



Khavere v Kavuludi & 3 others; Kisia (Intended Interested Party) (Environment and Land Appeal 12 of 2022) [2024] KEELC 13387 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13387 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 12 OF 2022**

**E ASATI, J
NOVEMBER 14, 2024**

BETWEEN

CAROLINE KHAVERE APPELLANT

AND

PETER KHENDI KAVULUDI 1ST RESPONDENT

EMILLY KHAVERE 2ND RESPONDENT

FLORENCE KHAVAI 3RD RESPONDENT

HELLEN KHADI 4TH RESPONDENT

AND

JAMIN MISIGO KISIA INTENDED INTERESTED PARTY

RULING

1. This ruling is in respect of the Notice of Motion application dated 1st July 2024 brought by the applicants pursuant to the provisions of Articles 50(1) and 159(2) (d) of the Constitution of Kenya, Section 1A, 1B, 3A and Section 74 of the Civil Procedure Act, the Environment and Land Court Act and Order 42 Rule 6 of the Civil Procedure Rules 2010.

The application seeks for orders of:

- a. Stay of execution of the judgment of the honourable court delivered on 13/6/2024 together with the decree and subsequent orders arising therefrom pending hearing and final determination of the appeal to the Court of Appeal.
- b. Injunction restraining the appellant her agents, workers and /or sympathizers from transferring, cutting down trees, evicting, fencing, erecting structures and/or causing any



wastage of parcel No. Tiriki/senende/5 and the resultant parcels of L.P Tiriki/senende/106 being Tiriki/senende/1110,1111 and 1112.

- c. That the orders once issued be served upon the OCS Serem and the area Chief to ensure compliance if requested by the applicants
 - d. Costs of the application be provided for.
2. The grounds upon which the application is brought are that the applicants are apprehensive that pursuant to the judgment the appellant will be earnest to execute the decree arising therefrom and in the process dispossess or displace the applicants entirely from the land. That the applicants have instituted an appeal to the court of appeal which appeal may not be disposed of immediately. That if the order of stay sought is not granted, the appeal shall be rendered nugatory. That the applicants stand to suffer substantial loss if the appeal is finally decided in their favour after execution of the decree. That the application has been brought without undue delay, that the application is in the best interest of justice and that the applicants shall abide by the terms of the order. The application was supported by the averments in the Supporting Affidavit sworn by Peter Khendi Kavuludi on 1st July 2024.

The application was opposed vide the contents of the Replying Affidavit sworn by the appellant on 17th September 2023. It was the appellants' case that the Notice of Appeal was not endorsed by the Deputy Registrar and that the same was served out of time under the provisions of Rule 79(1) of the [Court of Appeal Rules 2022](#). That therefore there is no valid appeal. That the defective Notice of appeal cannot be the basis for grant of the orders sought.

3. The application was canvassed by way of written submissions. It was submitted on behalf of the applicant that the application before court has satisfied the provisions of order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#). That the suit lands the subject of the judgment are to the knowledge of the applicant's ancestral land and that unless the court grants stay of execution the suit lands are likely to be alienated, disposed of and sold by the appellant and that this will result to substantial loss on the part of the applicant who will be rendered homeless and landless and that the appeal namely, Kisumu Court of Appeal, Appeal No. E098 of 2024 will be rendered nugatory. Counsel relied on the case of [Jason Ngumba Kagu & 2 others Vs Intra Africa Assurance Co. Ltd](#) (2014) eKLR to support the submissions. Counsel further submitted that the applicant will abide by the terms of the honourable in regard to grant of the orders of stay of execution of the Judgment.
4. On behalf for the appellant (Respondent in the application) it was submitted that the Notice of Appeal did not comply with the provisions of Rules 77 and 79 of the [Court of Appeal Rules 2022](#). That therefore there is no competent Notice of Appeal hence no appeal pending or competent process to initiate the intended appeal Counsel urged the court to disallow the application with costs.

Counsel submitted further that the order being sought to be stayed is a negative order since the judgment merely dismissed the plaintiffs' suit in the lower court with costs, hence incapable of being stayed.

5. I have considered the application. The decision in the judgment whose execution is sought to be stayed was that the appeal was allowed, judgment of the lower court set aside and substituted with judgment dismissing the present applicants suit in the lower court and each party was ordered to bear own costs.

It is true that the said decision amounts to a negative order which is incapable of execution. As held in the authorities relied on by the Respondent herein the relief of stay of execution is not available.

On the prayer for an order of temporary injunction, under order 42 Rule 6 (6) the court has jurisdiction to grant temporary injunction pending hearing and disposal of the appeal.



6. An temporary injunction order is meant to preserve the status quo of the subject property pending an event, in this case, the appeal to the Court of Appeal. It is true that the copy of the Notice of Appeal attached to the application has nothing on it to show that it has been lodged in court. The same is not endorsed by the Deputy Registrar of the Court.

However, the court record shows that the same Notice was lodged in court on 14/6/2024 and paid for on the same date.

Under the provisions of Order 42 Rule 6 (4), for the purposes of that rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of the Court notice of appeal has been given.

7. Taking the facts of the case into account and to preserve the suit land pending hearing of the appeal an order of temporary injunction is merited.

The application is therefore hereby allowed on the terms that;

- a. An order of temporary injunction is hereby granted restraining the appellant from, selling, cutting down trees on the suit land, erecting houses on the suit land, alienating or parting with possession of the suit land pending hearing and determination of the appeal to the Court of Appeal.
- b. No order as to costs.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 14TH DAY OF NOVEMBER 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

Malanda for the Applicants.

Nabasenge for the Respondent.

