



**Mwangi v Kiarie & 4 others (Environment and Land Appeal  
E030 of 2022) [2023] KEELC 17020 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17020 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E030 OF 2022  
LC KOMINGOI, J  
APRIL 20, 2023**

**BETWEEN**

**EVANS KANJA MWANGI ..... APPELLANT**

**AND**

**ALICE MWIHAKI KIARIE ..... 1<sup>ST</sup> RESPONDENT**

**ABED KYUNGUTI MULEE ..... 2<sup>ND</sup> RESPONDENT**

**SIRAT MOHAMMED SALAT ..... 3<sup>RD</sup> RESPONDENT**

**JAFFER MUSTAFA ..... 4<sup>TH</sup> RESPONDENT**

**HON ATTORNEY GENERAL (SUED FOR AND ON BEHALF OF THE LAND  
REGISTRAR) ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This is the notice of motion dated 2/8/2022 brought under;  
  
(Under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, order 42 rule 6(6) of the *Civil Procedure Rules*, Gazette Notice 7296 –Practice Directions on Electronic Case Management and all other enabling provisions of the law).
2. It seeks Orders:
  1. Spent.
  2. Spent.
  3. That an order of stay of execution be issued for the Judgement delivered by Hon. Irene Marcia Kahuya (PM) delivered on June 15, 2022 in Kajiado MC.



ELC No.162 of 2018 Alice Mwhaki Kiarie vs. Evans Kanja & 4others pending the hearing and determination of the Appellant's appeal filed herein.

4. That costs be provided for.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 6.
4. The application is supported by the Affidavit of Evans Kanja Mwangi, the Appellant herein sworn on the 2/8/2022.
5. The application is opposed. There is a replying affidavit sworn by Alice Mwhaki Kiarie, the 1st respondent herein on the 8/9/2022.
6. It appears the 2<sup>nd</sup> to the 5th respondents did not file any responses.
7. On the 26/10/2022 the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

#### **The Appellant's Submissions.**

8. They are dated 10/3/2023. They raise one issue for determination.
  1. Whether the Appellant's application qualifies for a grant of stay of execution pending appeal.
9. Counsel has relied on order 42 rule 6(6) of the *Civil Procedure Rules* and the Cases of *Arun C.Sharma Vs. Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* (2014) eKLR. *Focin Motorcycle Co. Limited Vs. Ann Wambui Wangui & another* (2018)eKLR.
10. Counsel has submitted that this application was filed without undue delay. Further that the appellant is likely to suffer substantial loss as he is likely to lose the suit property if these orders are not granted.
11. It is further submitted that the appellant is willing to provide such security for the due performance of the decree as the court may order.

He prays that the application be allowed.

#### **The 1st Respondents submissions**

12. They are dated 30/11/2022. Counsel has submitted that the application herein has been overtaken by events on account that the decree and orders of the lower court were implemented by the Kajiado Land Registry.
13. The copy of an official certificate of search for the suit property being Kajiado/Kaputie North/7645 shows that the current proprietor is the 1st Respondent. The entry in respect of the Appellant is no longer in place.
14. The certificate of official search is inclusive evidence that the order of cancellation of all entries made in respect of Kajiado/Kaputie North/7645 was made and the plaintiff was restored as the registered owner in terms of the decree of the court.
15. Counsel has further submitted that the application herein has not satisfied the conditions set out in Order 42 rule 6(2) of the Civil Procedure Rules.



**The 1<sup>st</sup> Respondent prays that the application be dismissed with costs.**

16. I have considered the notice of motion and the affidavits in support. I have also considered the response thereto, the written submissions and the authorities cited. The issues for determination are:
- i. Whether the Appellant's/Applicant's application meets the threshold for grant of Orders of Stay of execution pending appeal.
  - ii. Who should bear costs of this application?
17. The Principles guiding the grant of stay of execution pending appeal are well settled. Order 42 rule 6(2) of the Civil Procedure rules provides that;
- (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
18. It is clear from the above Provision that for an order of Stay of execution to be granted, specific conditions must be met by the applicant.
19. I have considered the notice of motion herein and I find that it has been brought without unreasonable delay.
- Judgement was delivered on 15/6/2022 the Learned Trial Magistrate granted thirty (30) days stay of execution. This application was filed on 2/8/2022.
20. It is the Appellant's/Applicant's case that he stands to lose the suit property if these orders are not granted.
21. The 1<sup>st</sup> Respondent on the other hand submitted that the decree has already been executed. She exhibited a certificate of official search which shows that there has been cancellation of all entries made before. The suit property is now registered in her name.
22. This has not been controverted by the appellant/applicant. I agree with the submissions of counsel of the 1<sup>st</sup> Respondent that this court cannot grant orders in vain as the decree has been executed.
23. I find that the Appellant/Applicant has failed to demonstrate that he will suffer substantial loss if these orders are not granted.

In the case of James Wangalwa & Another Vs. Agnes Naliaka Cheseto (2014)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 where 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 Civil Procedure Rules. 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”

24. In conclusion I find that the Applicant’s application has not met the conditions set out in order 42 rule 6(2) of the *Civil Procedure Rules*.
25. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the appeal.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20<sup>TH</sup> APRIL, 2023.**

**L.C. KOMINGOI**

**JUDGE**

**In the Presence of:**

Mr. Obura for the Appellant.

Mr. Narangwi for the 1<sup>st</sup> Respondent.

N/A for the 2<sup>nd</sup> -5<sup>th</sup> Respondents.

**Court Assistant – Mutisya.**

