



**Mosiany v Oloiptip & 4 others (Environment and Land Appeal E031 of 2023) [2024] KEELC 13247 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13247 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E031 OF 2023  
LC KOMINGOI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**STANLEY LOOREMETA MOSIANY ..... APPELLANT**

**AND**

**REHEMA KISININYE OLOITIPTIP ..... 1<sup>ST</sup> RESPONDENT**

**PETER MUTHAMI KINYANJUI ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**KAJIADO COUNTY GOVERNMENT ..... 5<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgement dated 30th November 2023 of the Honourable SPM P. Achieng in Ngong Senior Principal Magistrate's Court ELC No. 18 of 2018)*

**RULING**

1. This is the Amended Notice of Motion dated 29<sup>th</sup> February 2024 brought under; (Filed pursuant to leave granted to amend the application and supporting affidavit on the 12<sup>th</sup> of February 2024, Order 42 rule 6 of the Civil Procedure Rules, 2010, Section 68 (1) of the [Land Registration Act](#) and the inherent powers of the Court)
2. It seeks Orders;
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of this Appeal there be a stay of execution of the Judgement, Orders & Decree by the Honourable P. Achieng Senior Principal Magistrate



delivered on 30<sup>th</sup> November 2023 in Ngong ELC Cause No. 18 of 2018 between the parties herein.

4. That the Honourable Court do issue an order of inhibition, inhibiting the transfer, charge encumbrances and/or any other dealings whatsoever in respect to the suit property.
5. That the Appellants do have costs of this Application.
3. The grounds are on the face of the Application and are set out in paragraphs 1 to 22.
4. The Application is supported by the affidavits of Stanley Looremata Mosiany sworn on the 7<sup>th</sup> December 2023, the supplementary affidavit sworn on the 29<sup>th</sup> February 2024 and a further affidavit sworn on 21<sup>st</sup> June 2024.
5. The Application is opposed. There is a Replying Affidavit sworn by Peter Muthami Kinyanjui, the 2<sup>nd</sup> Respondent herein sworn on the 8<sup>th</sup> May 2024.
6. On the 24<sup>th</sup> April 2024, the court with the consent of the parties directed that the Notice of Motion be canvassed by written submissions.

### **The Appellant's/Applicant's Submissions.**

7. They are dated 8<sup>th</sup> May 2024 and 1<sup>st</sup> July 2024. They raise three issues for determination;
  - i. Whether the Appellant should be granted stay of execution of Judgement, orders and decree, pending Appeal.
  - ii. Whether the Appellant should be granted an inhibition order against the property.
  - iii. Who should bear the costs of this Application?
8. Counsel submitted that the Appellant currently holds title to the suit property and has a right of appeal which if infringed, gives him no option to exhaust all avenues of Appeal.

Reliance is placed on Order 42 rule 6 of the Civil Procedure Rules and the cases of Kabugua Vs. Mwatata & Another (2023) KEELC 15715 (KLR); Antoine Ndiaye Vs. African Virtual University (2015) eKLR.
9. Counsel further submitted that the Appellant will suffer substantial and irreparable loss once the decree is executed, the parcels shall be permanently altered into two separate parcels, which not only changes the suit land, but renders the appeal herein nugatory.

He has put forward the cases of James Wangalwa & Another Vs. Agnes Naliaka Cheseto (2012)eKLR; Felix Kipchoge Limo Langat Vs. Robinson Kiplagat Tuwei (2018) eKLR; Nicholas Stephen Okaka & Another Vs. Alfred Waga Wesonga (2022) eKLR.
10. It is further submitted that the Respondents' may not be in a position to compensate the Appellant should he succeed on appeal as no evidence is provided by the Respondents on the ability to refund.
11. It is also submitted that the Application has been brought without undue delay and that the Appellant is willing to deposit the title deed in court. Reliance is placed on the case of Christine Wambui Mwaura Vs. Mary Njambi L.K Githegi (2020) eKLR.
12. It is also submitted that on an order of inhibition ought to be registered against the title number Bulbul Township/21 pending the hearing and determination of the appeal. He has put forward the case of Grace Kinoru Mark Vs. Mark Muriungi Mark & 2 others (2022) eKLR.



13. Counsel also submitted that the Replying Affidavit is sworn by the 2<sup>nd</sup> Respondent, the alleged buyer who is a total stranger to the matters allocation and or sub-division affecting the suit property and thus incompetent to swear an affidavit on such matters.

He prays that the Application be allowed.

#### **The 1st and 2nd Respondents Submissions.**

14. They are dated 21<sup>st</sup> June 2024. Counsel submitted that the Appellant has not satisfied any of the conditions for grant of stay pending appeal. Reliance is placed on the Order 42 rule (6) of the Civil Procedure Rule and the case of Francis K Chabari & Another Vs. Mwarania Gaichura Kairubi (2022) eKLR; Michael Ntouthi Mitheu Vs. Abraham Kivondo Musau (2021) eKLR.
15. It is further submitted that the Appellant has not offered any appropriate security. He has put forward the cases of Arun C. Sharma Vs. Ashana Raikundalia T/a Raikundalia & Co. Advocates & 2 others (2014) eKLR;  
Mwaura Karuga t/a Limit Enterprises Vs. Kenya Bus Services Ltd & 4 Others (2015) eKLR.
16. Counsel has also submitted that the Appellant has failed to demonstrate that the Appeal is arguable and has high chances of success. That the Appellant admitted that the legal and or lawful procedure of applying to the local authority and obtaining the allotment vide the 4<sup>th</sup> Respondent was never complied with.
17. It is further submitted that before a court issues order of inhibition, it must be satisfied that the Applicant has very good grounds to warrant the issuance of such an order as was held by Olao J in the case of Dorcas Muthoni & 2 others Vs. Michael Ireri Ngari (2016) eKLR. It is on record that the Respondents are in possession of the suit property. They pray that the Application be dismissed with costs.

#### **Analysis and Determination.**

18. I have considered the Notice of Motion, the affidavits in support, and the response thereto, the rival submissions and the authorities cited. The issues for determination are;
- i. Whether the Appellant's/Applicant's application meets the threshold for grant of stay of execution pending Appeal.
  - ii. Who should bear costs of the Application?
19. Order 42 rule 6 (1) (2) of the Civil Procedure Rule provides that;
1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  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.”
20. The Court of Appeal in Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 Others (2013) eKLR as affirmed recently by the same court in Mwaura Vs. EACC & Another (2024). KECA 307 (KLR) outlined at length; “; “each case must be determined on its own facts and circumstances; that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous; and that whether or not an appeal will 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 will reasonably compensate the party aggrieved.”
21. I am satisfied that the Application herein was made without undue delay.
22. It is the Appellant’s case that he will suffer substantial loss if the decree is executed as the parcel shall be permanently atter into two separate parcels of land. I rely on the case of James Wangalwa & Another Vs. Agnes Naliaka Cheseto (2012) eKLR to find that the Appellant’s apprehension is real.
23. However this court is hesitant to grant any order of inhibition as the Respondents have always been in possession and continue to be in possession. I find that no good grounds have been given to warrant the grant of such an order.
24. In conclusion I find that the Application succeeds partly. I grant the following orders;
  - a. That there be stay of execution of the Judgement issued on 30th November 2023 pending the hearing and determination of this Appeal on Condition that the Appellant do deposit Kshs.500,000/= in a first interest earning account in the names of counsel for the Appellant and for the Respondents within forty five (45) days from the date of this ruling.

In Addition the Appellant do deposit the certificate of title in his possession with the Deputy Registrar of this court within forty five (45) days from the date of the ruling.

In Default, the orders of stay shall automatically lapse.
  - b. The costs of this Application shall be borne by the Appellant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Ms. Anam for the Appellant.

Mr. Thimba for the 1<sup>st</sup>, 2<sup>nd</sup> Respondents.

N/A for the 3<sup>rd</sup> to 5<sup>th</sup> Respondents.

Mutisya – Court Assistant.

