



M’itunga & 3 others v M’ikunga & 3 others (Environment and Land Appeal 48 of 2022) [2023] KEELC 353 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEELC 353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 48 OF 2022
CK NZILI, J
JANUARY 30, 2023**

BETWEEN

**MUTHOMI M’KIUNGA M’ITUNGA 1ST APPELLANT
JA B MUGAMBI 2ND APPELLANT
JOSEPH MWITI 3RD APPELLANT
PHINEAS GITONGA 4TH APPELLANT**

AND

**M’RIMBERIA M’IKUNGA 1ST RESPONDENT
M’MUKIRA KIUNGA 2ND RESPONDENT
GERVASIO MBOGORI 3RD RESPONDENT
JOHN M’ETHARA M’IKIUNGA 4TH RESPONDENT**

RULING

1. The court is asked to stay the execution of the decree passed at the lower court on September 6, 2022 pending the hearing and determination of the appeal. The application is supported by an affidavit of Jacob Mugambi sworn on the even date. The reasons given are that there was miscarriage of justice; the subject matter is family land and the home is likely to be demolished if stay is not granted as per the attached photographs attached and marked JM “3”. That the appeal has high chances of success and unless the stay is granted, the applicant will suffer injustice and the appeal will be rendered nugatory.
2. The application is opposed by grounds of opposition dated October 26, 2022 on account of being brought under the wrong provisions of law, for being defective, as an abuse of the court process; a delaying tactic and as overtaken by events since the eviction has already occurred pursuant to the orders of court in Meru CMC ELC No 62 of 2022.



3. A party seeking stay of execution of a decree is supposed to demonstrate any substantial loss or damage, file the application without inordinate delay, offer security for the due realization of the decree should the appeal not succeed and lastly demonstrate that it is in the interest of justice for an order of stay to issue.
4. In *Machira t/a Machira & Co. Advocates v East Africa Standard* (2002) KLR 63, the court held that an applicant must prove specific details and particulars of substantial loss otherwise without demonstratable pecuniary loss or tangible loss to the satisfaction of the court, it will not grant stay.
5. In *Superior Homes (K) Ltd v Musango Kithome* (2018) eKLR, the Court of Appeal held that substantial loss was what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
6. Further in *Samvir Trustee Ltd v Guardian Bank Ltd* Nairobi Milimani HCC 795 of 1997, Warsame J as he then was held that the court should not put unnecessary hindrance to the enjoyment and the exercise of the right by the defendant. That the court in granting or refusing stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. The court said that the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time, ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment who prima facie is entitled to the same of his judgment. Further, the court that held the consequence of a judgment is that it has defined the rights of a party with definite conclusion. Additionally, the court stated that it is not enough to put forward mere assertions of substantial loss without empirical or documentary evidence to support such contention.
7. In the case of *Jenifer Akinyu Osodo v Boniface Okumu Osodo and 3 others*, (2021) eKLR the court was faced with an application for stay of a negative order and for an application for temporary injunction pending appeal. The court held that it could not stay a negative order for there was no demonstration of any substantial loss. The court held that an arguable appeal was not one that must necessarily succeed but one which merits consideration by the court.
8. In this application, the applicant has merely asserted substantial loss. Other than attaching the photographs, there are no specific particulars and or details of the nature of the loss or damage likely to be suffered. The applicants have not demonstrated special circumstances why the court should stay a regular judgment issued following the sharing of properties in a succession cause. The applicants have also not offered any security for the due satisfaction of the decree if the appeal were to fail.
9. The judgment was rendered on August 18, 2022 while this application was filed on October 7, 2022. The delay has not been explained at all. On the other hand, the respondent has attacked the application as overtaken by events since execution occurred pursuant to the lower court orders. The applicants have not clarified if there has been an eviction particularly going by the photographs produced which show the structure as upside down.
10. In view of the foregoing, I find the application lacking merits. The same is dismissed with costs.
11. The lower court file to be availed in order to fast track the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 30TH DAY OF JANUARY, 2023

In presence of:

C/A: Kananu



Aluvi for Maheli for respondent

Applicant

HON. C.K. NZILI

ELC JUDGE

