



**Dabasso v Ngalogalo (Environment and Land Civil Miscellaneous Application
11 of 2022) [2023] KEELC 16525 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION 11 OF 2022**

AK BOR, J

MARCH 23, 2023

BETWEEN

WAKO HASSAN DABASSO APPLICANT

AND

ABDUBA HAR NGALOGALO RESPONDENT

RULING

1. The Applicant brought the application dated December 14, 2022 seeking an order to stay execution of the judgment and decree issued on October 14, 2022 in Nanyuki Chief Magistrates Case Number 86 of 2019 pending hearing and determination of the intended appeal. The application was made on the ground that the Applicant was the son of the proprietor of the plot known as Uns Industrial Plot No B Nanyuki Municipality which he purchased from
2. Hezekiel Gichuru M’Mugambi. The judgment delivered was against the Applicant and he was anxious that the Respondent may extract the decree and commence execution. The Applicant stated that he intended to file an appeal which he contended raised triable issues with high chances of success and if stay was not granted the intended appeal would be rendered nugatory.
3. The Applicant swore the affidavit in support of the application and exhibited the sale agreement dated February 7, 2002. He averred that he stood to suffer huge losses and damages if an order of stay was not granted. Further, he contended that this court had a duty under Article 40 of the Constitution to protect his right to property.
4. The Respondent swore the affidavit in opposition to the application and averred that the Applicant was yet to file an appeal against the judgment and decree. He contended that there were no triable issues to go on appeal. He further deponed that the Applicant was using the application to stop him from enjoying the fruits of his judgment after evicting him unceremoniously from the land on or about July 2019 without due process and destroying the structures which he had built on the land. He averred that



it was not true that the Applicant would suffer huge losses if an order of stay was not granted because he does not reside on the land and has not put up any structures on it. He added that the Applicant had not stated that he was ready to abide by the conditions set by the court especially on security which showed insincerity on his part.

5. The court granted the Applicant leave to file a supplementary affidavit. He deponed in the affidavit sworn on February 13, 2023 that his late father bought the suit property in 1984 for Kshs 60,000/= from Hezekiah Gichuru M'Mugambi. He averred that his father enjoyed quiet possession of the land until the Applicant attempted to forcefully and illegally acquire it. He relied on the affidavit of Hezekiah Gichuru and his witness statement in support of his claim that the Respondent had no right over the suit property. He averred that they had structures on the suit property and were utilising the land as a family. Further, that they had sentimental attachment to the land as a family because it was the only investment their late father left to them.
6. He averred that being aggrieved by the judgment a copy of which he produced, he had commenced the process of filing the appeal and attached a letter dated December 16, 2022 seeking proceedings and judgment. He also attached a memorandum of appeal dated February 13, 2023, which had not been filed. He explained that the appeal could not be filed since they were waiting for proceedings to be typed so that they could compile the record of appeal. He maintained that the land was exposed to possible encroachment and seizure by the Respondent who had visited the plot and that the appeal could be rendered nugatory if it were repossessed. Further, that this meant that he would lose both the money invested on the property and the structures he had constructed on the site. He argued that it was imperative to preserve the substratum of the litigation for otherwise the Respondent may dispose of the plot to a third party once he gained possession.
7. The application was argued orally. The Applicant relied on Order 42 Rule 6 (2) of the [Civil Procedure Rule](#). He claimed that he had resided on the suit property with his family since 1984 and that he had substantially developed the land. He submitted that the Respondent had never occupied the land and that the portion which the Respondent was claiming was small and not the whole parcel of the land. He explained that the suit land was sold by one person to two different people with the Applicant buying it in 1984 and the Respondent in 1988. It was submitted that the Applicant was willing to make a cash deposit of Kshs 50,000/= as security which was to be held in an interest earning account in both advocates' names. The court was urged to protect the substratum of the dispute.
8. The Respondent's advocate pointed out that it was not the appeal being argued but the application for stay of execution. He submitted that there had been delay in filing the appeal and that the portion which the Respondent was claiming was not built on which therefore means that the Applicant would not lose anything unless he proceeded to build on that part. The Respondent argued that the offer to give a cash deposit of Kshs 50,000/= was too little and he counter-proposed a deposit of Kshs 500,000/= as security. The Respondent argued that the failure by the Applicant to file a memorandum of appeal showed lack of seriousness. He urged that he had developed the suit property but the Applicant destroyed and demolished his structures and evicted him. It was submitted that the Respondent had sentimental value to the land and that the Applicant wanted to delay the conclusion of the matter yet he evicted the Respondent from the land in 2019. In response, the Applicant submitted that he intended to file an application for leave to appeal out of time and reiterated the plea for the court to order stay of execution.
9. The issue for determination is whether the court should grant an order for stay of execution. Under Rule 6 of Order 42 of the Civil Procedure Rules, the court must be satisfied that substantial loss may result to the Applicant if execution is not stayed. The application for stay of execution should have



been made without unreasonable delay and the Applicant is required to give such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant.

10. Section 79 G of the *Civil Procedure Act* requires an appeal from a subordinate court to be filed in the High Court within 30 days of the date of decree or order appealed against excluding the time that the court may satisfy as having been required for the preparation and delivery to the appellant of a copy of the decree. The court notes that the judgment in this case was delivered on December 14, 2022 in the presence of the 2nd Defendant who is the Applicant in this matter. It is contended that the Applicant has not developed the suit property. The Applicant did not place any material before the court to prove that he had developed the suit property and that he stood to suffer loss. Regarding the issue of security, the Applicant indicated that he was prepared to give Kshs 50,000/= while the Respondent argued that Kshs 500,000/= would be appropriate.
11. The Applicant is granted stay of execution of the decree flowing from the judgment delivered on December 14, 2022 on condition that he deposits the sum of Kshs 500,000/= in an interest earning account in the joint names of the advocates for the Applicant and Respondent within 14 days of the date of this ruling.
12. The Respondent is awarded the costs of the application to be borne by the Applicant.

DELIVERED VIRTUALLY AT NANYUKI THIS 23RD DAY OF MARCH 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Robin Bundi for the Applicant

Mr. Nderitu Gichuki for the Respondent

Ms. Stella Gakii - Court Assistant

