



REPUBLIC OF KENYA



**Muhura & 5 others v Karanja (Environment & Land Case
23 of 2020) [2023] KEELC 20792 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 23 OF 2020
LN GACHERU, J
OCTOBER 19, 2023**

BETWEEN

**HENRY GITAU MUHURA 1ST PLAINTIFF
AGNES NJOKI MUHURA 2ND PLAINTIFF
JOSPHAT IRUNGU MUHURA 3RD PLAINTIFF
STEPHEN KARANJA MUHURA 4TH PLAINTIFF
MARY WAITHIRA MUHURA 5TH PLAINTIFF
MBOTE GICHINI 6TH PLAINTIFF**

AND

BERNARD MUTURI KARANJA DEFENDANT

RULING

1. The first Notice of Motion Application is dated 12th June 2023, brought by the Defendant/Applicant. The 2nd Notice of Motion Application is dated 20th June 2023, brought by the Plaintiffs/Applicants.
2. On 23rd March 2023, this Court entered Judgement in favour of the Plaintiffs and issued several orders; - Among the orders issued are; - that the trust is determined and the land parcel No. Fort Hall Loc.18/Kirere/3, shall be shared equally among the Children of Gichuhi Gaturu(deceased); The Land Registrar be and is hereby ordered to Cancel Entry No. 2, is the Green Card for Fort Hall Loc.18/ Kirere/3, and any subsequent titles emanating thereof; A Government Land Surveyor be and is hereby directed to survey the land and undertakes the requisite steps to ensure that the land is surveyed as per the Judgement of this Court within 30 days of this Judgement.
3. Subsequent to the above Judgement, a Decree was issued on 18th May 2023, which stipulated the orders issued by the Court.



4. Thereafter, the Defendant/Applicant Benard Muturi Karanja filed a Notice of Motion dated 12th June 2023, brought under Order 42 Rule 1 of the Civil Procedure Rules and sought for these orders.
 1. That the orders issued by this Court be stayed pending the hearing and determination of Nyeri HCA No. E82 of 2023 or until further orders of this Court.
 2. Costs of the Application be provided for.
5. This Notice of Motion Application is anchored on the four ground.stated on its face; and the Supporting Affidavit of Benard Muturi Karanja: These grounds are: - That the Defendant/Applicant was dissatisfied with the Judgement of this Court and he filed an appeal at Nyeri being Nyeri Court of Appeal No. E082 OF 2023; - that the Appeal has high chances of success; and it would be prudent to stay the orders pending the hearing and determination of the appeal; the Application has been brought without undue delay and will not prejudice the Plaintiffs/Respondents in any way.
5. In his Supporting Affidavit, the Defendant/Applicant – Benard Muturi Karanja, averred that a Judgement in this matter was delivered on 23rd March 2023, and he felt aggrieved by the said Judgement and he instructed his advocate to file an appeal on his behalf. He further averred that an Appeal against the said Judgement was filed on 8th May 2023, as per the Memorandum of Appeal marked BMK 1. He contended that the said Appeal has a high chance of success and thus he urged the court to stay of execution of the Judgement of the Court dated 23rd March 2023, as the Plaintiffs have attempted to execute the said Judgement of this Court on 10th June 2023, by unlawfully subdividing the land. He urged the Court to stay the Judgement of this Court dated 23rd March 2023, pending the hearing and determination of the Appeal.
6. This Application is vehemently resisted by Plaintiffs/Respondents who filed their Replying Affidavit through Henry Gitau Muhura, who averred that he is the Personal Representatives of the Estate of Muhura Gichini and has authority to plead on behalf of the other Plaintiffs/Respondents. It was his contention that the Application herein is aimed at frustrating execution of the Decree and was only filed after the Plaintiffs/Respondents took a Surveyor to the suit property so as to execute the Decree of this Court. That the Defendant/Applicant has been frustrating the execution of the Decree of this Court by interfering with the Surveyor’s work on the suit property. He contended that his Advocate has advised him that an Appeal does not serve as a stay of execution on proceedings.
7. Further that this application is contemptuous in nature, as it refers to the execution processes unlawful. He also averred that the Plaintiffs/Respondents should be allowed to proceed with the execution and enjoy the fruits of their valid Judgement. The Plaintiffs/Respondents urged the Court to dismiss the instant application.
8. The 2nd Notice of Motion Application dated 20th June 2023, is by the Plaintiffs/Applicants herein brought under Sections 1A & 1B of the [Civil Procedure Act](#) wherein the Applicants have sought for the orders that; -
 - a. The Court be pleased to order that the OCS – Kigumo Police station do supervise execution of the Decree of this Court issued on 18th May 2023.
9. The Application is based on the sole ground that; the Defendant/Respondent has frustrated the process of execution of the Decree of this Court by interfering with the Surveyor’s whilst in the midst of performing his duties on the 10th June 2023.
10. It is further supported by the Affidavit of Henry Gitau Muhura, the 1st Plaintiff/Applicant, who averred that on the 10th June 2023, the Plaintiffs/Applicants were accompanied by the Surveyor and



they visited the suit land with the sole purpose of conducting survey in compliance with the Decree of this Court that was issued on 18th May 2023, marked HGM1.

11. He further averred that despite the Defendant/Respondent's is a Judgement debtor, being aware of the said Decree, he proceeded to disrupt the process to the point where it was impossible to conduct proper surveyor. They contended that the Defendant/Respondent actions are deliberately aimed at frustrating the process of execution. Therefore, the Applicants are seeking the assistance of OCS Kigumo Police Station to enforce the execution of the Decree of this Court. He urged the Court to allow the instant application.
12. The Application is equally resisted by the Defendant/Respondent. Benard Muturi Karanja via his Replying Affidavit sworn on 11th July 2013. He averred that he has been advised by advocate on record, that there is a Memorandum of Appeal on record, and that he has filed an application seeking to stay execution of the Judgement pending hearing and determination of the said appeal. Therefore, the instant application is incompetent and improperly before this Court. He further averred that the Judgement of this Court issued on 23rd March 2023, is erroneous as there is a case in Kigumo Law Courts regarding the ownership of the said parcel of land being Kigumo Succession Cause No. 175 of 2019. That the parcel of land belongs to Gichini Gaturu and not the Plaintiffs/Applicants herein.
13. He urged the Court to stay execution herein as there is an Appeal filed, and the same should first be heard and determined before the execution can issue. He urged the Court to dismiss the instant application.
14. The two Applications were canvassed together by way of written submissions.
15. In regard to the Notice of Motion Application dated 12th June 2023, the Defendant/Applicant through T M Njoroge & Co. Advocates filed his submissions on 11th July 2023, and submitted that the Defendant/Applicant is deserving of the order of stay of execution. He relied on order 42 rule 6(2) of the [Civil Procedure Rules](#) which spells out the conditions to be satisfied before grant of stay of execution.
16. On substantial loss, the Defendant/Applicant relied on the case of [James Wangalwa & Another vs Agnes Naliaka Cheseto](#)(2012)eKLR, where the Court held;

“the Applicant must establish other factor which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.....the issue of substantial loss is the cornerstone of both jurisdictions substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”
17. The Defendant/Applicant further submitted that if stay of execution is not granted and the Suitland is subdivided, then the Applicant will be left out of his ancestral home even before the Succession Cause is completed.
18. He also submitted that if execution is carried out, the Defendant/Applicant's Appeal will be rendered nugatory and will expose the Applicant to irreparable loss and damage. That the Applicant should be granted an opportunity to exhaust all his legal remedies. He further submitted that there was no inordinate delay by himself in bringing the Instant Application as the Memo of Appeal was filed on 8th May 2023, and the Judgement was delivered on 23rd March 2023.



19. The Defendant/Applicant also submitted that the power of the Court to grant stay is discretionary and that the purpose of stay of execution is to preserve the subject matter in dispute, while balancing the interests of the parties and considering the circumstances of the case.
20. He urged the Court to exercise its discretion and grant the stay of execution.
21. On their party, the Plaintiffs/Respondents filed their submissions on 2nd August 2023, through Chiuri & Chiuri Co. Advocates, and submitted that the Judgement of the Court was delivered on 23rd November 2023, and the Application was filed on 13th June 2023, and therefore it was not filed timeously, and the Application is an attempt to delay execution of the Judgement of this Court.
22. On whether the Defendant/Applicant should be granted stay of execution, the Plaintiffs/Respondents submitted that no sufficient cause has been shown as provided by order 42 rule 6(1) of the [Civil Procedure Rules](#). That it is clear that no appeal or second appeal shall operate as stay. Further that the said provision gives the Court discretion to grant stay for sufficient cause. The Plaintiffs/Respondents relied on the case of [RWW vs EKRL](#) (2019) eKLR, where the Court held;

“The purpose of an application for stay of execution pending an 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, is not rendered nugatory. However, in doing so, the Court should weigh 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”
23. It was further submitted that the Defendant/Applicant application was not made timeously since the Judgement was delivered on 23rd March 2023, and the Application was filed on 13th June 2023.
24. That the subdivision in issue is not unlawful as it stems from the decisions of this Court, and in balancing the interests of the parties, the Court should not allow the instant application.
25. Further that the Defendant/Applicant reside on the suit property, and the subdivision will not deprive any party of his home as all parties to the suit land have been residing on the subject property over the years. The Plaintiffs/Respondents urged the Court to dismiss the instant application and that in the event the same is allowed, then the Defendant/Applicant should be ordered to deposit security for costs of Ksh. 400,000/=.
26. In respect to the Notice of Motion Application dated 20th June 2023, the Plaintiffs/Applicants through Chiuri & Chiuri Advocates, filed their submissions on 2nd August 2013, and submitted that the since the Court issued a Judgement on 23rd March 2023, and Decree on 18th May 2023, orders sought are meant to ensure smooth and peaceful compliance with the orders of the Court. That the Defendant/Respondent disrupted the subdivision process to frustrate execution of the Decree. The Plaintiffs/Applicants urged the Court to allow them to use Police assistance in execution of the Decree of this Court.



27. They relied on the case of *Kimutai Lelei vs Hosea Bittok & Another* (2020) eKLR, where the Court held;

“This is an application for an order directing the police to ensure peace and order during eviction. It should be noted that this is a matter where a judgement has been rendered and a decree issued. The only issue remaining is the enforcement of the decree which requires police supervision to ensure peace”

28. Further that since there is no stay, then the Plaintiffs/Applicants should be allowed to execute the Decree issued by the Court. That the Defendant/Respondent is keen on frustrating the execution of the Court order and thus the reasons why the orders sought should be allowed. Reliance was placed on the case of *Lal Chand v. Radha Krishan* Air 1977 SC 789, where the Court held;

“The Principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The Principle is also founded in equality, justice and good conscience, which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue”.

29. It was the Plaintiffs/Applicants further submissions that the Defendant/Respondent cannot now raise issues that were tackled during litigation in the Replying Affidavit as the same defeats the end of justice.

30. On his part the Defendant/Respondent filed his submissions in respect of the Notice of Motion dated 20th June 2023, through his advocates T M Njoroge & Co. Advocates, where he submitted that he was dissatisfied with the Judgement of the Court delivered on 23rd March 2022, and has since lodged an appeal challenging the said Judgement and Decree. That he has also filed an application for stay of execution as provided by order 42 rule 6 (2) of the *Civil Procedure Rules* and therefore the Application for Police assistance should be declined. That if the orders is granted, the same shall amount to denying the Defendant/Respondent an opportunity to exhaust all legal remedies available to him.

31. The Court has now carefully considered the Court record, the two Notice of Motion Applications and the Affidavits in support and against the same, and the cited authorities. The Court has also considered the relevant provisions of law, and finds the issues for determination are;

- i. Whether the Application for stay of execution is merited?
- ii. Whether the Application for Police assistance through OCS Kigumo Police Station is merited?
- iii. Who should pay costs of the Application?

(i) Whether the Application for stay of execution is merited?

32. It is not in doubt that once a Judgement is delivered and Decree issued, execution is imminent and as such, a Judgement debtor who is aggrieved by the Decree of the Court has a duty or responsibility to act the soonest to seek stay of execution of the said Judgement and Decree. The Judgement herein was delivered on 23rd March 2023, and the Decree was issued on 18th May 2023. The Defendant/Applicant did not file for stay of execution immediately after the Judgement was delivered.

33. It is not in doubt that the Plaintiffs/Respondents had taken the Surveyor to the ground to execute the orders of the Court on 10th June 2023. This said action jolted the Defendant/Applicant and thus this application has been filed after about 80 days from the date of the Judgement and about 45 days after the Memorandum of Appeal was filed.



34. Order 42 rule 6 of the [Civil Procedure Rules](#) governs the law on stay of execution. It is trite that filing of an Appeal is not a stay in itself. order 42 rule 6(2) of the said [Civil Procedure Rules](#) provides;
- “(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.”
35. The above principles have been echoed in so many decisions of the Courts. In the case of [Gitirau Peter Munya vs Dickson Mwenda Kitbinji & 2 Others](#) (2014) eKRL, the Supreme Court held as follows;
- “Before a Court grant an order for stay of execution, the Appellant or intending Appellant must satisfy the Court that;-
- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
36. Further in the case of [Michael Ntouthi Mitheu vs Abraham Kivondo Musau](#) (2021) eKLR, the Court tied the principles for stay with the provisions of Sections 1A and 1B of the [Civil Procedure Act](#) and had this to say;-
- “To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.”
27. Taking into account the provision of order 42 rule 6, of the [Civil Procedure Rules](#) and the above cited authorities, the Court will now juxtapose the same to come to a conclusion on whether the Defendant/Applicant is deserving of the orders of stay of execution.
28. The Defendant/Applicant must satisfy; --
1. The Application was made without unreasonable delay.
 2. That he will suffer substantial loss.
 3. The Appeal will be rendered nugatory.
 4. Security of costs for due performance.
29. On whether the application was filed without unreasonable delay, it is evident that the impugned judgment was delivered on 23rd March 2023, and the instant application was filed on 13th June 2023. That is a period of about 80 days from the date of Judgement. In the case of [Jaber Mohsen Ali & Another vs Priscillah Boit & Another](#) (2014)eKRL, the Court held that a delay of even a day was a delay.



The Applicant in the above case had filed for stay of execution and the Court held that a delay of four days was inordinate.

30. The Plaintiffs/Respondents have submitted that the Defendant/Applicant did not file his application timeously. That he filed the same after execution had begun and thus there was inordinate delay. What amount to inordinate delay was explained by the Court in the case of *Utalii Transport Company Ltd. & 3 Others vs. NIC Bank Ltd & Another* (2014) eKRL, where the Court held;

“Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”

31. The Defendant/Applicant filed a Notice of Appeal on 28th March 2023, and the Memorandum of Appeal on 8th May 2023. However, he did not explain the reasons for delay of about 80 days in filing this Application for stay of execution. It might be that the Defendant/Applicant was jolted to action by the actions of the Plaintiffs/Respondents to execute the Decree of the Court.

32. In the case of *Tamil Enterprises Ltd vs Official Receiver & Provisional & Another* (2010) eKLR, the Court of Appeal concurred with the trial Court that an Application for extension of time to file an appeal after seventeen days amounted to inordinate delay.

33. Once Judgement is delivered, there is anticipation that execution will ensure anytime and there is no reasons advanced herein for not filing an application for stay of execution at the earliest. With no reasons advanced for the delay, of about 80 days, this Court finds that there was unreasonably delay.

34. On the second principle that the Applicant will suffer substantial loss, the Defendant/Applicant has submitted that the subdivision to be undertaken is unlawful. However, the said subdivision by the Government Surveyor is in execution of a Decree of the Court. The said Decree has not been set aside and it cannot be said to be unlawful. Execution is a lawful process. It is also evident that all the parties live on the suit property and the Court gave orders that a Government Survey should survey the suit property taking into account the current occupation of the parties herein. Substantial loss was defined by the Court in the case of *Tropical Commodities Supplies Ltd and others vs International Credit Bank Ltd (in liquidation)* 2004 E A LR 337, where the Court held;

“...substantial loss does not represent any particular mathematical formula, rather, it is a quantitative concept. It refers to any loss, great or small, that is of real worth or value and as distinguished from a loss without value or loss that is merely nominal...”

35. The Defendant/Applicant has not demonstrated the loss that he will suffer given that none of the parties will be moved or evicted from where they currently utilize the land in question.

36. In the case of *James Wangalwa & Another vs Agnes Nabaka Cheseto* (2012) eKLR, the Court held;

“No doubt in law and fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *CPR*. This is so because execution is a lawful process”.



37. The Plaintiffs/Applicants are putting in Motion the process of execution and that in itself does not amount to substantial loss.
38. Given that the process of carrying out survey and subdividing the land as per the Judgement of the Court will not cause any eviction to any party or any of the parties herein, then the Court finds the Defendant/Applicant has not established that he will suffer substantial loss, if the said survey work is carried out
39. On whether the Appeal will be rendered nugatory, the Court will rely on the Supreme Court decision in the case of Kampala *International University vs Housing Finance Company Ltd.* (E035) of 2022(2023), where the Court held;
- “On the arguability of the appeal, this question does not call for the interrogation of the merit of the appeal and the court, at this stage, must not make any definitive findings of either fact or law. An arguable Appeal is not one which necessarily must succeed but one which ought to be argued fully by the court.”
40. Therefore, the Defendant/Applicant ought to demonstrate that the Appeal if successful will be rendered nugatory. As the Court observed earlier, the parties herein are related and have lived on the suit property all their lifetime. If the appeal is successful, the parties will continue to live as they do and thus the Defendant/Applicant’s Appeal will not have been rendered nugatory at all. As the Court deduced from the proceedings that the parties are occupying their respective portion of land, then the Defendant/Applicant has not demonstrated that if his appeal is successful, the said Appeal will be rendered nugatory.
41. As the Court determines this application it bears in mind that an application for stay pending appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising his right of appeal is safeguarded, and that the right of the Respondents who are successful litigants are also protected by not depriving them the fruits of their judgment. In considering the above, the Court should ensure that no party suffers prejudice that cannot be compensated by an award of costs.
42. The Defendant/Applicant has not demonstrated that the Plaintiffs/Respondents intends to dispose off their portion of land which they have occupied all along. The grant of stay of execution is discretionary and thus Court exercises that discretion and finds that the Defendant/Applicant has not demonstrated that he will suffer substantial loss and therefore the Court declines to grant the order of stay of execution as sought by the Applicant herein.

(ii) Whether the Application for Police Assistance is merited?

43. On the 2nd Notice of Motion Application for an order that the OCS Kigumo Police Station be directed to supervise execution of the Court’s decree that was issued on 18th May 2023, the Court finds that the said Decree, is an order issued by the Court and it is not illegal or unlawful as alluded by the Defendant/ Respondent. The said Decree has not been overturned and for now it is lawful. There is no stay of execution of the Judgement of this Court. As provided by order 42 rule 6, an Appeal is not a stay of execution. The Plaintiffs/Applicants are successful litigants and should not be deprived the fruits of their Judgment. The Court will be persuaded by the findings in the case of *Kimutal Lelei vs Hosea Bittok & Another (Supra)* that Judgement has been rendered and a Decree issued herein. The only issue remaining is the enforcement of the said Decree, which requires police supervision to ensure smooth execution of the Decree of this Court.



44. The Plaintiffs/Applicants alleged that the Defendant/Respondent frustrated the execution of the said Court's Decree on 10th June 2023, by denying the Plaintiffs/Applicants and the Government Surveyor a conducive atmosphere to carry out the survey works.
45. For the above reasons, the Court finds that the Plaintiffs/Applicants have demonstrated that police assistance is needed for peaceful execution of the Court's Decree of 18th May 2023. Consequently, the Notice of Motion Application dated 20th June 2023, is found merited and thus allowed.

(iii) Who should bear costs of the Applications?

46. It is the trite law that costs follow the event and it is ordinarily awarded to the successful litigant. The Plaintiffs/Applicants /Respondents are the successful litigants herein and are consequently awarded costs of the two Applications.
47. In a nutshell, the Application dated 12th June 2023, by the Defendant/Applicant is found not merited and is dismissed entirely with costs to the Plaintiffs/Respondents.
48. However, the Notice of Motion Application dated 20th June 2023, is found merited and is allowed entirely with costs to the Plaintiffs/Applicants.
49. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19TH DAY OF OCTOBER, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Chiuri for the Plaintiffs/Respondents/Applicants

Mr T.M Njoroge for the Defendant/Applicant/Respondent

Court Assistant – Joel Njonjo

L. Gacheru

Judge

19/10/2023

