



Kaleve & another v Musyoki (Suing as the Administrator of the Estate of the Late Peter Musyoki Kathama) (Environment and Land Appeal E021 of 2024) [2024] KEELC 13850 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E021 OF 2024
LG KIMANI, J
DECEMBER 17, 2024**

BETWEEN

KAMENE KALEVE 1ST APPELLANT

KATHAMA KALEVE 2ND APPELLANT

AND

KASYOKA MUSYOKI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PETER MUSYOKI KATHAMA) RESPONDENT

RULING

1. The Applicants filed the Notice of Motion dated 19th July 2024 seeking the following orders:
 1. Spent
 2. Spent.
 3. That there be a stay of execution of the Judgment and Decree of the Court in CMS ELC No. 336 of 2014 at Kitui Kayoka Musyoki vs Kamene Kaleve; Kathama Kaleve dated 12/7/2024
 4. There be a stay of execution of the Judgment and Decree of the Court dated 12/7/2023 in CMS ELC No. 336 of 2014 at Kitui Kayoka Musyoki vs Kamene Kaleve; Kathama Kaleve pending the hearing and determination of this Appeal and/or further direction of this Honourable Court.
 5. That costs of this application be in the cause.
2. The application is supported by the affidavit of the 1st Appellant/Applicant and is founded on the grounds that judgment was delivered by the trial court on 12th July 2023 in CM ELC No.336 of 2014 at Kitui Kayoka Musyoki vs Kamene Kaleve and Kathama Kaleve. The judgement requires the applicant



to be evicted from the suit property that he has been in occupation of since 1995 when the dispute commenced.

3. He added that the Trial Court had directed that the disputed portion be excised from Title No. Mutonguni/Kauwi/758 but instead the Land Parcel Title No. Mutonguni/Kauwi/5250 was excised from his own Land Parcel Title No. Mutonguni/Kauwi/750, contrary to the Court order. He further states that this excision was based on a forged court order dated 6th May 2021 as was found by the Trial Court's ruling dated 25th January 2021.
4. The Applicants are apprehensive that they are exposed to imminent execution proceedings which the Respondent may begin at any time. They noted that the Respondent has already begun fencing the suit property to their detriment.
5. The Applicants state that they have an arguable appeal with high chances of success which may be rendered nugatory if the stay is not granted. They also state that they stand to suffer substantial loss and that the application has been filed without inordinate delay.

The Respondent's Replying affidavit

6. The Respondent stated that he has authority to swear the replying affidavit as the personal representative of the estate of the late Peter Musyoki Kathama. He described the origin of the dispute between the parties as being prompted by the encroachment of the Applicants onto the suit property.
7. It was denied that the Applicants had occupied the suit property as there has been no form of development thereon, therefore there is no damage likely to be suffered by the Applicants because they are not on the suit land.

Applicants/Appellants' submissions.

8. The Applicant filed written submissions pointing out that there was an act of forgery and illegality in the sub-division of Mutonguni/Kauwi/750, which was not part of the land in dispute and that was corrected by the ruling of the Court dated 25th February 2022. The said ruling found the action taken pursuant to an unlawful and illegal order was null and void. They state this is an arguable issue in the Appeal.
9. He also stated that the Respondent has been on the land since 1995 a period of 29 years and that the property ought to be preserved pending the hearing and determination of the appeal.
10. They also submit that the Application and the Appeal were filed without inordinate delay and that they stand to suffer substantial loss since the Respondent has already commenced the process of evicting them by fencing the suit land.
11. It is the Applicants' submission that they have made a case for stay of execution pending Appeal and prayed that the Application be allowed.

The Respondent's submissions

12. Counsel for the 1st Respondent also filed written submissions, citing Order 42 rule 6 of the Civil Procedure Rules and submitting that the Applicants have not demonstrated the substantial loss that they will suffer should the Respondent execute, save that the Respondent will fence the suit property.
13. The Respondent argues that the Applicants have never been in occupation of the suit property and there is therefore no need for the Respondent to evict them.



14. The Respondent’s submission is that the balance of convenience tilts in their favour, and they relied on the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* (2012) eKLR, where the Court elaborated the meaning of substantial loss. They also relied on the case of *Luxus Woods K. Limited vs Patrick Amugre Kamadi* (2016) eKLR) as well and urged the Court to dismiss the instant application.

Analysis and Determination

15. The issue for determination in this application is whether the Court should grant the Appellant stay of execution of the Judgment and Decree of Hon. David Mburu, Chief Magistrate at Kitui in case CM ELC No.336 of 2014 at Kitui Kayoka Musyoki vs Kamene Kaleve and Kathama Kleve, which was dated and delivered on 12th July 2024.

16. The Application is made under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 the application being made, to consider such application and to make such order thereon as may to it seems 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.”

17. The purpose of stay orders is to preserve the subject matter of the appeal so as not to render the appeal nugatory. In the famous case of *Butt vs. Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal underscored the considerations for the grant or refuse a stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

18. As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR that was relied on by the Respondent that:

“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 in the 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.”

19. The Applicant states that he stands to suffer substantial loss since Respondent has already began the process of execution by fencing off the suit property.

20. The trial court in its judgement made the following orders;



- (a) An order of eviction of the defendants from the occupied portion of Land Parcel Number Mutonguni/Kauwi/5250.
 - (b) An order of permanent injunction restraining the defendants from further encroachment of Land Parcel Number Mutonguni/Kauwi/5250.
 - (c) Costs of the suit.
21. In the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR, Hancox JA was of the view that:
- “As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”
22. In balancing the rights of the Appellant to having his appeal heard and those of the 1st Respondent who has a judgment in his favour and would like to see an end to litigation, the law provides that a stay may be granted on condition that the Appellant deposit security. Security as the court orders is for the due performance of such decree or order as may ultimately be binding on the applicant should the appeal fail.
23. The Applicants have not given any offer for security. It also appears from the judgment of the trial court that there are substantial issues of sub-division of land that the Applicants have raised in the Memorandum of Appeal dated 16th July 2024 that appear to be arguable. The court is satisfied that an order of stay of execution may be granted so as not to render the appeal nugatory.
24. It is further the court’s view that the Applicants do stand to suffer substantial loss due to the order of eviction from the suit property, and the fact that the Respondent may proceed to make developments or dispose of the suit property.
25. From the foregoing the final orders of the court are that the application dated 9th February, 2023 is allowed as follows;
1. Stay of execution of the Judgment and Decree delivered in Kitui CMELC NO. 336 OF 2014: Kasyoka Musyoki -vs- Kamene Kaleve and Kathama Kaleve be and is hereby granted on condition that the Appellants prosecute this appeal within six months from the date hereof in default of which the orders herein will automatically lapse.
 2. Costs of the application to be borne by the Applicants.

DELIVERED, DATED AND SIGNED AT KITUI THIS 17TH DAY OF DECEMBER 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

Ruling read in open court and virtually in the presence of-

Catherine – Court Assistant

M/s Kiama for Respondent

Kalili for Appellant/Applicant

