



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugure & another v Kimathi & 4 others (Environment and Land Appeal  
E051 of 2022) [2023] KEELC 56 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 56 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E051 OF 2022**

**CK YANO, J**

**JANUARY 18, 2023**

**BETWEEN**

**REGINA MUGURE ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN MWENDA MUGAMBI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KENNEDY KIMATHI ..... 1<sup>ST</sup> RESPONDENT**

**MARY NTINYARI ..... 2<sup>ND</sup> RESPONDENT**

**FAMILY BANK LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**MERU LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the notice of motion application dated 16<sup>th</sup> September, 2022 brought pursuant to Article 159 (2) (d) & 162 (2) (b) of *the Constitution* of Kenya 2010, Section 3,11,13,18 and 19 of the *Environment and Land Court Act* No. 19 of 2011 and Order 51 of the Civil Procedure Rules and all other enabling provisions of the law. The appellants/applicants seek for orders;
  - i. THAT the application be certified urgent and service thereof be dispensed with in the first instance.
  - ii. THAT pending the hearing and determination of the application inter partes, Mary Ntinyari, the 2<sup>nd</sup> respondent herein be barred from selling, advertising for sale, or in any other manner interfering with the parcel of land known as Ngusishi Settlement Scheme/1218.



- iii. THAT pending the hearing and determination of the application inter partes, Family Bank Limited, the 3<sup>rd</sup> respondent be barred from selling, advertising for sale, or in any other manner interfering with the parcel of land known as Ngusishi Settlement Scheme/1219.
  - iv. THAT pending the hearing and determination of this application inter partes, the Honourable court be pleased to stay any further proceedings in Meru CMELC No. 5 of 201 (sic) Kennedy Kimathi & Mary Ntinyari Kinyua Vs Stephen Mwenda & Regina Mugure.
  - v. THAT pending the hearing and determination of this appeal Mary Ntinyari the 2<sup>nd</sup> respondent herein be barred from selling, advertising for sale, or in any other manner interfering with the parcel of land known as Ngusishi Settlement Scheme /1218.
  - vi. THAT pending the hearing and determination of this appeal Family Bank Limited the 3<sup>rd</sup> respondent herein be barred from selling, advertising for sale, or in any other manner interfering with the parcel of land known as Ngusishi Settlement Scheme/1219.
  - vii. THAT pending the hearing and determination of this appeal, the Honourable court be pleased to stay any further proceedings in Meru MCEL NO. 5 OF 201 (sic) Kennedy Kimathi & Mary Ntinyari Kinyua Vs Stephen Mwenda & Regina Mugure.
  - viii. THAT the Honourable court be pleased to issue any other orders in the interest of justice.
  - ix. THAT costs of this application be provided for.
2. The application is premised on the grounds that:
- a. the 1<sup>st</sup> appellant is the widow to the late Edward Mwirigi M'Marete
  - b. That 1<sup>st</sup> appellant was the sole beneficiary of her late husband's estate being Land title No. Meru /Ngusishi/466.
  - c. The 1<sup>st</sup> respondent illegally and fraudulently subdivided and transferred the parcels of land known as Meru Ngusishi/466.
  - d. The 1<sup>st</sup> respondent purported to charge one of the resulted subdivisions of Meru/ Ngusishi/466 being Ngusishi Settlement Scheme/1219 after obtaining the sum of Kshs. 3,100,000 from the 3<sup>rd</sup> respondent.
  - e. The 1<sup>st</sup> appellant only learnt about the fraud that had been perpetuated by the 1<sup>st</sup> respondent in concert with the other respondent when she was sued in Meru MCEL NO. 5 of 2019
  - f. The trial court delivered its judgment on 5<sup>th</sup> September, 2022 in which the appellant's suit against the respondents was dismissed with costs.
  - g. The appellants have appealed against the entire judgment of the trial court and that it is clear that they have an arguable appeal.
  - h. The 1<sup>st</sup> respondent took out a loan facility with the 3<sup>rd</sup> respondent which facility he has not been servicing and thus the 3<sup>rd</sup> respondent may sell the parcel of land known as Ngusishi Settlement Scheme/ 1219.
  - i. Should the 3<sup>rd</sup> respondent proceed and sell Ngusishi Settlement Scheme/1219 the appeal shall be rendered nugatory and a mere academic exercise.



- j. The 1<sup>st</sup> and 2<sup>nd</sup> respondents herein had filed a suit against the appellants herein being Meru MCELC No. 5 of 2019 which is scheduled for hearing on 21<sup>st</sup> September, 2022.
  - k. Meru MCELC NO. 5 of 2019 relates to the same subject matter as Meru MCELC NO. 32 OF 2020 and should the said matter proceed there is a likelihood of two conflicting judgments being delivered by the subordinate courts.
  - l. That it is in the interest of justice that the application be allowed.
3. The application is supported by the affidavit of REGINA MUGURE the 1<sup>st</sup> appellant herein sworn on 16<sup>th</sup> September, 2022 and a further affidavit sworn on 27<sup>th</sup> October, 2022 and another on 11<sup>th</sup> November 2022 wherein she averred that she was the 1<sup>st</sup> plaintiff in Meru MCELC No. E032 of 2020 while the 2<sup>nd</sup> appellant was the 2<sup>nd</sup> plaintiff and she annexed a copy of the plaint in Meru MCELC no. E032 OF 2020.
  4. The deponent averred that judgment in the suit before the trial court was delivered on 5<sup>th</sup> September, 2022 in which the trial court dismissed the suit filed by the 2<sup>nd</sup> appellant and her and has annexed a copy of the trial court's judgment.
  5. The deponent contended that the 2<sup>nd</sup> appellant and her appealed against the entire judgment of the trial court and had requested for certified copies of the proceedings, judgment as well as the decree and has annexed copies of the memorandum of appeal and the letter requesting for copies of the proceedings, judgment and decree.
  6. The 1<sup>st</sup> applicant further states that she is the widow of the late Edward Mwirigi M'Marete who was the registered owner of Land Title No. Meru/Ngusishi/466.
  7. The 1<sup>st</sup> applicant states that she is the sole beneficiary of the estate of the late Edward Mwirigi M'Marete and has annexed copies of the grant of letters of administration intestate as well as the certificate of confirmation of grant. She states that before starting the succession process, she sold one acre of land to Mr. Stephen Mwenda Mugambi the 2<sup>nd</sup> appellant herein who paid Kshs. 50,000/= as deposit and took possession and lives on it together with his family and has developed it.
  8. The 1<sup>st</sup> applicant avers that upon transmission of her late husband's property to her name, the 1<sup>st</sup> respondent illegally fraudulently and without her knowledge subdivided and transferred part of her parcel of land to the 2<sup>nd</sup> respondent and has annexed copies of the green card searches for the resultant subdivisions.
  9. The 1<sup>st</sup> applicant further avers that the 1<sup>st</sup> respondent further obtained a loan facility from Family Bank Limited, the 3<sup>rd</sup> respondent with a subdivision of Meru Ngusishi/466 (Ngusishi Settlement Scheme/1219) being the security for the loan facility.
  10. The 1<sup>st</sup> applicant contends that the 1<sup>st</sup> respondent has not been servicing the loan facility obtained from the 3<sup>rd</sup> respondent and thus the 3<sup>rd</sup> respondent may sell the said parcel of land at any moment.
  11. The 1<sup>st</sup> applicant further states that the 1<sup>st</sup> respondent's action of subdividing and selling part of her husband's parcel of land was calculated at obtaining money from the 2<sup>nd</sup> respondent as well as the 3<sup>rd</sup> respondent.
  12. The 1<sup>st</sup> applicant avers that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not participate in the proceedings before the trial court despite proper service a clear indication that the subdivision and sale of her property was fraudulent.



13. The 1<sup>st</sup> applicant further avers that it was clear from the testimony of the 3<sup>rd</sup> respondent before the trial court that the 1<sup>st</sup> respondent did not pay a single cent with respect to the loan facility of Kshs. 3,100,000 advanced to him and has annexed a copy of the witness statement by Job Kariuki Mwangi dated 11<sup>th</sup> March 2021 marked “RM 6”.
14. The 1<sup>st</sup> applicant states that it is evident that the 1<sup>st</sup> respondent was not interested in holding any of the sub divisions of her parcel of land since he only wanted to obtain money from third parties who did not carry out their due diligence as required.
15. The 1<sup>st</sup> applicant further states that she only discovered about the fraud that had been carried out by the 1<sup>st</sup> respondent when she was served with court papers in Meru MCELC NO. 5 of 2019 and has annexed copies of pleadings in Meru MCELC No. 5 of 2019 Marked “RM 7”.
16. The 1<sup>st</sup> applicant avers that it is clear from the plaint in MCELC NO. 5 of 2019 that the subject matter is the parcel of land described as Timau Settlement Scheme/1218 which is a subdivision of the parcel of land known as Land title No. Meru Ngusishi/466.
17. The 1<sup>st</sup> applicant further avers that the trial court discharged the interim orders that were subsisting thus exposing the two parcels of land registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondent to being sold and transferred to third parties.
18. The 1<sup>st</sup> applicant states that she believes that should Meru MC ELC No. 5 of 2019 proceed for full hearing there is a likelihood of two conflicting judgments being delivered by the subordinate court over the same subject matter.
19. The 1<sup>st</sup> applicant further states that she believes that the trial court ought to have made a finding that the particulars of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> respondents had been proved as they did not participate in the hearing.
20. The 1<sup>st</sup> applicant avers that her advocates on record wrote to the Meru Land Registrar on 23<sup>rd</sup> March 2020 requesting for various documents including green cards, mutation forms and transfer and has annexed a copy of the letter dated 23<sup>rd</sup> March 2020 marked “RM8”
21. The 1<sup>st</sup> applicant further avers that the Meru Land Registrar replied to the letter dated 23<sup>rd</sup> March, 2020 with the letter dated 24<sup>th</sup> May 2020 in which he indicated that transfer documents with respect to the suit parcels of land could not be traced and has annexed the letter dated 24<sup>th</sup> May 2021 marked “RM 9”.
22. The 1<sup>st</sup> applicant states that she believes that if the custodian of the land records indicated that certain documents were missing that was a clear illustration of foul play.
23. The 1<sup>st</sup> applicant further states that she believes the appeal raises weighty issues and has high likelihood of success.
24. The 1<sup>st</sup> applicant avers that the appeal filed against the trial court’s judgment shall be rendered nugatory should the application herein be declined and that it is important to preserve the subject matter to avoid engaging in an appeal which may end up being a mere academic exercise.
25. The 1<sup>st</sup> applicant further states that the respondent will not be prejudiced in any manner should the application be allowed.
26. In opposing the application the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition dated 5<sup>th</sup> October, 2022 on the following grounds:
  - i. The application as filed is an abuse of the due process of the law.



- ii. The application lacks in merit and ought to be dismissed.
  - iii. The Magistrate’s judgment is sound and unchangeable.
  - iv. The applicants are illegally on the suit land and ought to be evicted forthwith.
  - v. The applicant ought to seek to be enjoined as parties in CMCC NO. 5/19 and not to stay as it is an advanced stage.
  - vi. The application is therefore fictitious and frivolous and should be dismissed forthwith.
27. The 3<sup>rd</sup> respondent filed a replying affidavit sworn by Sylvia Wambani, the legal Manager of the 3<sup>rd</sup> respondent, on 31<sup>st</sup> October, 2022. In her deposition she avers that the 1<sup>st</sup> appellant has concealed the truth as she has not disclosed her dealings with the 1<sup>st</sup> respondent nor has she explained how her land was subdivided without her knowledge, or how the 1<sup>st</sup> respondent obtained the original title deed without which subdivision would not occur. That the 1<sup>st</sup> appellant has not disclosed her dealings with the 2<sup>nd</sup> appellant with respect to the suit parcels stating that if truly there was a fraudulent case, the 1<sup>st</sup> appellant would have reported the loss of her title deed and the alleged fraud to the police.
28. It is the 3<sup>rd</sup> respondent’s contention that the 1<sup>st</sup> appellant appears to be working in cahoots with the 1<sup>st</sup> respondent to dispossess the 2<sup>nd</sup> and 3<sup>rd</sup> respondents of their respective rights to the respective land parcels. It is stated that it is unlikely that subdivision of the land was done without the knowledge of the 1<sup>st</sup> appellant and subsequently transfers done all without her knowledge, and it is pointed out that the appellant’s exhibit “RM – 5b” ( a copy of the green card) shows that the transfer of land parcel Ngusishi Settlement Scheme/1219 was transferred from the appellant to the 2<sup>nd</sup> respondent on 29<sup>th</sup> November, 2002 and subsequently, the 2<sup>nd</sup> respondent took a loan with the said land parcel as collateral and he charged it to Agricultural Finance corporation on 19<sup>th</sup> July, 2006 and no issue was raised by the appellant at the time. That the said land parcel was discharged by Agricultural Finance Corporation on 28<sup>th</sup> September, 2015. That the 1<sup>st</sup> respondent was advanced another loan by the 3<sup>rd</sup> respondent with the same land as collateral and the land was duly and procedurally charged to the 3<sup>rd</sup> respondent. It is further stated that the 1<sup>st</sup> respondent failed to repay the loan and it is only when the 3<sup>rd</sup> respondent intended to exercise its right as chargee that the 1<sup>st</sup> appellant alleged that the transfer to the 1<sup>st</sup> respondent was fraudulent without producing an iota of evidence. That the appellants filed the suit in the lower court six (6) years ago after their right of action was extinguished by dint of Section 7 of the Limitation of Actions Act and the appellants are accused of being guilty of laches and therefore not entitled to the interim orders, having waited for 20 years. It is the 3<sup>rd</sup> respondent contention that having not produced any evidence of fraud in the trial court, the appellants’ appeal is hopeless, adding that the appellants have no arguable appeal as it does not raise any bonafide issue and that the appeal will not be rendered nugatory if the stay is not granted. The 3<sup>rd</sup> respondent’s case is that there is no wrongdoing on their part and therefore ought to be allowed to dispose of the land to recover the loan and interest due which continue to accrue.
29. With the agreement of the parties, the court directed that the application be canvassed by way of written submissions. It is only the appellants who filed their submissions on 1<sup>st</sup> November, 2022 while counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents informed the court the 3<sup>rd</sup> and 4<sup>th</sup> respondents are not opposed to the application.
30. The applicants submitted that while the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition, they opted not to file an affidavit in reply to the application and argued that the factual issues set out in the application have not been controverted. Counsel for the applicants relied on the case of Kennedy



Otieno Diyo and 12 others Vs. Kenya Electricity Generating company Limited (2010) eKLR and Gulf Timber & Hardware Supplies Limited s Mungai Nguraiya & others (2022) KECA 87 (KLR) and submitted that failure to grant the orders sought would expose the appellants to eviction and having the suit property sold by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. That the Honourable court should thus preserve the subject matter before the appeal can be heard on its merits.

### **Analysis And Determination**

31. I have considered the application, the responses made and the submissions filed. In my view, the main issue for determination is whether the applicants have met the criteria for the grant of orders of stay pending appeal.

32. The principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which gives the court discretionary powers to stay execution and provides as follows-;

“6(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 Sub Rule (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”.

33. The Court of Appeal in the case of Butt Vs Rent Restriction Tribunal (1982) KLR 417 gave guidance on how a court should exercise the said discretion and held that:

“ 1. The power of the court to grant or refuse an application for a stay of execution is 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.”

34. In the case of RWW VS EKW (2019) eKLR, it was stated that:-

“The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, it is not rendered nugatory. However, in doing so the court should weight this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

35. Therefore, for an applicant to move the court into exercising its discretion to stay execution pending appeal, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.

36. The purpose of stay pending appeal is also to preserve the substratum of the case while the appeal is pending so that the appeal may not be rendered nugatory. However, in exercising its discretion on whether or not to grant stay, the court should weigh the rights of both the appellant against the successful litigant who should not be deprived from enjoying the fruits of his judgment.

37. In the case of Victory Construction V BM( a minor suing through next friend one PMM (2019 ) eKLR, the court stated that “the court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in section 1A and 1B of the *Civil Procedure Act* should also be taken into consideration” The court further stated that the court is no longer limited to the Provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in exercise of its powers under the *Civil Procedure Act* or interpretation of any of its provisions.

38. On the first criterion as set out in Order 42 Rule 6, that is whether the application has been brought without unreasonable delay, the judgment in the lower court was delivered on 5<sup>th</sup> September, 2022 while the application herein was filed on 16<sup>th</sup> September, 2022. I find that there was no delay in filing the application for stay pending appeal.

39. The second criterion is whether the applicants have demonstrated that they are bound to suffer substantial loss if the orders of stay of execution are not granted. In *Silverstein V Chesoni* (2002) 1KLR 867 the issue of what comprises substantial loss was held as follows:

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what loss has to be prevented by preserving the status quo because such loss would render the appeal nugatory”



40. The applicants have deposed that failure to grant the orders sought would expose them to eviction and having the suit property sold by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. In my view if the applicants are evicted and the suit land is sold, the appeal would be rendered nugatory and no doubt the applicants would suffer substantial loss.
41. The third criterion to consider is that the applicants must furnish security for the due performance of the decree. The issue of security has not been addressed by the applicants. However, the court has powers to order for the applicants to give security. In the circumstances, and considering the facts of this case, I will grant stay of execution pending appeal on condition that the applicants deposit the sum of Kshs. 1,000,000/= as security in an interest earning account in the joint names of the advocates for the applicants and the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The said sum of Kshs. 1,000,000 to be deposited within thirty (30) days from the date of this ruling and in default, the stay orders will lapse automatically.
42. The applicants have also prayed for stay of proceedings in Meru CM ELC case No. 5 of 2019. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his/her litigation. It impinges on the right of access to justice, right to be heard without undue delay and overall, right to a fair trial. Stay of proceedings can only be granted sparingly, and only in exceptional cases. In this case, I am far from being satisfied that the applicants have shown proper reason to stay the proceedings pending before the subordinate court. Granting the order of stay of proceedings will further delay the proceedings in that court. I am therefore of the view that the applicants have not met the test for grant of stay of proceedings in the matter before the subordinate court and I decline to grant the said order.
43. In the circumstances and for the reason I have given above, the court exercises its discretion and allows the application dated 16<sup>th</sup> September, 2022 in the following terms:-
- a. That the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are barred from selling, advertising for sale or in any other manner interfering with the parcels of land known as Ngusishi Settlement Scheme/1218 and Ngusishi Settlement Scheme/1219 pending hearing and determination of the applicant's appeal.
  - b. That the applicants/appellants shall furnish security of Kshs. 1,000,000/= for performance of the decree in Meru CMC ELC No. 031/032 OF 2020. The said amount shall be deposited in an interest earning account in the joint names of the appellants and the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents within thirty (30) days from the date hereof.
  - c. That in the event of failure to comply with the order in (b) above, the order in (a) shall stand vacated.
  - d. The costs of this application shall abide the outcome of the appeal.
44. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF JANUARY, 2023**

**In presence of**

C.A Kibagendi

Mutuma for appellants

No appearance for respondents

**C.K YANO**



**ELC JUDGE**

