



**Francis & another v Katu (Environment and Land Appeal E047 of 2024)
[2024] KEELC 13318 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E047 OF 2024
A NYUKURI, J
NOVEMBER 18, 2024**

BETWEEN

KATHIMBU FRANCIS 1ST APPELLANT

MUENI FRANCIS 2ND APPELLANT

AND

JOHNSON F. KATU RESPONDENT

*(Being an appeal from the judgment of Honourable C. N. Ondieki,
Principal Magistrate, in Machakos Chief Magistrate's Court in
Machakos ELC Case No. E029 of 2021 delivered on 9th September 2024)*

RULING

Introduction

1. Before court is a notice of motion dated 16th October 2024 filed by the appellant seeking orders that pending hearing and determination of the appeal herein, there be a stay of execution of the judgment delivered on 9th September 2024. The application is supported by the affidavit sworn by the 2nd appellant, Mueni Francis on 16th October 2024. The applicants' case is that the appellants are dissatisfied with the judgment of the lower court which is why they filed the instant appeal and that if execution proceeds, they stand to suffer loss as the respondent who is the appellants' biological father will evict them from the family homestead where they were borne and bred and where the 1st appellant has a permanent house in which he resides with his family.
2. The applicants stated that their mother died in 2007 and since the 2nd applicant is not married, he is living on parcel of land No. Muvuti/Kaani/1413 which is ancestral land but currently registered in the name of their father who is the respondent. The deponent stated that if the application is not granted, the appeal will be rendered nugatory and a mere academic exercise while the same has high chances of



success. He stated that his right to human dignity under Article 28 of the Constitution will be violated if he is evicted from his parent's homestead. Further, that his economic and social rights granted in Article 43 (1) (b) of the Constitution will be breached if eviction is carried out against them.

3. He urged the court to waive the requirement for security, in view of the fact that the parties are related as father and sons. He attached a copy of the Memorandum of Appeal and judgment.
4. The court has considered the Judiciary Case Tracking System and it appears the respondent did not file a response to the application. Therefore, the application is unopposed. The applicant further filed supplementary affidavit dated 30th October 2024. He denied harassing and intimidating the respondent. He also denied evicting the respondent from the suit property. He insisted that the family house on the suit property was due to the joint effort of the respondent and their late mother. He stated that the 1st respondent's house is on both parcels Muvuti/Kaani/1413 and Muvuti/Kaani/1414, which was put up without opposition by the respondent.
5. He further stated that there is nothing that will hinder the respondent from accessing the family house. The applicant filed written submissions dated 30th October 2024 which this court has duly considered.

Analysis and determination

6. The court has carefully considered the application and submissions filed and the only issue that arise for determination is whether the appellants have met the conditions for grant of stay of execution pending appeal.
7. Order 42 Rule 6 of the Civil Procedure Rules grants this court the power to order stay of execution pending appeal where the applicant shows that the or she stands to suffer substantial loss if execution proceeds and provides security for the due performance of the decree that may ultimately be passed. Besides, an applicant seeking stay pending appeal must do so timeously without unreasonable delay.
8. It is therefore essential that an applicant demonstrates imminent substantial loss if she or she were to succeed in an application for stay pending appeal. The applicants herein state that the suit property is ancestral land and is registered in their father's name. According to them, if they are evicted, their economic and social rights under Article 43 of the Constitution and their right to dignity under Article 28 of the Constitution will be violated.
9. The court notes that while the applicants conceded that the suit property is registered in the respondent's name, they did not attempt to demonstrate their allegation that the same was ancestral land. It cannot be presumed that all land held by one's parent is ancestral land. As Section 109 of the Evidence Act places the burden of proof of an alleged fact on the person alleging existence of such fact, the applicants herein have merely alleged but not proved that the suit property is ancestral land and therefore their presence on the land has apparently no legal or equitable basis.
10. Although the applicants alleged that the 1st appellant has a house on the suit property, no evidence to that effect was presented. The 2nd applicant alleged that he lives in the family home as he is not married. It is therefore clear that the applicants failed to demonstrate having homes on the suit property, as alleged or at all, hence they failed to demonstrate imminent substantial loss. From the record, it appears to me that there is palpable animosity between the parties herein, that is between father and sons. Since the applicants are adults, the respondent although being their father, is not obligated in law to allow them occupy the suit property. Looking at the history of this matter, it is clear that the applicants and the respondent cannot as of now peacefully coexist on one property. The applicants have not suggested that the respondent has alternative land where he can stay. As the respondent is the registered proprietor of the suit property, it is clear to me that granting stay of execution will mean that



the appellants will stay on the suit property to the respondent's exclusion, which in my view would be contrary to the respondent's property rights, which he apparently currently holds as per the title document and the lower court's judgment.

11. In view of the fact that the applicants have failed to demonstrate that they will suffer substantial loss, I decline to allow the application dated 16th October 2024 which I find to be unmeritorious. In the premises, the application dated 16th October 2024 is hereby dismissed with no order as to costs.

12. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ngolya for appellants

No appearance for respondent

Court assistant – Josephine

