



**Ng'ang'a v Mpeketoni Planners Enterprise & 5 others (Land Case 63 of 2017) [2024] KEELC 13505 (KLR) (26 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13505 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 63 OF 2017  
FM NJOROGE, J  
NOVEMBER 26, 2024**

**BETWEEN**

**PATRICK KAMAU NG'ANG'A ..... PLAINTIFF**

**AND**

**MPEKETONI PLANNERS ENTERPRISE ..... 1<sup>ST</sup> DEFENDANT**

**SIMON MWAURA KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**SIMON GATTY ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH MACHARIA MUGO ..... 4<sup>TH</sup> DEFENDANT**

**THE COUNTY LAND SURVEYOR - LAMU COUNTY ..... 5<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR- LAMU COUNTY ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. For determination is the application dated 10<sup>th</sup> June, 2024 brought under Order 42 Rule 6 (2) of the Civil Procedure Rules and Sections 1A, 1B and 3A and 63 of the Civil Procedure Act and Article 50 and 159 of the Constitution seeking the following orders:

1. ....Spent;
2. ....Spent;
3. That the Honourable court be pleased to order a stay of execution of the judgment delivered on 29<sup>th</sup> May, 2024 in this suit and all other consequential orders emanating therefrom pending the hearing and determination of the intended appeal herein;
4. Costs.



2. The application was supported by the grounds on the face of the application and the affidavit sworn by Simon Mwaura Kariuki on even date. He deposed that the Plaintiff sold 2 ½ acres out of Title No Lamu/ Lake Kenyatta 1/780 for price of Kshs. 900,000/- which led to the subject property being subdivided into four portions. That the 1<sup>st</sup> defendant is the rightful owner of plot number Lamu/ Lake Kenyatta 1/3885 measuring 2.5 acres while parcel number Lamu/ Lake Kenyatta 1/ 3884 was transferred to the Plaintiff; that through an oral agreement with the plaintiff on 3<sup>rd</sup> June, 2011, the 1<sup>st</sup> defendant bought Lamu/ Lake Kenyatta 1/ 3884 measuring 0.75 acres for Kshs. 260,000/-; that plot number Lamu/ Lake Kenyatta 1/ 3884 was subdivided into two portions i.e. Lamu/ Lake Kenyatta 1/ 3925 and Lamu/ Lake Kenyatta 1/3926 and plot number 3926 which was transferred to his name. He contended that the plaintiff had plot number Lamu/ Lake Kenyatta 1/ 3884 was subdivided into two portions 3925 and 3926 and thereafter plot number 3926 was subdivided into two portions i.e. plot numbers 5664 and 5665; that the 1<sup>st</sup> to 4<sup>th</sup> defendants being dissatisfied with the judgment of this court filed a Notice of Appeal challenging the said judgment. He asserted that they are currently in occupation and had made developments on subject matter plot number Lamu/ Lake Kenyatta 1/ 3926, Lamu/ Lake Kenyatta 1/ 5664 and Lamu/ Kenyatta 1/ 5665; that to demolish the houses and give vacant possession to the plaintiff would cause substantial and irreparable loss and damage and affect the substratum of the appeal.
3. He also asserted that the plaintiff will not suffer any prejudice or loss if the orders are granted and further that with the cancellation of their title, they face an imminent risk of demolition of their property in the subject matter properties and it is important that the status quo be maintained pending the hearing of the application and the appeal.
4. In response to the application, the Plaintiff filed his sworn replying affidavit on 25<sup>th</sup> June, 2024. He deposed that an order for stay of execution pending appeal is granted at the discretion of the court when sufficient cause has been established by the applicants on whom the incidence of the legal burden of proof lies. He also deposed that the applicants have failed to show this court sufficient cause why the said order should be granted.
5. He asserted that the applicant has not demonstrated that they would suffer irreparable harm in any way if the order for stay of execution are not granted; that since the court found that there was no valid transfer of title from him to the applicants, no harm will be suffered if the title is cancelled and reverted back to him. He stated that there is nothing that has been presented to the court to demonstrate that the applicants would undergo any substantial and irreparable loss and damage should the orders sought not be granted.
6. According to him, the applicants are merely trying to delay and prolong the matter herein as the intended appeal has minimal chances of success, and any attempts by the applicants are aimed at delaying justice and enjoying the fruits of his judgments which has been elusive for seven years.

### **Submissions.**

7. The Appellants filed submissions dated 10<sup>th</sup> July, 2024 through the firm of Jengo Associates. On this being an application for stay pending appeal, counsel submitted that this court's jurisdiction is explained in *Tshusho Capital Kenya Limited vs Antony Mbutia Kiburi & Another* (2019) eKLR and the case of *West Kenya Sugar Co. Ltd vs Matayo Ingoshe* (2022) eKLR.
8. He submitted that the applicant has annexed the notice of appeal and letter requesting for proceedings and annexures to the supporting affidavit. He also submitted that under Order 42 Rule (6) (4) of the *Civil Procedure Rules*, the filing of the notice of appeal suffices as a sufficient ground that an appeal has been filed or the purpose of an application for stay pending appeal.



9. It was his submission that the decree issued in the matter shows that the prayers in the further amended plaint dated 9<sup>th</sup> August 2019 are different from the ones given by the court. According to him, an arguable appeal does not necessarily mean an appeal must succeed; that this was acknowledged by the Court of Appeal in *NIC Bank Limited & 2 Others vs Mombasa Water Products Limited* (2021) eKLR.
10. He also submitted that the application was filed without unreasonable delay as the Judgment in the subject matter was delivered on 29<sup>th</sup> May, 2024 and the notice of appeal was filed 30<sup>th</sup> May, 2024 and the application filed on 11<sup>th</sup> June, 2024.
11. On whether there is substantial and irreparable loss and damage, counsel submitted that the appellants herein are the ones in occupation of the suit land for over 10 years. He submitted that the Respondents seek to evict the defendants, remove their houses from the land and change registration at the lands office; that if the eviction and destruction of the defendants' property is allowed to be destroyed it will change the nature of the subject matter and undermine the appeal substantially hence undermining the appellant's right of appeal.
12. Further, he submitted that the Plaintiffs have not shown they can compensate the plaintiff in case eviction and destruction of their property happens and the appeal is successful. On this heading, he relied on the cases of *National Industrial Credit Bank vs Aquinas Francis Wasike & Another* (2006) eKLR, *Butt vs Rent Restriction Tribunal* (1979) eKLR and that of *Julius Musili Kyunga vs Kenya Commercial Bank Limited & Another* (2012) eKLR.
13. The Plaintiff on the other hand filed his submissions dated 30<sup>th</sup> September, 2024. He relied on the case of *Charles Kariuki Njuri v Francis Kimaru Rwara (Suing as Administrator of Estate of Rwara Kimaru alia Benson Rwara (Deceased))* (2020) eKLR where the court outlined the test for stay pending execution as follows.
 

“...there are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which: the court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered, the application is brought without undue delay and 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.”
14. He also submitted that the present application ought to be dismissed as it is only aimed at denying him the enjoyment of the fruit of this court's judgment. He relied on the case of *Machira t/a Machira & Co. Advocates vs East African Standard (No. 2)* (2002) KLR 63.
15. It was his submission that the 1<sup>st</sup> to 4<sup>th</sup> defendants have not demonstrated that they would suffer any substantial loss if stay is not granted. He cited the case of *Charles Wahome Gethi v Angela Wairimu Gethi* (2008) eKLR where the court examined the issue of substantial loss and arrived at a decision to dismiss the application for stay. According to him, the subdivision in issue is not registered in his name, the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants have structures on the suit land and he has a larger portion adjacent to them. In his view, where there is no danger of disposal of the suit property then stay ought not to be granted. He submitted that if stay is issued the same will prejudice him as he will continue to be deprived of his enjoyment of his land.

### **Analysis And Determination.**

16. I have carefully read through the Application, the affidavits in support and opposition, the submissions on record, the case law relied on and the provisions cited. I find only two issues for determination. These are:



- a) Whether the order for stay of execution pending appeal should issue;
  - b) Who to bear the costs of this Application?
17. The relevant law governing applications for stay of execution pending appeal is Order 42 Rule 6 1(2) of the *Civil Procedure Rules*. The Rule provides as follows:
- “(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.”
18. In *Halal & Another -vs- Thornton & Turpin [1963] Ltd* [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA) held that:
- “...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”
- In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd* (2013) as follows:
- “In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”
- These two principles go hand in hand and failure to prove one dislodges the other.”
19. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that there is an appeal in place, that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
20. On the first criterion a notice of appeal has been lodged and therefore there is an appeal in place for the purposes of this stay of execution application.
21. Regarding the second issue i.e. whether Applicants/Appellants have brought this application without unreasonable delay, the Judgement was delivered on 29<sup>th</sup> May, 2024. The Notice of Appeal was filed on 30<sup>th</sup> May 2024 and this application on 11<sup>th</sup> June, 2024. I am of the view that the application was filed timeously.



22. The third criterion is whether the Applicant has demonstrated that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In *Silverstein Vs Chesoni* (2002)1 KLR 867 it was held that:

“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”

23. The Appellants/Applicants have deposed that if the judgment is enforced, the Respondent will wrongfully and illegally evict and remove their houses from the land and change registration at the lands office; that if the eviction and destruction of the defendants’ property is allowed to be destroyed it will change the nature of the subject matter and undermine the appeal substantially hence undermining the appellant’s right of appeal.

24. It is this court’s considered view that the applicant has established substantial loss. If the judgment of this court were to be executed, it would be tantamount to eviction of the Appellants from the suit property. This court must therefore preserve the status quo to prevent the intended Appeal from being rendered nugatory.

25. The upshot of the foregoing is that this court finds that the application dated 10<sup>th</sup> June, 2024 has merit and the same is hereby allowed as prayed in prayer no 3 thereof. However, the applicant shall file and serve upon the respondents the record of appeal within 30 days of this order in default of which the stay order granted shall lapse and the plaintiff shall be at liberty to execute. The costs of the application shall abide the outcome of the appeal.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

