



**Makokha v Khasede & another (Environment and Land Appeal  
E021 of 2024) [2024] KEELC 7565 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7565 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E021 OF 2024  
AY KOROSS, J  
NOVEMBER 14, 2024**

**BETWEEN**

**MARGARET ADHIAMBO MAKOKHA ..... APPELLANT**

**AND**

**MARGARET HALONYERE KHASSEDE ..... 1<sup>ST</sup> RESPONDENT**

**PHILOMENA AKINYI MAKOKHA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Appellant's case**

1. The notice of motion that is the subject of this ruling is dated 22/08/2024. The appellant seeks several reliefs from this court some of which are spent and the main prayers pending determination are: -
  - a. Pending the hearing and determination of the appeal, the Hon. Court grants an order of stay of any further execution of the decree and judgment delivered on 24/06/2024 in Ukwala PM ELC No. 47 of 2018 and stay any transfer to the respondents or third party or cancellation, of the suit titles no. North/Ugenya/Ndenga 552 and 524.
  - b. That the costs of the motion abide by the outcome of the appeal.
2. The motion is predicated on grounds particularised on its face and on the appellant's affidavit that she was deposed on 22/08/2024. This affidavit has several annexures attached to it.
3. In summary, she averred that the respondents have commenced execution using unorthodox means that were contrary to the decree; she would suffer loss as before the suit was filed, she had sold portions of North/Ugenya/Ndenga 552 and 524 (suit properties) to 3<sup>rd</sup> parties and her home was on them; the appeal has chances of success and she was willing to abide with conditions of security as the court may order.



## Respondents' case

4. In rejoinder, the respondents who were self-represented filed a replying affidavit that was sworn by the 2<sup>nd</sup> respondent on 16/09/2024.
5. She averred inter alia; that the motion was an afterthought and overtaken by events as the decree has been executed, it was filed with inordinate delay, the appellant will not be prejudiced, 3<sup>rd</sup> parties could always be compensated and the motion should be dismissed. It is noted the affidavit did not have any annexures.
6. Additionally, they filed grounds of opposition dated 16/09/2024 which contained 3 grounds; the motion is unmeritorious, it has been overtaken by events and the appellant has not offered any security for costs.

## Parties' submissions

7. As directed by the court, both parties filed written submissions. The appellant's law firm on record M/s. M.A. Ochanji- Opondo & Co. Advocates filed written submissions dated 29/08/2024 in which counsel submitted on the 3 principles of stay of execution pending appeal which are undue delay, substantial loss, and security for performance of decree.
8. The respondents too filed written submissions dated 16/09/2024 and submitted on the principles of stay of execution proffered by Order 42 Rule 6 (2) of the Civil Procedure Rules.

## Issues for Determination, Analysis, and Determination

9. Having carefully considered the motion, affidavits as well as the rival submissions, and cited provisions of law and precedents, the issue for determination is whether the appellant has met the legal threshold to warrant the grant of the orders sought.
10. When dealing with applications for a stay of execution pending appeal, this court has to satisfy itself with the 3 principles enunciated in Order 42 Rule 6 (2) of the Civil Procedure Rules which provides as follows:

“No order for stay of execution shall be made under sub rule (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.”  
Emphasis added.

11. Being an appellate court and as was held in the decision of *Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004* (Nyr. 32/04), this court exercises judicious discretion and the principles were summarised thus: -

“...As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the



importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”

12. The purpose of a stay of execution is to preserve the substratum of the case so that the rights of the appellant who is exercising her undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. See Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi) cited with approval in Charles Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR.
13. Now, as to the circumstances of this case, it is undoubted this motion is filed without unreasonable delay as it was filed close to 2 months after the judgment and decree of the lower court was rendered. In addition, the appellant has left this court with the discretion to determine the nature of the security she could furnish. She has therefore satisfied 2 limbs.
14. In the instant case, the appellant contends that she would suffer substantial loss if the judgment of the lower court is executed. She contends she is in occupation of the suit properties. The respondents have not rebutted this and the court has noted that she is probably the registered owner of the suit properties as evidenced by the decree.
15. The memorandum of appeal on record raises several grounds of appeal which are arguable. Of particular interest is the ground on the nonexistence of land parcel no. North/Ugenya/Ndenga 524 which is the substance of the decree. It appears the respondents in circumventing this ground of appeal, have allegedly gazetted the cancellation of North/Ugenya/Ndenga 1468, 1469, and 1470 which are alleged to be the subdivisions thereof.
16. On scrutiny of the decree, these actions of the respondents were never sanctioned by the judgment of the trial court and I am at this point uncertain if such an order was made. Be that as it may, I find these actions will undoubtedly render the appeal nugatory.
17. The respondents are also allegedly in occupation of the suit properties and I find that the respondents will not suffer substantial prejudice if the application herein is allowed.
18. The upshot is that I find merit in this motion, and allow it. Costs shall abide by the outcome of the appeal. I hereby issue the following disposal orders: -
  - a. That stay of the execution of the judgment and decree rendered on 24/06/2024 in Ukwala PM. ELC Case no. 47 of 2018 is granted subject to the appellant depositing in court a letter of guarantee from a reputable financial institution for the amount of Kshs. 200,000/= within 30 days from the date hereof in default of which the respondents shall be at liberty to execute the decree of the trial court.
  - b. That pending the determination of the appeal, the respondents are hereby restricted from transacting on land parcel nos. North/Ugenya/Ndenga 552, 524, 1468, 1469, and 1470 or interfering with their registers.
  - c. That The appellant shall serve the record of appeal within 30 days from the date hereof.
  - d. That this matter shall be mentioned before the Deputy Registrar on 18/02/2025 to confirm compliance and issue further directions.
  - e. That the appeal is hereby admitted and the lower court record to be called for.
  - f. That costs shall abide by the outcome of the appeal.

It is so ordered.



**DELIVERED AND DATED AT SIAYA THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**14/11/2024**

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mrs. Opondo for the appellant

1<sup>st</sup> respondent

2<sup>nd</sup> respondent

Court assistant: Mr. Ishmael Orwa.

