



**Muriuki v Muriuki & another (Environment & Land Case
35 of 2018) [2023] KEELC 15712 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 35 OF 2018
EK WABWOTO, J
FEBRUARY 22, 2023**

BETWEEN

WILSON NDIRANGU MURIUKI APPLICANT

AND

MARY MUTHONI MURIUKI 1ST RESPONDENT

SUSAN NYAMBURA MURIUKI 2ND RESPONDENT

RULING

1. This ruling is in respect to the Applicant's Notion of motion application dated December 16, 2022 and accompanied by a supporting affidavit sworn by Wilson Ndirangu Muriuki where the Applicant sought the following orders:
 - a. Spent.
 - b. That pending hearing and determination of this Application and the intended Appeal this Honourable Court be pleased to stay execution and all proceedings pertaining to ELC CASE No 35 OF 2018 OS.
 - c. That the Honourable Court be pleased to grant leave to the applicant to lodge and serve a memorandum of appeal against the Judgement of the Environment and Land Court issued on November 21, 2022 in respect of ELC CASE No 35 OF 2018 OS.
 - d. That the Honourable Court be pleased to grant leave to the Intended Applicant to file an Appeal against the judgment of the ELC issued in November 21, 2022 in respect of ELC CASE No 35 OF 2018 OS.
 - e. That the costs of this application be in the cause
2. The application was based on the following grounds:



- i. Judgement was delivered in ELC CASE No 35 OF 2018 OS against the Intended Appellant/Applicant on November 21, 2022
 - ii. The intended Applicant is desirous of instituting an Appeal against the Judgement to have the matter heard on merits and it is only just that stay of execution be granted and that the Intended Appellant be granted leave to file the Appeal
 - iii. The Intended Appeal is highly meritorious and has high chances of success and it is further grounded on legitimate questions of law and facts and the Application has been brought without delay
 - iv. That the subject suit was in relation to the Applicant seeking to be registered as the proprietor of all that parcel of Land situated within Nairobi County known as LR No 14225/48 having acquired it by adverse possession.
 - v. That the Applicant has made substantial development on the suit property and even put up a permanent home with the father's authority granted in 1982 and the Respondents stand to benefit and be enriched upon his eviction
 - vi. It is necessary to stay execution so as to ensure the right to ownership of property of the Intended Appellant is not put at jeopardy
 - vii. That the Appellant has a draft Memorandum of Appeal which raises triable issues hence the need to grant the orders sought herewith
 - viii. That it is in the best interest of justice that said Judgement be set aside and/or stayed forthwith since it was issued irregularly.
 - ix. That the Appellant stands to suffer a substantial an irreparable loss if this Honourable Court fails to urgently intervene and issue orders sought herewith
 - x. That the Respondents will not suffer any prejudice if the orders sought herewith are granted.
 - xi. It is the interest of justice that this application be granted.
3. The matter came up for hearing of the application on February 7, 2023 in which it was argued that the Applicant was on the verge of eviction and likely to suffer the greatest harm. Moreover, the delay in filing was acknowledged and attributed to a delay in the obtaining the typed and certified proceedings.
 4. The Respondents opposed the application vide the grounds of opposition dated February 6, 2023. It was submitted that there is nothing to be stayed since it would be a negative orders. It was further argued that under Rule 77 of the [Court of Appeal Rules](#), the notice of appeal should be filed within 7 days.
 5. Having considered the submissions, authorities and supporting documents, it is clear that the issue for determination before this court is whether the application dated December 16, 2022 is merited.
 6. On the issue of stay of proceedings, I wish to state that stay of proceedings is a serious judicial action which greatly interferes with the right of a litigant to conduct his litigation. In *Halsbury's Law of England*, 4th Edition Vol 37 page 330 and 332, it was stated that:

“...The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to



continue....The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”[Emphasis Mine]

7. This court must factor in that stay of proceedings is also a discretion of the court. The use of discretion is to ensure proper use of judicial time and resources to dispense justice for the parties and guard against multiplicity of applications which are meant to delay the pursuit of justice.

8. Order 42, Rule 6 of the [Civil Procedure Code](#) outlines the parameters under which appeals will be brought before the court and how application for stay should be considered:

“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.

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.”

9. In respect to the issue of leave, Order 43, rule 2 of the [Civil Procedure Code](#) outlines the discretion of this court to grant leave for situations outside the purview of Order 43, rule 1 and section 75 of the [Civil Procedure Act](#) as follows:

“An appeal shall lie with the leave of the court from any other order made under these rules”

10. In this instance, Paragraph 40 and 41 of the said judgement confirms that the suit was dismissed in its entirety and no costs were awarded.

“...having found that the applicant has not satisfied the ingredients and or elements to succeed in a claim of adverse possession, he is not entitled to any of the reliefs sought since the same are not for granting. In the end, the originating summons dated January 29, 2018 is not merited and the same is dismissed in its entirety. On the issue of costs, having considered the relationship of the parties who are siblings, I direct that each party bears own costs of the suit.”

11. Bearing this in mind, I find that the orders granted in the judgement would not require any stay of proceedings nor stay of execution since the suit was dismissed in its entirety and requires no further



action. I align myself with the sentiments of the Court of Appeal in the case of Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR:

“The parties were not ordered to do anything or to refrain from doing anything...in Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus:

The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...

Consequently, the prayer for stay of execution must fall by the wayside and the same is hereby dismissed”

12. This court is bound to ensure that parties undergo due process at every stage of the litigation process. In upholding Article 50(1) of the Constitution, I find that the prayer for leave to appeal is rightly placed before the court and the same is therefore allowed.
13. In conclusion, the court hereby finds that the application dated December 16, 2022 partially succeeds and makes the following orders:
 - i. The Applicant is hereby granted leave to file an appeal against the judgement delivered on November 21, 2022 within 14 days of delivery of this ruling.
 - ii. Each party to bear its own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF FEBRUARY 2023

E K WABWOTO

JUDGE

In the presence of:

Ms Muraguri for the Applicant

Mr Wanjohi Theuri for the 1st and 2nd Respondents.

Court Assistant; Caroline Nafuna.

E K WABWOTO

JUDGE

