



**Njaria v Muraya (Suing as legal attorney of Teresia Wangui Muraya) (Environment and Land Appeal E031 of 2024) [2024] KEELC 13770 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13770 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**  
**ENVIRONMENT AND LAND APPEAL E031 OF 2024**  
**EC CHERONO, J**  
**NOVEMBER 14, 2024**

**BETWEEN**

**TERESIAH WANGUI NJARIA ..... APPELLANT**

**AND**

**ERASTUS MAINA MURAYA (SUING AS LEGAL ATTORNEY OF TERESIA WANGUI MURAYA) ..... RESPONDENT**

**RULING**

1. Before me for determination is a Notice of Motion application dated 3<sup>rd</sup> July, 2024 brought under Order 42 Rule 6(2) and Order 51 of the Civil Procedure Rules, 2010 seeking the following orders;
  - a. That this Application be certified urgent and be heard ex parte in the first instance.
  - b. That pending the hearing and determination of this application, this Hon. Court be pleased to issue stay of execution orders staying the execution of the orders issued by Hon. Tom Mark Orlando on 13<sup>th</sup> June, 2024 in Bungoma MCELC Case No.E103 of 2023, Erastus Maina Muraya v.Teresia Wangui Njaria & Another.
  - c. That pending the hearing and determination of this appeal, this Hon. Court be pleased to stay execution of the orders issued by Hon. Tom Mark Orlando on 13<sup>th</sup> June, 2024 in Bungoma MCELC Case No.E103 of 2023, Erastus Maina Muraya v.Teresia Wangui Njaria & Another.
  - d. That pending the hearing and determination of this application, further & other proceedings in the Bungoma Chief Magistrates court MCELC Case No. E103 OF 2023 Maina Muraya v.Teresia Wangui Njaria & Another be stayed.
  - e. That further & other proceedings in the Bungoma Chief Magistrates court Maina Muraya v.Teresia Wangui Njaria & Another be stayed pending the hearing and determination of the Appellants Appeal



- f. That the costs hereof be provided for.
2. The application is premised on the grounds on the face of the application supported by the affidavit of the Applicant sworn on 03/07/2024.
  3. It is the Applicants case that Hon. Tom Mark Orlando, in determining the Respondent's application dated 18/04/2024 issued orders vide a ruling dated 13/06/2024 which amounted to determining the substantive suit at an interlocutory stage. It is argued that the application dated 18/04/2024 is res judicata since the same issues were raised in a similar application dated 04/01/2024 which had been heard and determined vide a ruling dated 28/02/2024. The Applicant deposed that the Respondent acknowledged being in possession of seven title deeds belonging to Teresia Wangui Muraya which were handed over to the firm of J.W.Sichangi & Co. Advocates for the Respondents. The Applicant argued that the orders of 13/06/2024 amounted to evicting her from the suit property through the backdoor.
  4. The Applicant also contends that the matter before the trial court has been slated for pre-trial directions and the existence of the orders in place defeat the purpose of the main suit as she has been condemned unheard contrary to the rules of natural justice and Article 50 of *the Constitution* of Kenya, 2010. She stated that the ruling in question has brought into question the issue of the impartiality and independence of the court and as such, the proceedings of the said suit ought to be arrested to avoid a further miscarriage of justice. The Applicant contends that she is the registered owner of the suit lands and has been in actual possession, use and enjoyment of the same for over 20 years and now her family has been denied access to the property depriving them of their source of income.
  5. In opposition to the said application, the Respondent filed a replying affidavit sworn on 19<sup>th</sup> July, 2024 in which he laid out the relationship of the parties herein and averred that Theresia Wangui Muraya purchased land parcel no. Ndivisi/Muchi/2325 for the purpose of housing the Applicant who was taking care of her (Theresia Wangui Muraya) three children. He stated that the Respondent again through the Applicant who was her Attorney at the time purchased land parcel no. Ndivisi/Muchi/6324 and 6467 measuring 0.05ha each. The Respondent argued that the said plots were owned jointly by the parties herein and and that it was surprising for the Applicant to claim that she was the sole proprietor. The Respondent stated that the Applicant purchased a total of 10 plots in various regions of the country and in breach of the mutual trust and power of Attorney, the Applicant registered Ndivisi/Muchi/2325, 6324 and 6467 in her name. That as a result of the suit before the subordinate court, the applicant surrendered titles for the other 7 plots.
  6. He stated that it was later discovered that the Applicant had sold land parcel no. Ndivisi/Muchi/2325 to one John Murigi Kangere. He also stated that upon discovery of this, the Respondent revoked the power of attorney issued to the Applicant and instructed the Respondent herein to collect rent from the tenants. The Respondent stated that he filed a notice of motion application dated 08/01/2024 seeking a temporary injunction against the Applicant from intermeddling and disposing off the properties in dispute which application was disallowed on 28/02/2024. He stated that the applicant attempted to settle the dispute out of court by trying to facilitate the transfer of land parcel no. NDIVISI/MUCHI/6324 and 6467.
  7. He stated that thereafter, he filed a fresh application on 18/04/2024 seeking for the release of documents, title deeds to the three properties i.e. land parcel no. Ndivisi/Muchi/2325, 6324 and 6467 and a ruling was delivered on 13/06/2024 allowing the application. The Respondent urged the court to discharge the injunctive orders issued on 05/07/2024 as the Applicant obtained the same by misleading the court.



8. When the application came for directions, the parties agreed, the parties agreed to have the same canvassed by way of written submissions.
9. The applicants filed submissions on 09/08/2024 in which she submitted that the orders issued were final and determinative of all the issues raised in the plaint dated 15/09/2023 denying her a chance to be heard. She relied in the case of; Deoraj vs. State of Maharashtra & Others Civil Appeal No. 2084 of 2024, Ashok Kumar Bajpai vs. Dr.(Smt) Ranjama Baipai, AIR 2004, ALL 107, 2004(1) AWC 88. The applicants submitted that they have established the requirements of Order 42 Rule 6(1) on orders for stay of execution pending appeal. She submitted that as the legal owners of the plots in issue and having lived there, she is entitled to protection under the law. Reliance was placed in the case of; RWW vs. EKW (2019) eKLR. Re Global Tours & Travels Limited, (Nairobi High Court Winding Up cause no. 43 of 2000).
10. The Respondent filed submissions dated 29/09/2024 where she identified 7 issues for determination. In summary, it was submitted that the orders complained of are temporary in nature and meant to preserve the properties and were not final in nature as alleged. The Respondent argued that there being no final judgment in the matter, the doctrine of res judicata cannot apply. He referred to the case of; Kamunywa & Others vs. Pineer General Assurance Society Ltd(1971) EA . He argued that the requirements for the grant orders of stay had not been established as required in the case of Elena D Korir vs. Kenyatta University (2012) eKLR. In conclusion, the Respondent urged this court to dismiss the application with costs.

### **Legal Analysis And Decision**

11. I have considered the application, the replying affidavit and the written submissions filed by both parties as well as the authorities cited. In my view, the issues for determination are;
  - a. Whether this court ought to grant the applicant herein stay of proceedings pending the hearing and determination of the intended appeal.
  - b. Whether the court ought to stay the proceedings in Bungoma MCELC Case No. E103 of 2023, Erastus Maina Muraya v.Teresia Wangui Njaria & Another.
12. The principles for the grant of stay of execution pending appeal are now well settled. From decisions by the superior courts, Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule6(1) provides as follows;

“6.

- (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 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 undue 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.

13. It is clear from the provisions of the law that before granting an order of stay pending appeal, an Applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree as may ultimately be binding on him/her.

14. On whether the Applicants would suffer substantial loss, the court is guided by the pronouncements of the court in Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 and the case of Machira T/A Machira & Co Advocates –vs- East African Standard (No.2) (2002) eKLR 63. In these two decisions, the court held that an Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicants to their Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the holder to the decree/order which includes full benefits under the decree/order.

15. F. Gikonyo J stated in Geoffery Muriungi & another v John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR and which wisdom I am persuaded with; -

“...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

16. The Applicant submitted that if the orders of the Lower court as delivered are not stayed, she will suffer substantial loss as she has been in actual possession, use and enjoyment of the land in issue for over 20 years where she has been living and generating income from rent.

17. Although a copy of the Plaintiff in the suit before the subordinate court has not been availed to this court, it is clear that the subject matter of the former suit is the ownership of land parcel no. Ndivisi/Muchi/2325, 6324 and 6467. From the record, the title deeds or certificates of search for land parcel no. Ndivisi/Muchi/2325, 6324 and 6467 have not also been availed to this court. However, it is not disputed that the Applicant is the registered owner of land parcel no. Ndivisi/Muchi/ 6324 and 6467 while one John Murigi Kangere is the registered owner of land parcel no. Ndivisi/Muchi/2325. Section 26 of the *Land Registration Act* is emphatic that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land and that the same can be challenged



where the Certificate of title has been acquired fraudulently, unprocedurally or through corrupt practice. See *Elijah Makeri Nyangw vs Stephen Mungai Njuguna & another* [2103] eKLR, and *Chemei Investments Limited –vs- The Attorney General & others* Nairobi Petition No. 94 of 2005.

18. In my considered view, the issue of ownership and rights to land is one that can only be determined during full hearing and not on affidavit evidence submitted at the interlocutory stage. Since it is not contested that the Applicant is the registered owner of two of the suit properties and has been in occupation and use of the land in issue to the exclusion of the Respondent who resided in the USA and her appointed attorney who stated that he resides in Nakuru, I am inclined to find that substantial loss has been proved.
19. On whether the application has been brought without inordinate delay, it is apparent that the impugned ruling was issued on 13/06/2024 while this application was filed on 03/07/2024 which is a period of about 21 days. I therefore find that the delay was not inordinate.
20. On the 2<sup>nd</sup> issue of stay of proceedings, the law on stay of proceedings pending appeal is 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. This provision is to be considered together with the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50(2) (e) of *the Constitution* as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority.
21. In Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, 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.”
22. Being guided by the above principles and in consideration of the impugned orders where the applicant contends that he was condemned unheard and the Rules of Natural justice was flaunted, I find the applicants request justified and I proceed to allow the same with a rider.
23. Ultimately, the notice of motion application dated 03/07/2024 is hereby allowed in the following terms;
  - a. Stay of execution of the orders issued by Hon. Tom Mark Orlando on 13<sup>th</sup> June, 2024 in Bungoma CMELC No.103 of 2023 is hereby granted pending hearing and determination of this appeal.
  - b. The stay of proceedings in Bungoma CMELC No. E103 of 2023 is hereby granted for 120 days only pending the hearing and determination of this appeal.
  - c. The applicant to file and serve the record of appeal within 14 days from the date of this Ruling.
  - d. Mention on 5/12/2024 to confirm compliance and further directions on the appeal.



24. It is so ordered.

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

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of

Appellant/Advocate-absent

Respondent/Advocate-absent

Bett C/A

