



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wabwile & another v Lubakaya (Substituted by Philip Masinde Lubakaya) & 13 others  
(Environment & Land Case 22 of 2003) [2023] KEELC 321 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 321 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 22 OF 2003**

**BN OLAO, J  
JANUARY 24, 2023**

**BETWEEN**

**PETER WANJALA WABWILE ..... 1<sup>ST</sup> PLAINTIFF  
CHARLES MUSUMBA KEYA (SUBSTITUTED BY SHADRACK MUNYIGULA  
KEYA) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PETER MAELO LUBAKAYA (SUBSTITUTED BY PHILIP MASINDE  
LUBAKAYA) ..... 1<sup>ST</sup> DEFENDANT  
LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT  
DAVID W MAELO ..... 4<sup>TH</sup> DEFENDANT  
BENEDICT W. MAELO ..... 5<sup>TH</sup> DEFENDANT  
VINCENT BARASA MAELO ..... 6<sup>TH</sup> DEFENDANT  
MAURICE M. MAELO ..... 7<sup>TH</sup> DEFENDANT  
ELIUD WAFULA MAELO ..... 8<sup>TH</sup> DEFENDANT  
MANUEL SIMIYU MAELO ..... 9<sup>TH</sup> DEFENDANT  
ABRAHAM MAINA MAELO ..... 10<sup>TH</sup> DEFENDANT  
WILFRED WAFULA MAELO ..... 11<sup>TH</sup> DEFENDANT  
DANIEL BARASA BABIKINA ..... 12<sup>TH</sup> DEFENDANT  
MOSES SIRENGO MAELO ..... 13<sup>TH</sup> DEFENDANT  
JOSEPH NYONGESA MAELO ..... 14<sup>TH</sup> DEFENDANT**



## RULING

1. By a judgment delivered on February 17, 2022 I made the following orders in disposal of this suit in favour of the plaintiffs:
  1. Peter Or Petro Maelo Lubakaya the 1<sup>st</sup> defendant herein held 24 acres out of the land parcel No East Bukusu/west Sang'alo/551 in trust for Murunga.
  2. The titles to the land parcel No East Bukusu/west Sang'alo/2970, 2971, 2972, 2973, 2974, 2975, 2976 and 2978 registered in the name of the 4<sup>th</sup> to 14<sup>th</sup> defendants are equally held in trust and were obtained fraudulently.
  3. The title No East Bukusu/west Sang'alo/2970, 2971, 2972, 2973, 2974, 2975 and 2976 a cancelled.
  4. The 4<sup>th</sup> to 14<sup>th</sup> defendant shall within 30 days of this judgment execute all the necessary documents to facilitate the registration of the land parcels No East Bukusu/west Sang'alo/2970, 2971, 2972, 2973, 2974, 2975 and 2976 totalling 18.8 acres in the names of Shadrack Munyingula Keya And Charles Musumba Keya to hold in trust for the family.
  5. In default of (4) above, the Deputy Registrar of this court shall execute all the necessary documents on behalf of the 4<sup>th</sup> to 14<sup>th</sup> defendants.
  6. The titles to the land parcels No East Bukusu/west Sang'alo/2977 and 2979 shall not be affected by this judgment and will remain in the names of Daniel Chengasia the registered proprietor thereof.
  7. The plaintiffs have succeeded in only part of their claim and they will therefore have only half of the costs.
2. Aggrieved by that judgment, the defendants promptly filed a notice of appeal which was lodged in this court on February 24, 2022. The plaintiffs similarly lodged their own Notice of appeal on March 14, 2022 envisaging their intention to appeal the judgment.
3. On March 17, 2022, the 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants filed a notice of motion dated March 16, 2022 and which is the subject of this ruling. They seek the following orders:
  1. Spent
  2. Spent
  3. That there be a stay of execution of the judgment and decree of this honourable court pending the hearing and determination of an appeal lodged in the Court of Appeal (sic) to be lodged in the Court of Appeal.
  4. That the costs of this application be provided for.
4. The application is premised on the grounds, set at therein and is also supported by the affidavit of Eliud Wafula Maelo the 8<sup>th</sup> defendant.
5. The gravamen of the application is that the defendants being aggrieved by the judgment delivered on February 17, 2022 intend to appeal and have lodged and served a Notice of Appeal. That their appeal is arguable and if the judgment is executed, their interests in the land parcels No East Bukusu/west



Sang'alo/2970, 2971, 2972, 2973, 2974, 2975 and 2976 will be deregistered and they face possible eviction and demolition of their homes and this will render them homeless and they will suffer substantial loss. That this application has been filed without unreasonable delay and they are ready to abide with such orders as to security which this court may impose as there are over 56 families comprising of 153 people living on the land in dispute and it is therefore necessary that the status quo be maintained. Meanwhile, they have applied for copies of the proceedings and judgment for purposes of lodging their appeal.

6. The following documents are annexed to the application:
  1. Letter dated February 23, 2022 by the defendants counsel requesting for copies of the proceedings and judgment.
  2. Notice of appeal dated February 24, 2022.
  3. Judgment dated February 17, 2022.
7. The application is opposed and Shadrack Munyingula Keya the 2<sup>nd</sup> plaintiff filed a replying affidavit dated September 20, 2022 in which he has deponed *inter alia*, that the application is vexatious, unmeritorious and scandalous and meant to defeat justice since the plaintiffs were only awarded 24 acres of the land in dispute leaving 42 acres to the defendants who had 30 days within which to re-organise themselves. That this suit has been in court since 2003 and the application is intended to prevent the defendants from enjoying the fruits of their long awaited judgement. In any case, the defendant can execute the decree in respect of only 18.8 acres which is un-developed since the plaintiffs have been rendered squatters in the market. That the defendants have not yet filed any memorandum of appeal or record of appeal to warrant the orders sought and are therefore guilty of laches. That the appeal has minimum chances of success and the defendants have not deposited nor are they willing to deposit any security.
8. When the application was placed before me on March 21, 2022, I directed that it be canvassed by way of written submissions to be filed on or before April 25, 2022. However, due to challenges of instructions and service, it was not until September 21, 2022 that the plaintiffs managed to file their submissions.
9. I have considered the application, the rival affidavits and submissions by Mr Murunga instructed by the firm of JO Makali & Company Advocates for the 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants and by Ms Ashitsa Instructed By The Firm Of SM Ashitsa & Company Advocats for the plaintiffs.
10. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides that:
  - (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. Emphasis mine.
11. It is therefore clear from the above that in order to meet the threshold of the orders sought herein, the 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants have to satisfy the following conditions:
1. Show sufficient cause.
  2. Demonstrate that if the orders are not granted, they will suffer substantial loss.
  3. File the application without unreasonable delay.
  4. Offer security.
12. The 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants filed this application on March 17, 2022 exactly a month after the judgment sought to be appealed was delivered. The memorandum of appeal was filed on February 24, 2022 which was a week after the delivery of the judgment. The lodging of the memorandum of appeal is sufficient cause and I do not consider the filing of this application one month following the delivery of the judgment to be unreasonable delay. The 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants have also stated in paragraph (h) of their application that they are willing to abide with any orders that this court may impose for the due performance of any decree. In paragraph 18 of his supporting affidavit Eliud Wafula Maelo the 8<sup>th</sup> defendant has deponed thus:
8. “That we are prepared to abide by any reasonable conditions that this court may order pending the hearing of the appeal.”
13. On the issue of substantial loss, it is the cornerstone of such an application PLatt Ag JA (as he then was) described it as follows in the case of *Kenya Shell Ltd v Benjamin Kibiru & Another* 1986 KLR 410;
- “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 form is the cornerstone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”. Emphasis mine.
14. On the issue of substantial loss, the 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants have averred vide paragraphs 12, 13 and 15 of the supporting affidavit of the 8<sup>th</sup> defendant Eliud Wafula Maelo thus:
- 12: “That if the judgment is executed by the cancellation of the titles and subsequent transfer of the titles to the plaintiffs as ordered, we shall suffer grant and substantial loss as we shall have been rendered trespassers liable to be evicted on the lands we have stayed on in our entire lifetime and known as home.”
13. “That a total of 56 families and 153 people stay on the respective parcel of land and it would be a tragedy of monumental proportions if they are rendered landless and homeless before their intended appeal is heard.”
15. “That on the contrary, the respondents have neither stayed on nor occupied any of the disputed parcels of land.”
15. That the 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants have been in occupation and possession of the land in dispute is not in doubt. Indeed, it is conceded in paragraphs 14 and 15 of the replying affidavit of Shadrack Munyingula Keya wherein he has deponed as follows:



- 14: “That it is within my knowledge that whereas the applicants wish to inform the court that they have been in occupation of the 18.8 acres decreed in our favour, this honourable court should be aware and consider that our entire family have been rendered homeless for decades as a consequence of applicants’ fraudulent actions.”
- 15: “That it is within my knowledge that our family has been squatters in the market and allowing the Applicants’ application shall be equivalent to denying us (me and our family) justice as justice delayed is justice denied.”
16. I did not hear the plaintiffs deny that they may evict the 56 families and 153 people currently living on the land parcels which this court has decreed to be registered in their names. If that were to happen before the intended appeal is heard and determined, there is no doubt that the defendants will suffer substantial loss should their appeal succeed. On the other hand, the only prejudice which the plaintiffs will suffer is that they will have to wait a little longer to enjoy the fruits of the decree if this judgment is up-held on appeal. Given the above circumstances, I am persuaded that the 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants are entitled to the orders sought.
17. The threshold which the 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants were required to meet in order to be granted the orders of stay of execution pending appeal were set at in the case of *Visbram Ravji Halai & Another v Thornton & Turpin (1963) Ltd* 1990 KLR where the Court of Appeal held that:
- “Thus the superior court’s discretion 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 a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.”
- The 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants have satisfied the above criteria.
18. It is also instructive to note that following this court’s judgment delivered on February 17, 2022, the plaintiffs also lodged in this court their notice of appeal on March 14, 2022 in which they clearly manifested their dissatisfaction with the said judgment. Of course that notice of appeal was filed well beyond the 14 days stipulated under rule 75 of the *Court of Appeal Rules*. However, rule 4 of the same rules grants the Court of Appeal a wide and unfettered discretion to extend that time. That is not a matter before this court for its consideration but I must allude to it because by filing the said notice of appeal signifying their dissatisfaction with this court’s judgment, it is proper to infer, in the plaintiffs’ favour, that at the appropriate time, they will be making an application in the Appellate Court for such extension. That being the case, this court must conclude that the plaintiffs are in fact not averse to any orders of stay of execution of this court’s judgment otherwise they would not have filed such a notice albeit late. It is safe to conclude therefore that the plaintiffs will not be unduly prejudiced by any orders of stay. If anything, they would not want to execute a decree with which they are not fully in agreement.
19. In the circumstances, the notice of motion dated March 16, 2022 is well merited. I allow it.
20. With regard to costs, I direct that each party meets their own costs.
21. Before I end this ruling, I have noted that in paragraph 47 of this judgment, I made a specific finding in the last sentence that:
- “Therefore, the creation of the land parcels No East Bukusu/west Sangalo 2970 to 2979 was fraudulent because the 1<sup>st</sup> defendant was not entitled to the extra 23.5 acres comprised thereon and further, that fraud was perpetuated in 2004 and cannot be caught by the statute of limitation.”



However, in paragraph 3 and 4 of the disposal orders made at the end of this judgement, I inadvertently omitted to include the land parcel No EAST Bukusu/west Sang'alo/2978 Which Is Registered In The Name Of Joseph Nyongesa Maelo the 14<sup>th</sup> defendant. I must therefore invoke the powers donated to me by section 99 of the [Civil Procedure Act](#) to amend that error.

22. The up-shot of all the above is that having considered the notice of motion dated March 16, 2022, this court makes the following orders:
- 1: An order is hereby issued staying execution of the judgment of this court dated February 17, 2022 and all the subsequent orders flowing therefrom pending the hearing and determination of the 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants' appeal.
  - 2: The 1<sup>st</sup>, 4<sup>th</sup> to 14<sup>th</sup> defendants shall not transfer, charge of in any other way alienate the land parcels No East Bukusu/west Sang'alo/2970, 2971, 2972, 2973, 2974, 2975, 2975, 2976 and 2978 pending the hearing and determination of that appeal or until any further order by this or the appellate court.
  - 3: The judgment of this court dated February 17, 2022 and the resultant decree are hereby amended to include the land parcels No East Bukusu/west Sang'alo/2978 in paragraph 3 and 4 of the final disposal orders. Deputy Registrar to advise parties accordingly.
  - 4: Each of the parties shall meet their costs of the application.

**RULING DATED SIGNED AND DELIVERED AT BUSIA ON THIS 24<sup>TH</sup> DAY OF JANUARY 2023 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.**

**B. N. OLAO**

**JUDGE**

**24<sup>TH</sup> JANAURY 2023**

