was personally caring for him and it is within his knowledge that his healthy status could not allow him transact any business and that it's no wonder that the application for consent and all transactions regarding land parcel LR. Mwimbi/Murugi/810 and its subdivisions were made by a surveyor by the name Kathumbi. The respondent annexed a copy of the application for presentation for registration for application for subdivision of LR. Mwimbi/Murugi/810 marked N.M 1. The respondent states that even if the applicants are given the benefit of the allegation that M'Raiji Miriti subdivided LR. Mwimbi/Murugi/810, the applicants cannot explain satisfactorily how the said M'Raiji Miriti could transact on 29th June, 2011 after his death and further that the applicants cannot explain the cancellation in the conveyancing documents. The respondent annexed a copy of death certificate of M'Raiji Miriti marked N.M 2.
20. The respondent contends that the interested party cannot explain how he obtained registration of LR. Mwimbi/Murugi/3764 without a signature or thumb print of the late M'Raiji Miriti, the original proprietor of LR. Mwimbi/Murugi/810. The respondent annexed a copy of the transfer form relating to LR. Mwimbi/Murugi/3764. That according to paper works, that is the conveyancing documents relating to parcel number LR. Mwimbi/Murugi/810, the Land Control Board Consent was granted on 29th July, 2010, but ironically at that time M'Raiji Miriti was very sick and he could not think in term of transacting any business let alone subdivision of LR. Mwimbi/Murugi/810 and transfer of resultant parcels thereto. The respondent invited the court to note that from LR 28 in relation to the application for subdivision of LR. Mwimbi/Murugi/810 was made not by the registered owner but one surveyor by the name Kathumbi. The respondent annexed a copy of RL28 marked N.M 4.
21. The respondent states that indeed a mutation form in respect of LR. Mwimbi/Murugi/810 was prepared and purported to subdivide it into 4 resultant parcels. That the applicants are not candid enough to depose that the said mutation form was registered on 29th February, 2012 when M'Raiji Miriti had passed on, on 29th June 2011, clearly showing that there must have been some fraudulent transactions relating to parcel number LR. Mwimbi/Murugi/810. The respondent annexed a copy of a mutation form marked N.M5.
22. The respondent argues that if M'Raiji Miriti died on 29th June, 2011, then all transactions relating to parcel number LR. Mwimbi/Murugi/810 and its subdivisions which the deceased was involved after his death relating to parcel number Mwimbi/Murugi/810 and its subdivisions amount to forgery and fraudulent transaction as he could not possibly execute documents that had not been generated by the time he died on 29th June, 2011. That LR. MWIMBI/MURUGI/3762, 3763, 3764 and 3765 could only be generated after the registration of the mutation form which registration took place on 29th February, 2012 and as such any allegation that M'Raiji Miriti signed any documents relating to transfer of the subdivisions of LR. Mwimbi/Murugi/810 would be unrealistic, clear fraud and forgery.
23. The respondent contends that to make matters worse, conveyancing documents relating to parcel LR. Mwimbi/Murugi/3764 do not bear the signature or thumb print of the late M'Raiji Miriti. That it is incorrect on the part of the applicants to contend that the deceased applied for the transfer of the resultant subdivisions of LR. Mwimbi/Murugi/810 when the truth of the matter is that form RL28 application for presentation for transfer of LR. Mwimbi/Murugi/3762, 3763, 3764 and 3765 were presented by one Kathumbi, the surveyor. The respondent annexed a copy of form RL28 of LR. Mwimbi/Murugi/3762, 3763, 3764 and 3765 marked N.M 6a, b and c.



24. The respondent avers that it is a clear contradiction on the part of the applicants to contend that the deceased was alive when the application to transfer was made on 11th June, 2011 when the truth of the matter is that the generation of the new numbers could only have come out after 29th June, 2012 when the mutation form was registered and that the applicants did not explain the cancellation and which were noted by the trial court where (1) is imposed on (2) in bid to fight the anomaly on dates between when the deceased died and when the transfer forms were signed. The respondent annexed copies of transfer forms of LR. Mwimbi/Murugi/3762, 3763, 3764 and 3765 clearly showing cancellation without endorsement marked N.M 7a, b and c.
25. The respondent states that an investigation carried out by the office of the DCI and which is part of the record returned a verdict that an offence of forgery had been committed in the manner in which land parcel LR. Mwimbi/Murugi/810 was subdivided and how the appellants and the interested party got registered with their respective parcels out of LR. Mwimbi/Murugi/810. The respondent annexed a copy of a report from a handwriting expert marked N. M8.
26. The respondent states further that the stamp of Macharia Muranguri advocate is alleged to have attested the signatures of the deceased and the appellants together with the interested party, but it could not have possibly been possible for the deceased to appear before the said advocate when he was dead. Further that the applicants do not explain the cancellation as to the date when Macharia Muranguri advocate may have signed and stamped the conveyancing documents.
27. The respondent avers that the trial magistrate, contrary to the deposition of the applicants in their supporting affidavit, was right in observing that there was no way that the interested party could get LR. Mwimbi/Murugi/3764 if it was never thump printed or signed by the deceased and further that the cancellation or imposition of 1 over 2 in the date of execution documents is not endorsed as to who exactly did so and particularly noting that the deceased could not transact any business after 29th June, 2011 when he passed on.
28. The respondent states that the entire process by which LR. Mwimbi/Murugi/810 was subdivided and the resultant parcels thereto transferred to the appellants and the interested party is tainted with fraud and forgery courtesy of government handwriting expert and as such the entire fraud and forgery vitiated the entire transaction and particularly noting that there is no way the deceased could have left the respondent homeless when he was caring for the said M'Raiji Miriti by transferring the entire parcels of land to the appellants and the interested party.
29. The respondent avers that the contention by the applicants that the committee that gave the consent could not make right that which was wrong and argued that the court was right to make a finding that there was forgery which necessitated cancellation of the applicants and the interested party's titles.
30. The respondent states that the applicants are completely wrong and they have missed the point by contending that proof of fraud is not the stranded of proof beyond any reasonable doubt when the correct position is proof of fraud is slightly above on the balance of probabilities but below beyond any reasonable doubt and as such his evidence was supported by the documents produced as exhibits that proved fraud to the required standard.
31. The respondent avers that the applicants have not demonstrated the substantial loss that they stand to suffer if stay of execution is not granted. That mere cultivation of the land is not substantial loss. The respondent avers that she is the daughter of the late M'Raiji Miriti and has been cultivating tea bushes and keeping dairy cow on the land before the interested party in cahoots with the applicants chased her from her home which is situated on LR. Mwimbi/Murugi/3764. The respondent annexed photographs of the tea bushes and house marked N.M 9.



32. The respondent states that the applicants have not suggested that they are willing to deposit any amount with the court for security of costs which is mandatory under Order 42 rule 6 (2) of the Civil Procedure Rules.
33. The respondent avers that she is only acting as a legal representative of the late M'Raiji Miriti and there is nothing she can do with the land apart from effecting cancellation of LR. Mwimbi/Murugi/3762, 3763, 3764 and 3765 and reverse the titles to the mother title LR. Mwimbi/Murugi/810 in the name of the late M'Raiji Miriti and cannot alienate the said land in any way. That it is in the interest of justice and fairness that the application should not be allowed.
34. Pursuant to directions given by the Court, the application was canvassed by way of written submissions. The applicants filed submissions dated 28th August, 2024 through the firm of Mutuma & Koskei Advocates while the Respondent opted to rely on her affidavits.

Analysis And Determination

35. I have considered the application, the affidavits in support and against. I have also considered the submissions filed together with case the law cited.
36. The main issue for determination is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:
 - “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.”
 1. Further to the above, stay may only be granted for sufficient cause and the Court in deciding whether or not to grant the stay and in light of the overriding objective stipulated in Section 1A and 1B of the *Civil Procedure Act*, the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
 2. Section 1A (2) of the *Civil Procedure Act* provides that “The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under Section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
 3. Therefore, 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. See Antoine Ndiaye Vs. African Virtual university [2015] eKLR.

4. As to what substantial loss is, it was observed in James Wangalwa & Another Vs. Agnes Naliaka Cheseto [2012] eKLR, 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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 the successful party in the appeal... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

41. In the instant case, the applicants aver that they stand to suffer substantial loss. The Applicant submitted that there is no doubt that they have sojourned on their parcels of land for almost a decade since the registration in their names. That the parcels of land have not only provided a source of livelihood but sentimental value and attachment to them. That the cancellation of the said titles of land has the effect of disorienting their lives during the pendency of the Appeal.
42. On her part, the respondent stated that the applicants have not demonstrated the loss and damage they are likely to suffer if stay of execution is granted. That even if stay of execution is not granted, the court will still be able to determine the appeal fairly and comprehensively.
43. The court, in RWW Vs. EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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 the undoubted right of appeal are safeguarded and the appeal is 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/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interest of the Appellant with those of the Respondent.”

44. In this case, the applicants submitted that if execution is set in motion and the title deeds in the name of the applicants are cancelled, then the entire substance of appeal will be rendered a nugatory and their livelihoods dangled on edge. I am persuaded by this submission.
45. I am also satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the 1st July, 2024 and the instant application filed on 17th July, 2024.
46. As to security of costs, the applicants are willing to furnish their title deeds for their land parcels as security pending finality of the appeal. I find that sufficient.



47. Taking all the above factors into account and in order not to render the appeal nugatory as well as to give effect to the overriding objective of the Civil Procedure Act, I find and hold that the applicants have fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
48. Accordingly, I hereby allow the applicants/appellants' application dated July 17, 2024. The applicants are however directed to deposit the title deeds of the suit properties in their names in court within 14 days of this ruling, failure to which the stay orders granted shall lapse.
49. Considering the relationship of the parties, I order that each party bear their own costs.
50. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH OCTOBER, 2024

C.K YANO,

JUDGE

In the presence of:

Court Assistant – Kiruja

Mutuma for Appellants

No appearance for I.C Mugo for Respondent

Interested Party present in person.

