



**Muramba (Suing through the power of attorney of Phoebe Nzale Kazungu) & 3 others v Kimani & another (Civil Case 219 of 2016) [2024] KEELC 7471 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7471 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL CASE 219 OF 2016  
FM NJOROGE, J  
NOVEMBER 13, 2024**

**BETWEEN**

**DAVID KAZUNGU MURAMBA (SUING THROUGH THE POWER OF ATTORNEY OF PHOEBE NZALE KAZUNGU) ..... 1<sup>ST</sup> PLAINTIFF  
ISSA KIPONDA CHOME ..... 2<sup>ND</sup> PLAINTIFF  
NOEL BAHA NDORO ..... 3<sup>RD</sup> PLAINTIFF  
RICHARD BARAKA NDORO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF STEVEN KATANA NDORO) ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**PETER MBUGUA KIMANI ..... 1<sup>ST</sup> DEFENDANT  
VINGI PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> defendants’ application dated 12<sup>th</sup> March 2024 and brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A, 75,78 and 79 of the *Civil Procedure Act* has been placed before this court for determination. It seeks the following orders: -
  - a. .... Spent;
  - b. ....Spent;
  - c. That pending the hearing and determination of the intended appeal the Honourable Court be pleased to restrain the Respondents jointly and severally, their employees, servants or agents or any one of them by order of injunction from trespassing, selling, mortgaging, transferring, removing beacons, leasing, constructing upon or in any other way dealing with the land known as portion number Group X/18 (Original number 12) Mtondia, within Kilifi County;



- d. In the alternative and or in addition to and without prejudice to the above, the Honourable Court be pleased to stay any further proceedings and execution of the Judgment delivered on 6<sup>th</sup> November, 2023 pending the hearing and determination of this application;
  - e. (Same as prayer (c ) herein above);
  - f. The Honourable Court be pleased to give directions on the extent and nature of the security to be supplied by the Applicant for the grant of the orders sought herein;
  - g. Costs of and incidental to this application be provided.
2. The application was supported by the grounds on the face of the application and supporting affidavit sworn by Moses Mathew Osoro on even date. He stated that at all material times to this suit the 2<sup>nd</sup> Defendant/ Applicants are registered as the absolute proprietors of land comprised in portion number 18 (Original Number 12) Mtondia, within Kilifi County containing approximately 4.204 Hectares or thereabout situated in Mtondia which property has been in the possession of the 2<sup>nd</sup> Defendant/ applicant prior to the commencement of the suit; that this court in its judgment of 6<sup>th</sup> November, 2023 ruled in favour of the Plaintiffs/Respondents herein; that he authorized his advocate on record to lodge an appeal which was done on 10<sup>th</sup> November, 2023; on 28<sup>th</sup> November 2023, the Plaintiffs embarked on the suit property and commenced to uproot some of the beacons. He deponed that the suit property is demarcated on the ground with beacons placed and approved by the relevant authorities.
  3. He deponed that the actions of the Plaintiffs/Respondents are unacceptable, having authorized an advocate to demand a cancellation of the deed plan to the suit property prior to the delivery of the judgement. Further, that unless interlocutory orders are granted as set out in this application, the Plaintiffs/Respondents may take steps to complete the cancellation of the deed plan as well as the title deed and further transfer the property in their favour causing the applicant to suffer substantial loss and damage If the appeal is successful.
  4. In Response, the Respondent filed a Replying Affidavit sworn by Phoebe Nzale Kazungu on the 8<sup>th</sup> April, 2024. She stated that while the applicant is the registered owner of Plot No. 18 (Original Number 12) Mtondia within Kilifi County measuring approximately 4.204 Hectares, he remains a mere title holder as he has never been in occupation of the suit property and after hearing the suit to finality, the court directed that appropriate steps be taken to ensure that the title deed in his favour is nullified and/or cancelled. According to her, the Plaintiffs became the owners of the suit properties in their respective portions and in readiness for the rain season, the Plaintiffs started clearing the property to pave way for planting of food crops; that there was nothing stopping them from taking over possession of the suit property since no stay orders had been granted by the Honourable Court despite the Applicants having lodged a Notice of Appeal. It was her contention that no steps have been undertaken by the Plaintiffs to cancel the title deeds and that the purported letter from the Ministry of Lands, Public works, Housing and Urban Development is fabricated to suit the present application and further, a lot of prejudice would befall the Plaintiffs with the grant of stay orders.

## **Submissions.**

### **Applicant's Submissions.**

5. The 2<sup>nd</sup> defendant/ Applicant filed submissions through the firm of Lucy Wangari Mwangi & Associates dated 11<sup>th</sup> September, 2024. Counsel submitted that Order 42 Rule 6 governs applications for stay of execution pending appeal and emphasize that an applicant must demonstrate substantial loss



if the stay is not granted, that the application has been made without unreasonable delay and security for costs.

6. She also submitted that injunctions are equitable remedies that require applicants to show that there is a prima facie case with a likelihood of success, that there is a likelihood of irreparable damage that cannot be adequately compensated by damages and a balance of convenience tilting in favour of the applicant. Counsel relied on a number of cases among them, *Giella v Cassman Brown & Co. Ltd* (1973) E.A. 358, *Butt v Rent Restriction Tribunal* (1982) KLR 417, *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* (1986) KLR 410, *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR and that of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* (2015) eKLR.
7. On whether the applicant has set out a prima facie case, counsel submitted that there is a strong case for the appeal evidenced by the fact that the Plaintiffs commenced the process of nullifying the deed plans to the said property even before the judgment was delivered. On substantial loss, she submitted that if the stay is not granted, the Plaintiffs' ongoing construction and intended cancellation of the deed plan will irreparably alter the nature of the property causing significant harm that cannot be adequately compensated by monetary damages. Further, on likelihood of success on appeal, she submitted that the notice of appeal already filed demonstrates a strong belief in the merits of the appeal; that there is reasonable chance that the Court of Appeal may find in favour of the 2<sup>nd</sup> Defendant.

#### **Respondents Submissions.**

8. The Plaintiffs/ Respondents filed submissions through the firm of Madzayo Mrima & Jadi Advocates dated 1<sup>st</sup> October, 2024. Counsel identified two issues for determination; whether the applicant's application is merited and whether an order of temporary injunction or stay of execution of the decree herein should be granted as sought by the Applicant.
9. Counsel submitted that it is trite law that an application for stay of execution of a decree or order pending appeal should satisfy the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules to wit, that substantial loss may result to the applicants unless the order is made, that the application has been made without unreasonable delay and that security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been give.
10. As to what constitutes substantial loss, she relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR submitting that stopping the respondents from farming on the suit land that the court has already declared as theirs shall amount to a great injustice since they have no other place to farm. It was also her submission that the applicant has failed to demonstrate why the decree should be stayed and that the applicant has also not offered any security to warrant grant of the order of stay of decree herein.
11. She also submitted that the court in considering an application for grant of stay of execution has to take into account the competing interests of both parties and endeavor to strike a balance such that no party is exposed to suffer undue prejudice one way or the other.

#### **Analysis And Determination.**

12. I have considered the application by the 2<sup>nd</sup> defendant/ applicant dated 12<sup>th</sup> March, 2024, the response thereto and the submissions by counsel. In my view the issue for determination is whether the order for stay of execution ought to issue.



13. Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides as follows:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

17. . In the case of *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR the court stated as follows:

“The Application must meet a criteria set out in precedent and the criteria is best captured in the case of *Halai & Another v Thorton & Turpin (1963) Ltd* [1990] KLR 365 where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that: -

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

An addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of *Hassan Guyo Wakalo v Straman East Africa Ltd* [2013] eKLR as follows: -

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other””

14. In the instant Application, judgment was delivered on 6/11/2023 and the appellant filed a Notice of Appeal dated 15/11/2023. Thus, the Appellant came to this Court within the time allowed by law to file an Appeal. There is therefore an appeal in place for the purposes of an application for stay of execution. However, the existence of such an appeal is not an automatic stay of execution of the decree of a Court and that is the true import of Order 42 Rule 6(1) of the Civil Procedure Rules.

15. On the issue of substantial loss, the applicant stated that the Plaintiffs embarked on the suit property and commenced to uproot some of the beacons and that the suit property is demarcated on the ground



with beacons placed and approved by the relevant authorities. The Plaintiffs on the other hand stated that when they became the owners of the suit properties in their respective portions and in readiness for the rain season, they started clearing the property to pave way for planting of food crops; that there was nothing stopping them from taking over possession of the suit property since no stay orders had been granted by the Honourable Court despite the Applicants having lodged a Notice of Appeal. The Applicant's apprehension is that this action may result in them losing the land. In the case of *James Wangalwa & Another V Agnes Naliaka Cheseto* [2012] eKLR the court held as follows:

“No doubt, in law, the fact the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of CPR. This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party on appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

16. In this court's view, the mere act of planting crops on the suit land can not result in substantial loss. This court has perused the photographic evidence attached by the applicant to its application and it is not possible for it to decipher either from that evidence, or from the images taken in conjunction with the statements in the affidavit that substantial loss that can not be compensated for by way of damages would result from the activities of the respondents. No allegation of impunity has been levelled against the respondents and neither is it established that perchance it was remitted to them the respondents would be unable to reimburse the amount in the decree in the event the appeal succeeded.
17. I would hardly also think that anything turns on the act of the respondents of approaching the Ministry of Lands seeking the cancellation of the 2<sup>nd</sup> defendant's title before judgment was delivered in this case as the applicant has not disclosed whether the Ministry did indeed act upon that proposal. There is nothing to raise a reasonable apprehension that the appeal would be rendered nugatory if the orders sought are not granted.
18. In the upshot, this court is not persuaded that the applicant has met the threshold for the grant of an order of stay of execution and the application dated 12/3/2024 is hereby dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

