



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chege & 5 others v Mukuna & 4 others (Environment & Land Case  
E011 of 2023) [2024] KEELC 13458 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13458 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E011 OF 2023**

**JG KEMEI, J**

**NOVEMBER 22, 2024**

**BETWEEN**

**PETER KARANJA B CHEGE ..... 1<sup>ST</sup> PLAINTIFF**  
**SAMUEL MUGO MWANGI ..... 2<sup>ND</sup> PLAINTIFF**  
**DAMARIS KIMURI (SUING AS A PERSONAL REPRESENTATIVE OF JOSEPH  
KIMURA) ..... 3<sup>RD</sup> PLAINTIFF**  
**JANE KAMURA MATHU (SUING AS A PERSONAL REPRESENTATIVE OF  
MATHU WAIRIA) ..... 4<sup>TH</sup> PLAINTIFF**  
**JULIUS GACHAU KANYIRI ..... 5<sup>TH</sup> PLAINTIFF**  
**KENNETH MWANGI WAMBUGU (SUING AS PERSONAL REPRESENTATIVE  
OF MWANGI ELIJAH) ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**JOHNSON MAINA MUKUNA ..... 1<sup>ST</sup> DEFENDANT**  
**ERASTUS MARENJE MUKUNA ..... 2<sup>ND</sup> DEFENDANT**  
**LEAH NJERI (SUED AS PERSONAL REPRESENTATIVE OF WILSON MBOGO  
MUKUNA) ..... 3<sup>RD</sup> DEFENDANT**  
**WILSON WAIRIA MUKUNA ..... 4<sup>TH</sup> DEFENDANT**  
**HANNAH MUTHONI (SUED AS PERSONAL REPRESENTATIVE OF JOHN  
MUKUNA WAIRIA) ..... 5<sup>TH</sup> DEFENDANT**



## RULING

1. The Defendants/Applicants filed the instant application dated the 28/2/2023 seeking in the main stay of proceedings herein pending the hearing and determination of Nairobi Civil Appeal No. E715 of 2022 between the parties.
2. The application is based on the grounds annexed thereto and the Supporting Affidavit of Johnson Maina Mukuna where he deponed that the Applicants have been in occupation of land parcel Loc. 16/ NDAKAINI/402 (the suit land) way before and after the registration of Mathua Wairia on 15/5/1986. That while the Applicants were in occupation, the Respondents clandestinely caused the subdivision of the suit land into 7 parcels namely LOC16/NDAKAINI/707-713 and allocated themselves a parcel each. This action prompted the Applicants to file a suit in HCCC 81 of 1999 on 15/1/1999 to claim ownership of the suit by adverse possession. That the suit was dismissed on 17/12/2020 and being aggrieved, the Applicants filed Nbi [CA E715 of 2022](#). That the subject matter in the aforesaid appeal is the suit land herein hence the plea for stay of proceedings. He added that proceeding with this suit is contrary to the provisions of Section 6 of the [Civil Procedure Act](#) and that the current proceedings should be stayed pending the determination of appeal.
3. The application is unopposed.
4. The application was prosecuted by way of written submissions. The Applicants through the firm of Gichahi & Co. Advocates filed submissions dated 30/7/24 while the Respondent's submission by Kwengu & Co. Advocates are dated 5/9/24. I have read and considered the rival submissions.
5. The key issue for determination is whether the application is merited.
6. The gist of the Applicants' application is that the suit be stayed pending the hearing and determination of the appeal. The Respondents opposed the application in their submissions on the grounds that the Court of appeal declined to grant stay of execution and having failed to so obtain the orders the Respondents filed this application which in their view is an attempt to get the orders of stay of execution through the backdoor.
7. None of the parties presented any evidence to support the refusal of stay of execution in the Court of Appeal. The Respondents ought to have annexed orders or a ruling of the Court of appeal to that extent. None was annexed and for that reason the Court is unable to know whether indeed such orders were obtained. Absent the orders the Court will proceed to determine the application based on the material placed before it
8. The law on stay of proceedings is generally provided for in Section 6 of the [Civil Procedure Act](#) to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another Court ought to stay its proceedings in respect of such suit.
9. In the case of *Global Tours & Travel Limited Vs. Five Continents Travel Limited* [2015] eKLR where it was held that:-

“... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should



be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

10. Moreover, in the case of *William Odhiambo Ramogi & 2 Others Vs. The Honourable Attorney General & 3 Others* [2019] eKLR the Court laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited Vs. Benjamin Karuga Kibiru & Another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein Vs. Atsango Chesoni* [2002] eKLR: The Court laid down the following six principles:
  - a. First, there must be an appeal pending before the higher Court;
  - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
  - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
  - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
  - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
  - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”
11. Additionally, the Court in the case of *Kenya Wildlife Service Vs. James Mutembei* [2019] eKLR held that: -

“... Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent ...”

12. The Halsbury’s Law of England 4<sup>th</sup> Edition Vol. 37 pages 330 states that;

“The stay of proceedings is a serious, grave, and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should



not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

13. Flowing from the above jurisprudence, it is emerging that whether or not to grant an order for stay of proceedings is a discretionary judicial power. This discretionary power must be exercised judiciously and sparingly. The Court has to consider if it will be in the interests of justice to grant the same.
14. I have perused the appeal before the appellate Court and in the main the Applicants have impugned the judgment of the superior Court on grounds that they are entitled to title by way of adverse possession and seek that the said judgement be overturned and their claim of adverse possession be allowed. The contest therefore between the parties is that of ownership of land. In the event that this suit is allowed to proceed to hearing there will be a likelihood of conflicting decisions by the two suits. The parties in this suit are the same with those at the Court of Appeal; the subject matter is the same and I dare say the issues are similar being that of ownership of the suit land.
15. The Court of Appeal in the case of Stanley Kang’ethe Kinyanjui Vs. Tony Keter [2013] eKLR stated that whether or not an appeal would be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or if it is not reversible whether damages would reasonably compensate the parties aggrieved. If the Court of Appeal find for the Respondents then they will have been condemned to pay mesne profits unjustifiably and worse still they will have been evicted from the land during the pendency of the appeal.
16. The upshot of the going therefore is that this Court is persuaded that this is a ripe case for stay of the trial Court proceedings pending the determination of the Applicants’ appeal.
17. Costs shall be in the cause.
18. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

1<sup>st</sup> – 6<sup>th</sup> Plaintiffs/Respondents – Absent

Kimani HB Gichachi for 1<sup>st</sup> – 5<sup>th</sup> Defendants/Applicants

Court Assistant – Phyllis

