



**Githinji & another (Suing as a Legal Representative of the Estate of
Flora Wanjiku Githinji) v Kabiri (Environment and Land Appeal
E009 of 2021) [2024] KEELC 5444 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E009 OF 2021**

**LN GACHERU, J
JULY 24, 2024**

BETWEEN

**ESTHER WANGARI GITHINJI 1ST APPLICANT
CHARLES KABIRI GITHINJI 2ND APPLICANT
SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF FLORA
WANJIKU GITHINJI**

AND

PETER NGUGI KABIRI RESPONDENT

RULING

1. There are two Applications herein for determination. The 1st Notice of Motion Application is dated 27th Feb 2024, by the Respondents/ Applicants. The 2nd Application is dated 1st March 2024, by the Appellant/ Applicant, Peter Ngugi Kabiri. The court directed that the two Applications be canvassed together.
2. The Respondents/Applicants herein Esther Wangari Githinji and Charles Kabiri Githinji, brought this Notice of Motion Application dated 27th February, 2024, which is premised on Order 42 Rule 6 of the *Civil Procedure Rules*, Article 159(2)(b) of the *Constitution* and Sections 1, 1A, 3 and 3A of the *Civil Procedure Act*. The Applicants sought for these orders; -
 - i. That this Court be pleased to issue orders of stay of execution on the Judgment delivered on 8th February, 2024, by this Court and Decree issued on 22nd February, 2024, pending the hearing and determination of the Application/Appeal.
 - ii. That costs of this Application be provided for.”



3. The Application is supported by the grounds stated thereon and the on Supporting Affidavit of Esther Wangari Githinji, sworn on 27th February, 2024. The deponent averred that the 2nd Respondent, Flora Wanjiku Githinji, was her co-wife, but is now deceased, while the Appellant/Respondent, Peter Ngugi Kabiri, is her brother-in-law. That the Respondents/ Applicants reside on LR Maragua Ridge/559 & 560 (the suit property,) which was sub-divided into two equal parts of 7.75 Acres, each shared out between the 1st and the 2nd Respondent/Applicants.
4. The 2nd Respondent was substituted by Charles Kabiri Githinji, vide a court order of 19th March 2024, following an Application for substitution filed in court on 12th March 2024. This Application was not opposed, and the same was allowed accordingly.
5. The 1st Respondent/Applicant contended that the Appellant /Respondent has initiated the process of executing the Judgment of this Court dated 8th February, 2024, to carve-out a third of the land, which act will cause great damage to the Respondents/ Applicants, since they have filed an Appeal which Appeal is awaiting determination by the Court of Appeal in Nyeri.
6. The 1st Respondent/Applicant annexed a copy of the Notice of Appeal, dated 15th February, 2024, filed against the decision of this Court dated 8th February, 2024. She contended that the intended Appeal has overwhelming chances of success. Further, that the Respondents/Applicants stand to suffer irreparable damage, loss and anxiety if the orders sought in the instant Application are not allowed.
7. It was her contention that no serious loss shall be occasioned to the Appellant/Respondent if the orders sought in the instant Application are granted by the Court.
8. This Application is opposed by the Appellant/ Respondent, Peter Ngugi Kabiri, through his Replying Affidavit dated 12th March, 2024, wherein, he described the instant Application as devoid of merit, scandalous and an abuse of the due process of the Court.
9. Further, he contended that the said Application is defective ab-initio for failure to annex the Judgment or Decree which is sought to be stayed by this Court.
10. Further, it was his allegations that he has lived on the suit property for more than 60 years, and that this averment is admitted by the 1st Applicant on paragraph 12 of her Supporting Affidavit dated 27th February, 2024.
11. It is the Appellant/Respondent's further contention that the Respondents/Applicants have failed to demonstrate what prejudice they will suffer if the Appellant/ Respondent acquires title over one third of the suit land, wherein he has been residing for 60 years. That he should be left to enjoy the fruits of his successful Judgment for which he has been waiting for many decades.
12. It was his further contention that an Appeal does not accord a party an automatic stay, and an Applicant seeking stay of execution must demonstrate to the Court the prejudice he or she would suffer if a stay is not granted. That the Respondents/ Applicants have failed to show to this court the prejudice which they stand to suffer if a stay is not granted.
13. The Appellant/Respondent also averred that the Respondents/Applicants' children have been destroying his crops, and have prevented the County Surveyor from executing the Judgment of this Court dated 8th February, 2024, through violence and harassment.
14. He further contended that the Respondents/Applicants have not offered any security for costs as required by law for an Applicant seeking a stay of execution. Consequently, he urged the court to dismiss the instant Application, with costs.



15. In the Notice of Motion dated 1st March 2024, the Appellant/ Applicant, Peter Ngugi Kabiri, sought for the following orders; -
 - a. That the court be pleased to direct the OCS Of Maragua Police Station, or the area Provincial Administration Police to provide police assistance to the Appellant/ Applicant and any Appointed Or Nominated Surveyor From The County Survey Office, Muranga County, in executing the decree dated 8th February 2024, in regard to subdivision of the suit land Maragua Ridge/ 559 & 560, and do ensure compliance and that peace prevails
 - b. That costs of the Application be provided for.
16. This application is premised on the grounds set out on the face of the Application, and on the Supporting Affidavit of the Appellant/ Applicant, Peter Ngugi Kabiri.
17. It was his averments that in the Judgement of the court dated 8th February 2028, he was awarded 5 acres, to be excised from land parcels no. Maragua Ridge/ 559 & 560, as is evident from annexure PNK1.
18. That in execution of the said Judgement, and accompanied by Muranga County Surveyor, they proceeded to execute the Decree of the court, but the Respondents became adamant ,hostile and violent.
19. Consequently, he requested Maragua Police Station, to assist in the execution of the4 Decree, but were reluctant to enforce the said Decree, unless served with Order of the court.
20. It was his averments that for the sake of peace and to control hostile situation on the ground, he urged the court to direct the OCS Maragua Police Station, to provide police assistance in the execution of this court’s Decree , and ensure that peace prevails.
21. The Respondents, opposed the said Application dated 1st March 2024, through its written submissions dated 26th April 2024
22. These two Applications were canvassed by way of written submissions, as the court had directed that the two Applications be canvassed and determined together, and thus this Ruling.
23. The Respondents/ Applicants filed their written submissions on 26th April 2024, through the Law Firm of Omwoyo Momanyi Gichuki & Co. Advocates, and identified two issues for determination by the Court as follows:
 - (i) Whether the Applicants have met the threshold for grant of stay of execution?
 - (ii) Who shall bear the costs of the Application?
24. The Respondents/ Applicants cited the provisions of Order 42, Rule 6 (1) of the [Civil Procedure Rules](#) and submitted that pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) which provides for the “Overriding Objective”, this Court is empowered to ensure the just determination of cases.
25. On the conditions that need to be satisfied by an Applicant seeking a stay of execution, reliance was placed on the holding of the Court in the case of [Antoine Ndiaye v African Virtual University](#) [2015] eKLR
26. On the issue of substantial loss, reliance was placed in the case of [Antoine Ndiaye v African Virtual University](#) [2015] eKLR and in the Ugandan case of [Sewankambo Dickson v Ziwa Abby](#) HCT-00-CC MA 0178 of 2005.



27. Further, the Applicants submitted that the instant Application for stay of execution, was brought without unreasonable delay, having been filed on 27th February, 2024, while the Decree of this Court which is sought to be stayed was issued on 22nd February, 2024.
28. Regarding provision of security, reliance was placed in the case of *Focin Motorcycle C. Limited v Ann Wambui Wangui & another* [2018] eKLR to anchor the proposition that security is a show of good faith, that the intended appeal is not calculated to deprive the decree holder of the fruits of the Judgment.
29. Further, the Respondents/ Applicants submitted that they are willing to provide sufficient security towards the Decree dated 22nd February, 2024, as the Court may direct in order to protect the Respondent's interest which would ensure that the Respondent will be in a position to realize Judgment should the intended Appeal be unsuccessful.
30. On the issue of costs, it was submitted that the instant Application is merited, and consequently costs thereof should be borne by the Appellant/Respondent.
31. It was further submitted that the intended Appeal if successful would be rendered moot if the ownership over the suit land exchanged hands.
32. With regard to the Notice of Motion dated 1st March 2024, the Respondents submitted that they have already filed a Notice of Appeal dated 15th February 2024, and an application for stay off execution.
33. It was their submissions that the Appeal has a high chance of success, and the occupation of the suit land should not be disturbed, pending the hearing and determination of that Appeal, being Civil Appeal No. E057 of 2024, and the Record of Appeal has been filed before the said Court of Appeal.
34. Further, it submitted that even if the Appellant/ Applicant has been in occupation of the 5 acres, he did not have titles in his name, which the Respondents are seeking to protect, pending the hearing of the Appeal.
35. It was also submitted that the Appellant/ Applicant will not be prejudiced in any way if the status quo ante, is maintained pending the hearing and determination of the Appeal, since the Appellant/ Applicant is in occupation of the 5 acres of the suit land, which he has been tilling and getting his farm produce.
36. They submitted that allowing the Application would give the Appellant/ Applicant full control of the said 5 acres, and if the Appeal is successful, then the same would be rendered moot.
37. On the issue of costs, it was submitted that costs should be borne by the Appellant/ Applicant. They urged the court to dismiss the said Application with costs.
38. The Appellant/ Respondent filed his two sets of written submissions dated 15th April 2024, through the Law Firm of Kanyi Kiruchi & Co. Advocates, in response to the two applications.
39. In respect to the Notice of Motion dated 27th February 2024, he identified two (2) issues for determination by the Court;
 - i. Whether the Applicant's Application should be allowed?
 - ii. Costs of the Application.
40. The Appellant/Respondent relied on the holding of the Court in the case of *RWW v EKW* (2019) eKLR, to buttress the position that in considering an Application for stay of execution, the Court needs to balance between the interests of both the Applicant/s and the Respondent/s.



41. It was his submitted that the instant Application dated 27th February 2024, is meant to deny the Appellant/ Respondent, who was the successful litigant in his Appeal, the fruits of his Judgment obtained from this Court.
42. He further submitted that the Respondents/ Applicants are not entitled to the reliefs sought in their Application, because they have frustrated the implementation of the Judgment of this court dated 8th February, 2024 by causing havoc towards the Appellant/Respondent, and the County Surveyor by preventing the demarcation of the suit land during the site visit of 28th February, 2024.
43. Reliance was also placed in the cases of *Awale Transporters v Kelvin Perminus Kimanzi* (HCCA No. 161 of 2019); and, *Samvir Trustee Limited v Guardian Bank Kenya Limited* (Milimani) HCCC no. 795 of 1997 in support of the argument that the Applicants have failed to show the court how they will be prejudiced if the Respondent acquires title to the land upon which he has been residing for 60 years.
44. On the issue of costs, the Appellant/ Respondent relied on the following cases: *DGM v EWG* [2021] eKLR; *Party of Independent Candidates of Kenya & Another v Mutula Kilonzo & 2 others* (2013) eKLR; and, *Lebven Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227
45. With regard to his Notice of Motion Application dated 1st March 2024, the Appellant/ Applicant set out two issues for determination;
- i. whether the police assistance should be allowed;
 - ii. costs of the application.
46. On whether the Police assistance should be allowed, he relied on section 24 of the *National Police Service Act*; which among the many functions of the police is to maintain law and order.
47. It was his submissions that since when he visited the suit land with the County Surveyor, the Respondents were hostile and violent, and prevented the implementation of the Judgment of this court, then the OCS Maragua Police Station, should be ordered to provide security needed so that the survey work can go on.
48. For this, the Appellant/Applicant relied on the case of *Namu Wachira & 2 Others v Njeru Wachira* (2015) eKLR, put its reliance in the case of *Claire Adamba Okanga v. Godfrey Gichuki Waiharo* being Civil Appeal number 69 of 2012 (at Nairobi) in which the court ordered that;
- “the officer commanding in charge of the police station to assist the appellant in enforcing the court order. The court had directed that the ex parte applicant be given interim custody of the two children of their marriage. The police assistance therein was requested for in order to break into the premises.....”
49. On the issue of costs, the Appellant/ Applicant submitted that costs do follow the event, as demonstrated in the case of *DGM vs EWG* (2021) eKLR, cited in the case of *Party of independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others* (2013) eKLR which approved the words at Murray C J in *Lebven Products vs Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 that it stated:
- “It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the



general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

50. Consequently, the Appellant/ Applicant urged the court to allow his Application with costs to him.
51. The Court has considered the two Notices of Motion Applications, the responses to the same, the rival written submissions and the cited authorities and finds that there is only one issues for determination, being; - Whether the Respondents/Applicants are entitled to the Orders sought in the Notice of Motion dated 27th Feb 2024, and whether the Appellant/ Applicant is entitled to the Notice of Motion Application dated 1st March 2024?
52. The Notice of Motion Application dated 27th February 2024, is founded on Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, which 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 appeal case of 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."
53. While citing the decision in Antoine Ndiaye v African Virtual University [2015] eKLR., the Court in the case of Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR declared as follows:
- "... an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given".
54. In the case of RWW v EKW [2019] eKLR, which was cited by the Appellant/ Respondent in his written submissions, the Court considered the purpose of a stay of execution order pending appeal, as follows:
- "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.”

55. Further, in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court held that:

“No doubt, in law, the 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. The applicant must establish other factors 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.”

56. Again, the Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR, reasoned as follows:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

57. Further, in the case of *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal as follows:

- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
- ii. 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 the Appeal court reverse the judge’s discretion.
- iii. Thirdly, 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.
- iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

58. In the instant Application for stay of execution, the Respondents/ Applicants are seeking for a stay of execution of this Court’s Judgment dated 8th February, 2024, and Decree dated 22nd February, 2024, in which the Court held that the Appellant/Respondent is entitled to 5 Acres, out of the suit land currently under his occupation.



59. The Appellant/ Respondent argued and submitted that the Respondents/ Applicants herein frustrated his attempts to demarcate his 5 Acres portion from the suit land by causing havoc, and by preventing the County Surveyor from implementing the said Judgment of the Court.
60. The Court has considered the pleadings, and rival written submissions of the parties in respect of this Application for stay of execution, and the Appellant/Respondent's response thereto, and his Application dated 1st March, 2024 and determines as follows;
61. The Appellant/ Respondent's annexure "PNK A" which is a Surveyor's Report prepared and signed by Peter Njeru (Land Surveyor-ministry Of Lands & Physical Planning) dated 1st March 2024, indicates that during the site visit of 28th February, 2024, the Respondent and his team of two Surveyors plus the driver were prevented from demarcating the suit land as directed by this Court.
62. The Respondents/Applicants in their Application for stay, have denied frustrating the execution of the orders of this Court dated 8th February, 2024, and they averred that the Appellant/ Respondent did not provide evidence of having made a report to the Police in respect of the said alleged actions of the Respondents.
63. However, it is trite that the Orders of the Court are not issued in vain. In the case of *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* [2018] eKLR, the Court held as follows:
- “It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:
- “It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.
64. Upon considering the totality of the evidence presented by the parties herein and their rival submissions, in regard to the allegedly abortive site visit of 28th February, 2024, the Court is satisfied that the Appellant/ Respondent and his team of Surveyors were prevented by the Respondents/Applicants herein from demarcating the Appellant/ Respondent's portion of the suit land as directed by the Court in its Judgment of 8th February, 2024.
65. By seeking to establish the exact coordinates of the 5 Acre portion out of the suit property, the Appellant/ Respondent and his team of Surveyors were executing a lawful Order of this Court. Accordingly, it was illegal and unlawful for the Respondents/Applicants and their family members to frustrate the said exercise from taking place.



66. Consequently, it is the holding of this Court that the Respondents/ Applicants are unlikely to suffer prejudice if the Appellant/ Respondent who is the Applicant in the Application dated 1st March 2024, is allowed to carry out the survey exercise in regard to the 5 Acres ,from of the suit property, which he currently occupies.
67. However, to obviate the danger by the Appellant/Respondent of disposing of the suit land thereby, rendering the Respondents/Applicants' intended Appeal nugatory, the Court hereby directs that the Appellant / Respondent shall not dispose of, sell, alienate and or charge the 5 Acre portion of the suit land to any third party, until the intended Appeal is heard and finally determined.
68. Consequently, the Appellant/Applicant's Application dated 1st March 2024, is found merited and the same is hereby allowed with the proviso that the Appellant/ Applicant is prevented from selling or disposing of the 5 Acre portion of the suit land granted to him by the Court via the Judgment dated 8th February, 2024, pending the outcome of the Appeal currently before the Court of Appeal at Nyeri.
69. Further, on Costs of the Application dated 1st March, 2024, the same shall be in the cause.
70. In regard to the Notice of Motion Application dated 27th February 2024, brought by the Respondents/ Applicants, the court finds that they did not come to court with clean hands or good faith. They prevented the due implementation of the Judgement of the court, and then rushed to court for stay of execution. There will be no prejudiced that will be occasioned to them since the Appellant / Respondent has been in occupation and use of the 5 acres of suit land for a long time.
71. For the above reasons, this court finds and that the Respondents/ Applicants Notice of Motion dated 27th February 2024, is not merited and consequently, the said Application is dismissed entirely with costs to the Appellant/ Respondent.
72. However, the Notice of Motion Application dated 1st March 2024, by the Appellant/ Applicant is allowed entirely in terms of prayer No 1, with costs being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF JULY, 2024

L. GACHERU

JUDGE

24/7/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr. Kanyi Kiruchi for Appellant/ Respondent/Applicant

Mr. Nyaberi for the Respondents/ Applicants/ Respondents

L. GACHERU

JUDGE

24/7/2024

