



Kinyenje (Suing on Behalf of Elias Kiautha Mputhia through Power of Attorney) v Mwiti & 4 others (Environment and Land Appeal E062 of 2024) [2024] KEELC 14020 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14020 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E062 OF 2024
CK YANO, J
DECEMBER 19, 2024**

BETWEEN

**MARY MWIHAKI KINYENJE APPLICANT
SUING ON BEHALF OF ELIAS KIAUTHA MPUTHIA THROUGH POWER OF
ATTORNEY**

AND

**PAUL MUTWIRI MWITI 1ST RESPONDENT
JERICA NTIORI M'IKIUGU 2ND RESPONDENT
CONSOLATA KANAN M'MUGUNA 3RD RESPONDENT
BEATRICE NKATHA 4TH RESPONDENT
BANK OF AFRICA LIMITED (MERU) 5TH RESPONDENT**

RULING

1. The application for consideration before this court is the appellant's notice of motion dated 20th August 2024 brought under Order 42 Rule 6 of the Civil Procedure Rules. The appellant/applicant seeks the following orders:-
 - a. Spent
 - b. Spent
 - c. That this Honourable court be pleased to issue an order of stay of execution of the judgment dated 7th August 2024 and the attendant decree pending the hearing and determination of the appeal herein.



- d. That the costs of the application abide the appeal.
2. The motion is premised on the grounds thereon and supported by the affidavit of Mary Mwihi Kinyenje, the appellant/applicant sworn on 20th August 2024 and a further affidavit dated 30th September, 2024. The applicant averred that she was aggrieved by the judgment in Meru Chief Magistrate ELC case no. 79 of 2018 between the parties herein which was delivered on 7th August 2024 where the applicant suit was dismissed. The applicant stated that She has preferred an appeal filed on 15th August 2024.
 3. The applicant averred that the respondents have attempted to invade the applicant's land and attempted to demolish the applicant's premises on 14th August 2024 but their acts were thwarted by members of the public. That the applicant shall suffer substantial loss if execution is levied as she will be evicted from the land which she has been in user and occupation from the year 2013 when her husband bought the same from the 2nd, 3rd and 4th respondents on 11th November, 2013.
 4. The applicant stated that she is ready and willing to provide security as may be imposed by this court for the due performance of the decree.
 5. The applicant contended that the trial court erred in the manner it analysed the evidence on record and arrived at an erroneous decision as the suit land was sold by the 2nd, 3rd and 4th respondents and vide the doctrine of proprietary estoppel, the respondents were estopped from selling it to a third party. That the application has been preferred without unreasonable delay.
 6. The applicant deponed that she filed the suit with the permission of her husband, one Elias Kiautha Mputhia who had issued her with a power of attorney. She stated that they settled on the land and have a wood workshop together with rental houses where she ekes out a living over the years. The applicant deponed that the 1st, 2nd, 3rd and 4th respondents are rehearsing to demolish the applicant's developments on the land with a view to violently evict her and take over occupation of the land being NTIMA/NTAKIRA/2770 which is now registered in the name of the 1st respondent who quickly took a loan with the 5th respondent while the matter was pending in court.
 7. In her supporting affidavit, the applicant has annexed copies of the judgment, the memorandum of appeal, the agreement, power of Attorney and a certificate of official search marked "MMK 1", "MMK 2", "MMK 3", "MMK 4" and "MMK 5" respectively.
 8. In opposing the application, the 1st – 4th respondents filed a replying affidavit dated 4th September, 2024 sworn by Paul Mutwiri Mwit, the 1st respondent herein. He deponed that the order being appealed against is a negative order and is incapable of attracting grant of stay of execution orders. That the appeal has no chances of success since the applicant had allegedly only paid part of the consideration to the 2nd – 4th respondents and the only recourse available to her would have been a refund, but the same failed to materialize as explained in the judgment.
 9. The deponent averred that amongst the grounds for dismissal of the suit was the failure to comply with Section 8(1) of the *Land Control Act* which requires one to obtain consent within six (6) months of making an agreement for a controlled transaction. That the said failure renders this appeal hopeless and with no chances of success. The 1st respondent stated that he is the registered proprietor of the suit land which is currently encumbered with the 5th respondent. A copy of the green card marked "PM 1" has been annexed.
 10. The 1st respondent further contended that he is an innocent purchaser for value as depicted in the judgment, having undergone through all the rigorous and processes to acquire the said parcel of land.



He annexed copies of the sale agreement, consent from the Land Control Board, transfer form among other documents marked “PM 2”.

11. The respondents contended that the applicant will not suffer any substantial loss since the 1st respondent is the registered proprietor of the land which is equally encumbered and that she has no rights known in law. That conversely, the 1st respondent is the one likely to suffer substantial loss since the applicant only occupies the building while the 1st respondent is in possession of the other part of the land. Some photographs marked “PM 3” have been annexed. The 1st respondent averred that he is the registered owner of the land, yet he is being restricted from wholly utilizing the same, hence curtailing his constitutional right to own property.
12. The 1st respondent deposed that the current market value of the said parcel of land is about Kshs. 6,000,000/= and that if the applicant is to be granted the stay orders, she should be ordered to deposit the said amount. A copy of valuation report marked “PM4” has been annexed.
13. That the structure being occupied by the applicant was built by the 2nd, 3rd and 4th respondents. The respondents contended that the applicant will not suffer any substantial loss since she only paid Kshs. 450,000/= as part of the consideration and which can easily be refunded in the event that the appeal succeeds. That moreover, the land is encumbered and the interests of the bank cannot be defeated by granting of stay of execution orders.
14. It is the respondents contention that the application is an abuse of the court process and urged the court to dismiss it with costs.
15. The 5th respondent also opposed the application and filed grounds of opposition dated 31st October, 2024 on the following grounds.
 1. That the application is frivolous, vexatious and an abuse of the court process
 2. That the judgment the applicant is seeking to stay is a dismissal order/ a negative order, and as such there is nothing to be executed/stayed.
 3. That the applicant has not met the threshold for the grant of stay orders set out in law.
 4. That the applicant does not have locus standi to institute this appeal as correctly held by the trial court as the purported power of attorney she is acting under has never been registered.
 5. That the application is unmerited and should be dismissed with costs to the respondents.
16. The application was canvassed by way of written submissions. The applicant filed submissions dated 29th October, 2024 through the firm of Muia Mwanzia & Co. Advocates while the 1st, 2nd, 3rd and 4th respondents filed theirs dated 4th November, 2024 through the firm of Mbogo & Muriuki advocates.
17. The applicant cited the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and submitted that she has demonstrated that she will suffer substantial loss if execution is levied as she faces imminent danger of eviction and demolition of her developments in the suit land and that her only source of livelihood would be lost. The applicant relied on the case of Andrew Nyado Othina Vs Edward Ouma Othina [2020] eKLR which cited the Court of Appeal decision in Blue Shield Company Limited Ms Mahinda (2009) KLR 551.
18. It was also submitted on behalf of the applicant that the application has been presented without delay since the lower court judgment was delivered on 7th August 2024 and the instant application was filed on 20th August 2024.



19. The applicant submitted that she has shown willingness to offer security as the court may deem just and fit in the circumstances for the due performance of the decree and relied on the case of Pamela Awuor Ochieng & another Vs Elisha Odari Ogunyi [2021] eKLR. The applicant submitted that this being a land matter, she is ready to execute bond and she urged the court to allow the application as prayed.
20. On their part, it was submitted on behalf of the 1st, 2nd, 3rd and 4th respondents that it is trite law that a negative order cannot attract a stay of execution orders. That the applicant's suit in the lower court was dismissed by the court and therefore the resultant order being a negative order, the same is not capable of being stayed. The respondents relied on the case of Bernard Njoroge Kibati t/a Njowa Njemu Enterprises Vs Equity Bank Limited & another [2020] eKLR.
21. It was further submitted that there is no demonstration that substantial loss will be occasioned. That the land subject matter already has an encumbrance from the 5th respondent which holds rights over the title deed as things stand. That the applicant has no known rights in law and will not suffer any substantial loss because the amount which she made is ascertainable and can easily be refunded. It was pointed out that the 1st respondent is the absolute registered proprietor of the suit land.
22. It was further submitted on behalf of the 1st – 4th respondents that if the court is to consider granting the stay orders, the applicant should be ordered to deposit Kshs. 6,000,000/= as security.
23. It is the respondent's submission that the applicant has failed to meet the benchmarks for stay of execution and prayed for the application to be dismissed with costs.
24. I have considered the application, the responses and submissions made. The sole issue for determination is whether or not, in the circumstances, I ought to grant stay of execution of the judgment of the magistrate's court delivered on 7th August 2024 pending the hearing and determination of the appeal.
25. The application is brought under Order 42 rule 6 of the Civil Procedure Rules which specifies the circumstances under which the court may order stay of execution of a decree or order pending an appeal. An applicant has to demonstrate that substantial loss may result to him/her unless the order was made, that the application was made without unreasonable delay, and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him/her has been given by the applicant.
26. The judgment of the lower court was delivered on 7th August 2024 while this application was filed on 20th August 2024. That was a period of about 13 days. In my view, the application was filed timeously.
27. The next consideration is whether the applicant has demonstrated that substantial loss may result to her unless the order of stay is made. The court has perused the judgment that the applicant seeks to stay. The trial court found that the applicant herein had failed to prove her case on a balance of probabilities and dismissed the applicant's suit with an order that each party shall bear their own costs. It is therefore not in dispute that that was a negative order. The trial court did not grant any positive order capable of being executed. As rightly submitted by the respondents, a negative order is incapable of being stayed as the applicant seeks. This is because there is nothing to stay.



28. In the case of Kanshik Panchamatia & 3 others Vs Prima Bank Limited & another [2020] eKLR, the Court of Appeal held as follows;

“... that a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold, we have no mandate to grant a stay order in the manner prayed for by the applicants”.

29. As already stated, the trial court in its judgment merely dismissed the applicant’s suit with each party bearing his/her own costs. The question I pose is, what is there to be executed under the said judgment. My answer is that there is nothing that can be executed since the magistrate’s court did not order any of the parties to do anything or to refrain from doing anything or to pay any sum of costs. There is nothing arising out of the lower court judgment for this court to stay. It therefore follows that in light of the above, this court has no mandate to grant a stay order in the manner prayed for by the applicant.

30. The upshot is that this court finds that the notice of motion application dated 20th August 2024 is devoid of merit and the same is hereby dismissed with costs to the respondents.

31. For avoidance of doubt, the interim orders of stay of execution granted by this court on 20th August 2024 and subsequently extended are hereby discharged and or vacated.

32. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2024

In the presence of

Court Assistant – Tupet

Muriuki for 1st, 2nd, 3rd and 4th respondents

Munene holding brief for Mwanzia for appellant/applicant

No appearance for 5th respondent

C.K YANO

JUDGE

