



**Mainga v Mwikya (Environment and Land Appeal E021 of 2022)  
[2025] KEELC 2939 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2939 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E021 OF 2022**

**EO OBAGA, J  
MARCH 27, 2025**

**BETWEEN**

**PETER NZIKALI MAINGA ..... APPELLANT**

**AND**

**PHILIP NDOKO MWIKYA ..... RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 25<sup>th</sup> July, 2024 brought under the provisions of Article 159 (2) (d) of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Section 13 (7) (a) of the *Environment and Land Court Act* in addition to Order 42 Rule 6 (1) and (6), Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks issuance of the following orders: -
  1. [SPENT]
  2. [SPENT]
  3. That there be a stay of execution of the judgment and decree herein as well as the judgment and decree of the subordinate court in Kilungu Mcelc E003/2021 Peter Nzikali Mainga V Philip Ndoko Mwikya pending the hearing and determination of the intended Appeal against the judgment herein.
  4. That an order of injunction do issue restraining the Respondent either by himself, agents, servants, employees, workers, proxies or anybody claiming under him from entering into, selling, subdividing, leasing, alienating, developing, cultivating, grazing, cutting down trees, harvesting sand or in any other way dealing with or using the parcels of land known as MAKUENI/UVALENI/1621, MAKUENI/UVALENI/1095 and MAKUENI/UVALENI/1724 pending the hearing and determination of the intended Appeal against the judgment herein.



5. That the costs of this application do abide the outcome of the intended Appeal.
2. The application is premised on the grounds appearing on its face in addition to the supporting affidavit sworn by Peter Nzikali Mainga on 26<sup>th</sup> July, 2024. The Applicant averred that he was the Plaintiff in KILUNGU MCELC NO. E003 OF 2021 wherein he sued the Respondent for orders inter alia of permanent injunction. He further averred that he is the registered owner of the parcels of land known as MAKUENI/UVALENI/1621, MAKUENI/UVALENI/1095 and MAKUENI/UVALENI/1724. The Applicant averred that he is aggrieved by the judgment of this Court delivered on 12<sup>th</sup> June, 2024 which upheld the judgment of the subordinate court.
3. The Applicant contended that the subordinate court issued orders directing the Makueni County Surveyor and Land Registrar to survey and establish the acreage occupied by the Respondent for purposes of excision and transfer from his parcels of land known as MAKUENI/UVALENI/1095 and MAKUENI/UVALENI/1724. He added that he is apprehensive that the Respondent will proceed to execute the judgment of the lower court through a survey and transfer of the land. He further contended the Respondent will thereafter be at liberty to sell, subdivide, charge, lease, transfer, develop, cultivate or otherwise deal with the suit property.
4. The Applicant argued that execution of the decree of the subordinate Court would render the application herein as well as the intended appeal mere academic exercise. Further, it was contended that if the application is disallowed, the Applicant will suffer substantial loss in that it would be impossible or extremely difficult to recover the portion of the suit property that would have been excised and transferred to the Respondent. The Applicant averred that he is willing to abide by such terms on security as this Court may impose and as such, it is in the interest of justice that the application be allowed in order to preserve the substratum of the appeal.
5. Opposing the application, the Respondent filed grounds of opposition dated 20<sup>th</sup> September, 2024. He contended that the application is misconceived and an abuse of court process. That the Applicant has no arguable appeal before the appellate court and that he has not satisfied the conditions for the grant of the orders sought.
6. The Respondent argued that the application is a ploy and stratagem to further preventing him from enjoying the fruits of his judgment that was obtained in the year 2022. He maintained that the application is an abuse of the court process and that it ought to be dismissed ex debito justitiae.
7. In a supplementary affidavit sworn by the Applicant on 16<sup>th</sup> October, 2024, he averred that the instant application is aimed at preserving the subject property as he pursues his appeal. He added that his Advocates had filed a memorandum and record of appeal at the Court of Appeal on 22<sup>nd</sup> August, 2024 and the same was served upon the Respondent's advocates. The Applicant contended that he had complied with the timelines set out in the Court of Appeal Rules in pursuit of his desire to prosecute his appeal timeously.
8. The application was disposed of by way of written submissions.
9. In the Applicant's submissions dated 17<sup>th</sup> October, 2024, Counsel submitted that the Applicant had satisfied the requirements under Order 42 Rule 6 (2) of the Civil Procedure Rules. Counsel contended that the application herein was filed on 26<sup>th</sup> July, 2024 which was a period of about one and half months from the date of delivery of the judgment of this court. Counsel opined that there had been no unreasonable delay thereof.
10. Arguing that the Applicant would suffer substantial loss, Counsel contended that the Respondent had not denied the averments of the Applicant at paragraph 12 of the supporting affidavit. Counsel



maintained that it is in the interest of justice that the suit land be preserved so as the same is readily available to the successful party at the conclusion of the appeal. He argued that if the Respondent proceeds to execute the decree of the lower court, the Applicant will be greatly prejudiced.

11. Lastly, Counsel submitted that the Applicant had in addition to offering to give security, undertaken not to sell, lease, charge or transfer the suit land pending hearing and determination of the appeal. Counsel urged the court to allow the application as prayed. Reliance was placed on the following authorities: -
  - i. Ngoge v Isanda & 2 others [2024] KEELC 578 (KLR)
  - ii. Kibue & 2 others v Kiarie & 3 others; Kibue & 2 others (Respondent) [2022] KEELC 2440 (KLR)
12. The sole issue for determination is whether the Applicant has demonstrated the threshold for issuance of the orders sought.
13. The governing law in an application for stay of execution pending appeal is Order 42 Rule 6 (1) and (2) which provide as follows: -
  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 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.
14. This Court's discretion to grant an order for stay of execution pending the determination of an appeal is guided by the decision of the Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 where it held as follows: -
  - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. 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.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and



unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

15. Platt Ag. J.A. (as he then was) held as follows in *Kenya Shell Ltd v Kibiru* [1986] KLR 416: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”

16. Whereas the Applicant has an undoubted right of appeal from the judgment of this court, the Respondent has an equally undoubted right to enjoy the fruits of its judgment. It is unclear whether the Respondent has already commenced a lawful execution of the decree in the lower court judgment. Nonetheless, the Applicant expressed his fears that if he were to release the title deeds of the suit property and transfer done, the Respondent might proceed to dispose the suit property to third parties, averments which were not controverted.

17. In the case of *Venture Capital & Credit Limited vs Consolidated Bank of Kenya Ltd Civil Application No Nairobi 349 of 2003 (174 of 2003 UR)* the Court of Appeal gave the following guidance on grant of temporary injunctions pending appeal: -

- “a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited vs Kerr* (1985) KLR 840 The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries vs KCB* (1982 – 88) KLR 1088
- (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
- (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt vs Rent Restriction Tribunal* (1982) KLR 417
- (d) The Court should also be guided by the principles in *Giella vs Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445”

18. The Applicant annexed copies of the memorandum of appeal and record of appeal to his supplementary affidavit as Exhibits “PNMVII” and “PNMVIIB”. It is aptly clear that he has demonstrated that he has an arguable appeal.

19. Secondly, the Respondent did not challenge the averments by the Applicant that in the event the subordinate court’s decree is executed and the suit property transferred to him, it would occasion substantial loss to the Applicant.

20. Thirdly, it is clear from the record that the application herein was filed after the lapse of about one and half months after judgement was delivered on 13<sup>th</sup> June, 2024. The said period is not inordinate.



21. Lastly, the Applicant has offered to give security for the due performance of such decree as may ultimately be binding upon him.
22. In the circumstances of the case, it is manifest that the Applicant has demonstrated merit in the application and therefore the following orders ought to issue in his favour: -
  1. That an order for stay of execution of the judgment and decree herein as well as the judgment and decree of the subordinate court in KILUNGU MCELC E003/2021 PETER NZIKALI MAINGA V PHILIP NDOKO MWIKYA is hereby granted pending the hearing and determination of Civil Appeal No. E630 of 2024 at the Court of Appeal.
  2. The Applicant shall deposit in court Kshs. 100,000/= as security for the due performance of the eventual decree within Thirty (30) days from the date hereof.
  3. In default of Order (2) above, the orders for stay shall lapse automatically.
  4. Costs shall abide the outcome of Civil Appeal No. E630 of 2024 Peter Nzikali Mainga v Philip Ndoko Mwikya.

It is so ordered.

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**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

In the presence of:

Mr. Wambua for Appellant/Applicant.

Court assistant - Steve Musyoki

