



**Ndana v Gitau (Environment and Land Appeal E086 of 2021)  
[2023] KEELC 16907 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E086 OF 2021**

**JG KEMEI, J**

**APRIL 20, 2023**

**BETWEEN**

**EPHANTUS NDANA ..... APPELLANT**

**AND**

**EUNICE WANJIKU GITAU ..... RESPONDENT**

**RULING**

1. It is the notice of motion dated November 15, 2022 filed by appellant/applicant seeking the following orders:-
  - a. spent.
  - b. That pending the hearing and determination of this application, there be a stay of execution of judgment delivered by the Honourable C. K Kisiangani (Senior Resident Magistrate) in Ruiru SPMCC MCLE case No 51 of 2020 delivered on October 14, 2021 and all consequential orders.
  - c. That pending the hearing and determination of this appeal there be a stay of execution of the Judgment delivered by the Honourable C. K. Kisiangani (Senior Resident Magistrate) in Ruiru SPMCC MCLE Case No 51 of 2020 delivered on October 14, 2021 and all consequential orders.
  - d. That this honourable court be pleased to grant a temporary injunction restraining the respondent, her agents and/or representatives from developing, selling, charging, leasing, subdividing or in any way dealing with the property known as Ruiru/ruiru East Block 2/2135 pending the hearing and determination of this application.
  - e. That this honourable court be pleased to grant a temporary injunction restraining the respondent, her agents and/or representatives from developing, selling, charging, leasing,



subdividing or in any way dealing with the property known as Ruiru/ruiru East Block 2/2135 pending the hearing and determination of the applicants' appeal.

- f. That the costs of this application be in the cause.
2. The application is premised on the following grounds:-
    - a. That the applicant is aggrieved by the judgment of the trial court in Ruiru SPMCC MCLE Case No 51 of 2020 delivered on October 14, 2021 and has opted to appeal against the same.
    - b. That whereas the present appeal herein is pending, the respondent filed an application in the lower court seeking orders to evict the appellant from the suit property known as Ruiru/ruiru East Block 2/2135.
    - c. That the trial court allowed the application and granted orders of eviction to the respondent/ plaintiff via ruling issued on November 10, 2022.
    - d. That through the said orders, the respondent has effectively commenced execution of the judgment and she is on the verge of forcefully evicting the appellant and destroying the appellant's family homestead.
    - e. That unless the eviction orders are stayed, the appellant and his family shall be thrown out in the cold streets and left to endure and suffer a desolate, destitute and homeless life.
    - f. That the appellant's young family has known the land as their only home for over a decade and they stand to lose a place of abode and stability if evicted and their house demolished.
    - g. That demolition would be a draconian and extremely inhumane act that is irreversible and would cause such a heavy loss to the appellant and his family.
    - h. That the appellant's appeal is to challenge the judgment/decree of the trial court and which appeal shall be rendered entirely nugatory if the respondent is allowed to demolish the appellant's permanent home in the suit property and commence forceful eviction.
    - i. That the appeal herein raises weighty pertinent issues that are arguable with a likely chance of success.
    - j. That there shall be no prejudice to the respondent should stay orders be granted as she can still prosecute her claim the appeal herein.
    - k. That this application has been brought in good faith and without undue delay.
    - l. That it is only fair and just that the present application be allowed.
  3. In his supporting affidavit the applicant avowed that being aggrieved with the judgment of the court issued in Ruiru SPMCC MCLE No 51 of 2020 delivered on October 14, 2021, he wishes to appeal against it.
  4. That he is currently in possession of the suit property Ruiru/Ruiru/East Block 2/2135 where he has built a homestead that he resides with family for the last decade.
  5. That on November 10, 2022 the lower court issued an eviction order against the appellant and that the appellant is at verge of being evicted.
  6. He deponed that he risks suffering substantial loss and damage if the judgment is executed by way of eviction before his appeal is heard and determined. That the appeal shall be rendered nugatory. That the respondent stands to suffer no prejudice if stay orders are not granted.



7. The respondent *vide* a replying affidavit sworn on February 27, 2023 contended that the application dated November 15, 2022 is *resjudicata* and therefore unmerited. That the application seeks orders similar to those sought in the application of October 21, 2021 which application was dismissed.
8. That the second notice of motion dated August 31, 2022 met the same fate of dismissal on account of *resjudicata*. That the current application is the 3<sup>rd</sup> attempt by the applicant to seek similar orders which makes it a clear case of abuse of the process of court. She averred that 8 other defendants sued in the lower court were not enjoined in the appeal. That the court adjudged her as the owner of the parcel of land and the applicant has no case with strong chance of success on appeal. That the applicant has not satisfied the threshold for grant of conservatory orders sought in the application.
9. Parties elected to file written submissions in respect to the application. I have read and considered the written submissions.
10. In supporting the grounds on substantial loss the applicant submitted that if eviction is to proceed he will lose the house that he has lived in with his family for the past 10 years.
11. Further that the appeal was filed without delay. On the issue of *resjudicata* the applicant argued that the present application is premised on new circumstances distinct from the facts of the earlier application or stay dated May 31, 2022. That the present facts that is to say the existence of eviction orders were not available when the other application was made. That the existing eviction orders constitute special circumstances and bringing the present application not within the doctrine of *resjudicata*.
12. On the issue of provision of security the applicant averred that it is willing to abide with orders that the court may make for appropriate security. He urged the court to hold that the land can be sufficient security *in lieu* of the eviction.
13. The respondent filed written submissions on February 28, 2023. She submitted that this application is *resjudicata* on account of the previous two applications dated October 21, 2022 and May 31, 2022 seeking similar orders which applications were dismissed.
14. As to whether the applicant has met the threshold for grant of stay of execution, the respondent submitted that the applicant has no arguable appeal that meets the threshold of grant of stay of execution or orders of injunction. Reliance was placed on the case of *Regoil Kenya Ltd v Winfred Njeri Karanja* (2019) which reaffirmed the position in *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* (2012).
15. In relying on the case of *Isabel Chelangat v Samuel tiro Rotich & 5 others*, *inter alia* the respondent argued that the applicant in this case has not disclosed a *prima facie* case since he has produced any single evidence to show ownership.
16. Further that no grounds of appeal have been demonstrated in the memorandum of appeal. Further that the appellant having not demonstrated any proprietary interest in the suit property he stands to suffer no irreparable loss on a balance of convenience. The respondent submitted that the balance of convenience tilts in favour of denying the prayers sought in the application.

### **Analysis And Determination**

17. The background of this case is that a judgment was rendered on October 4, 2021 in favour of the defendant. It is this judgment that has triggered an appeal which is already filed on record.



18. On the issue of *resjudicata*, I concur with the respondent that to the extent that the court has made two rulings on the issue of stay of execution and interim injunction this application is *resjudicata*. This is on the grounds that the parties are similar, the subject matter is the same etc.
19. The applicant raised the issue of eviction in his previous applications already mentioned. The applicant submitted that the eviction orders create a new state of affairs that were not in existence at the time of the former application thus ousting the elements of *res judicata*. No authority was submitted to this end to persuade the court to share this proposition. It is trite that execution in itself does not amount to substantial loss.
20. The Court of Appeal has dealt with the issue of substantial loss in the case of *Charles Wahome Getbi v Angela Wairimu Getbi* [2008]eKLR that:-
- “The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined. He did not file an affidavit to refute the deposition of the respondent that he has an adjacent expansive land with a permanent house. In the superior court, it was established that the applicant has another land in Nyeri. In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.”
21. My brother Gikonyo J described it as follows in *James Wangaiwa & another v Agnes Naliaka Cheseto* [2012]eKLR, the court observed 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.”
22. Having pronounced myself on the prayers before me in the previous 2 decisions, allowing the instant application would amount to inviting this court to sit on appeal on its own orders an invitation that is vehemently declined.
23. In the circumstances the application has no merit. It is dismissed.
24. Each party to bear their costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20<sup>TH</sup> DAY OF APRIL, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**



Bore HB Nyasani for Appellant/Applicant

Mokaya for Respondent

Court Assistant – Kevin/Lilian

