



REPUBLIC OF KENYA



**Akute v Ngigi & 2 others (Environment & Land Case 197 of 2017)
[2023] KEELC 20904 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 197 OF 2017
LC KOMINGOI, J
OCTOBER 19, 2023**

BETWEEN

SAMSON TEELA AKUTE PLAINTIFF

AND

KENNETH J KAMAU NGIGI 1ST DEFENDANT

TWYFORD CERAMICS COMPANY LIMITED 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This is the Notice of Motion dated 8th May 2023 brought under;

(Under Order 51 Rule (1) and Order 42 Rule (6) of the Civil Procedure Rules 2010: Section 1A, 1B, and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya: Article 50 and 159 of *the Constitution* of Kenya 2010 and all other enabling provisions of the law).
2. It seeks orders;
 1. Spent
 2. Spent
 3. That Pending the lodging, hearing and determination of the intended Appeal there be and is an order of Stay of execution of the said Judgement delivered herein by the Honourable Mr. Justice M.N. Gicheru, and the stay be, and is hereby , extended to consequential decree and any other orders(s) that may arise or have arisen from the said judgement.
 4. That pending lodging hearing and determination of this Application and the intended Appeal there forthwith be and is an order directed, through the Attorney General to the Chief Lands



Registrar and the Chairperson of the National Land Commission and all their subordinate staff, including the Registrar in charge of Kajiado County Land Registry inhibiting and or prohibiting any transaction of any nature and manner whatsoever in the parcel of land comprised in the Title Deed, Title Number: Kajiado/Dalalekutuk/1320.

5. That the costs of this Application abide by the Appeal.
3. The grounds are on the face of the application and are set out in paragraphs (a) to (k).
4. The Application is supported by the affidavit by Samson Teela Akute, the Plaintiff/Applicant sworn on the 8th May 2023.
5. The Application is opposed. There is a Replying Affidavit sworn by Kenneth J. Kamau Ngigi the 1st Defendant/Respondent sworn on the 31st May 2023.
6. There are also grounds of opposition filed by the 2nd Defendant/Respondent dated 9th June 2023.
7. On the 20th June 2023 the court with the consent of parties directed that the Notice of Motion be canvassed by way of written submissions.
8. I have considered the Notice of Motion and the affidavits in support. I have considered the responses thereto, the written submissions and the authorities cited. The issues for determination are;
 - i. Whether the Plaintiff's/Applicant's application meets the threshold for grant of stay pending appeal.
 - ii. Who should bear costs of this application?
9. In their submissions, counsel have substantiated the respective positions stated in their clients respective affidavits. It is now appropriate to consider the facts that have emerged out the legal principles applicable.
10. Order 42 rule 6(1)(2) of the Civil Procedure Rule, 2010 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.



11. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014)* eKLR held:

“... The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants 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.

12. It is the Plaintiff's/Applicant's case that he is the registered owner of Kajiado/Dalalekutuk/1320 by virtue of a title deed issued on 14th August 1997. The 1st Defendant/Respondent also has a title deed issued on 29th May 1996. It is the Plaintiff's/Applicant's contention that he stands to suffer substantial loss as the 1st Defendant/Respondent may dispose of the suit property.

The Court of Appeal in *re Estate of In re Estate of Harish Chandra Hindocha (Deceased)[2021]* eKLR had the following to say:

“... the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful... on this prerequisite, we find that in the circumstances of the rival position as laid before us, declining the relief sought would pave the way for the respondent to execute the judgment and decree granted in his favour as deemed fit, which may result either in an irreversible consequence or one that would likely be reversed after considerable hardship or expense and would therefore be highly prejudicial to the applicant...”

13. I am satisfied that the Plaintiff/Applicant has demonstrated substantial loss. I also rely on the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto (2021)* eKLR .

14. I note that the Application is dated 8th May 2023. The same is brought without undue delay.

15. In conclusion I find that the Plaintiff's/Applicant's application meets the threshold for grant of stay of execution pending appeal.

16. Accordingly I grant the following orders;

- a. That Pending the lodging, hearing and determination of the intended Appeal there be an order of Stay of execution of the Judgement delivered by the Honourable Mr. Justice M.N. Gicheru, and the stay be, and is hereby , extended to consequential decree and any other orders(s) that may arise or have arisen from the said judgement.

On Condition that the Plaintiff/Applicant deposit Kshs.500,000 in Court as security for costs within forty five (45) days from the date of this ruling.Failure to which the stay of execution order shall lapse automatically.

- b. That pending lodging hearing and determination of the intended Appeal an order is hereby issued directed, through the Attorney General to the Chief Lands Registrar and the Chairperson of the National Land Commission and all their subordinate staff, including the Registrar in charge of Kajiado County Land Registry inhibiting and or prohibiting any



dealings in the parcel of land known as Kajiado/Dalalekutuk/1320. Pending hearing and determination of the intended Appeal.

- c. The Costs of this Application be borne by the Plaintiff/Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19TH DAY OF OCTOBER 2023.

L. KOMINGOI

JUDGE

