



REPUBLIC OF KENYA



KENYA LAW
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**Muriuki v M'Ichoro & another (Environment and Land Appeal
E083 of 2022) [2023] KEELC 16490 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16490 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E083 OF 2022**

CK NZILI, J

MARCH 22, 2023

BETWEEN

TABITHA KAGWIRIA MURIUKI APPELLANT

AND

STEPHEN MAINGI M'ICHORO 1ST RESPONDENT

MARTIN MBAYA 2ND RESPONDENT

RULING

1. Through an application dated January 16, 2023, the court is asked to stay the execution of the judgment delivered on December 13, 2022 by the trial court pending the hearing and determination of this appeal. The reasons given are contained on the face of the application and the supporting affidavit sworn by Tabitha Kagwiria Muriuki on January 16, 2023.
2. It is the applicant's contention that her counterclaim was dismissed and the respondent's claim allowed despite having purchased a portion of the suit land from its original owner in 1985, taking up vacant possession and putting up several permanent buildings. Further, the applicant averred that the trial court failed to appreciate that an access road was created twenty years after her developments on the suit land.
3. Given the foregoing, the applicant averred that she stood to suffer substantial loss if her developments on the suit land were demolished, which the respondent was not willing to make compensation for, including the rental income she draws therefrom as per the valuation report attached as TKM "6". The applicant lastly expressed her willingness to offer any security for the due performance of the decree.
4. The notice of motion is opposed through a replying affidavit sworn by Stephen Maingi M'Ichoro, the 1st respondent on January 30, 2023 on the basis that the lower court decree was executed by excising a road of access after the stay of 21 days expired hence the application herein was already overtaken by events. That during the excision process, the applicant was allowed time to remove her temporary



house, which she did and the road was now in use. That the excised road was done by the land registrar and the land surveyor in the presence of the court and the applicant who never challenged it. That the applicant had encroached on a public road inconveniencing other road users without an authority from the land registrar; that the applicant has nothing to suffer if the road is excised since she can always sue the vendor for damages. That the appeal was a fishing expedition for a different outcome which essentially amounts to an academic exercise.

5. With leave of court parties filed written submissions. The applicant in her written submissions dated January 30, 2023 submitted that she has satisfied the requirements under Order 42 Rule (6) of the *Civil Procedure Rules* as held in *Halal and another v Thorton & Turpin Ltd* (1993) eKLR, *Elena Doudaladova Korir v Kenyatta University* (2012) eKLR, Republic v County Government of Kiambu and another exparte Kiambu Farmers Choice Ltd (2021) eKLR, *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & another* (2018) eKLR, otherwise if evicted her appeal would be rendered nugatory.
6. A party seeking a stay of execution pending appeal is expected to file the application timeously, demonstrate substantial loss or damage if the application is not granted, offer security for the due satisfaction of the decree should the appeal not succeed and lastly, demonstrate that it is in the interest of justice to grant the orders sought.
7. While discussing the above principles the court in *Mutegi Mugwewa v County Ministry of Lands; Physical Planning Energy and ICT County Government of Tharaka Nithi & 4 others* (2017) eKLR cited with approval *Butt v Rent Restrictions Tribunal* (1983) KLR 417, *Halal & another* (supra), that the power to grant or refuse a stay was discretionary so as to avoid the appeal being rendered nugatory, more so if there are special circumstances and unique requirements which as held in *Bake "N" Bitu (NRB) Ltd v Daniel Mutisya Mwalonzi* (2015) eKLR, the onus was on the applicant to prove.
8. Further in *Republic v County Government of Kiambu* (supra) the court cited with approval *James Wangalwa and another v Agnes Naliaka Cheseto* (2012) eKLR, that execution which has been put on motion was a legal process by itself did not amount to substantial loss and that a party 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 a successful party in the appeal, hence the reason there would be need to preserve the status quo, otherwise the appeal will be rendered nugatory.
9. As to security for due performance of the decree, the court in *Focin Motorcycle Ltd* (supra) cited with approval *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co advocates & 4 others* (2014) eKLR, where Gikonyo J held that the purpose of security was not to punish the applicant but to act as security and serve the purpose since a decree was like a debt.
10. Applying the foregoing key principles as discussed in the cited above case law, the application herein was filed on January 16, 2023 following a judgment delivered on December 13, 2022. The applicant had been given a stay order at the lower court to last till January 24, 2023. So, therefore, I find that there was no inordinate delay in coming to court.
11. On the aspect of substantial loss, the applicant on top of giving particulars of her developments and the nature of the likely loss, has attached a valuation report dated March 30, 2017 whose contents the respondent has not disputed. Coming to the aspect of security the applicant has also expressed her willingness to offer security. The respondent has not shown when and how the decree was executed yet there was a stay of execution since the delivery of the judgment. Further, no reports from the land registrar and the land surveyor have been filed to show when and how the decree was executed.



12. The upshot is that the application is allowed. The undertaking as to damages filed herein amounts to sufficient security. The stay orders shall subsist for a period of six months only. Lower court file to be availed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 22ND DAY OF MARCH, 2023

In presence of:

C/A: John Paul

Karanja for applicant

HON. C.K. NZILI

ELC JUDGE

