



**Maragua v Thiong'o & 3 others (Environment & Land Case
609 of 2017) [2023] KEELC 16841 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 609 OF 2017**

JG KEMEI, J

APRIL 13, 2023

BETWEEN

NAOMI KAGURE MARAGUA PLAINTIFF

AND

GEORGE KINUTHIA THIONG'O 1ST DEFENDANT

REGISTRAR FOR LANDS THIKA 2ND DEFENDANT

COMMISSIONER FOR LANDS 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. What is before me is the Notice of Motion dated September 20, 2022 seeking orders of stay of execution of the Judgment delivered on March 28, 2022 pending the hearing and determination of the appeal.
2. The Application is based on the grounds inter alia that the Applicant will suffer substantial loss if the stay of execution orders are not granted. Secondly that there are vacant possession orders pursuant to the Judgment. Finally there is reasonable apprehension that the appeal will be rendered nugatory.
3. The Application is supported by the Supporting Affidavit of the Applicant which reiterates the above grounds. In addition she stated that the 1st Respondent has descended on the land and cut down napier grass with a threat to proceed with construction. She pleaded with the Court for stay pending the hearing of appeal so as not to render the appeal nugatory.
4. The Application is opposed by the 1st Respondent through a Replying Affidavit dated October 11, 2022 and filed on even date.



5. The 1st Respondent faulted the Applicant for filing the Application under the wrong provisions of law that is to say Order 22 rule 22; Order 51 rule 13(2) of the *Civil Procedure Rules* as well as Section 1A, 1B and 3A of the *Civil Procedure Act*.
6. That his appreciation of the impugned Notice of Motion is to set aside the Judgment and stay its execution pending hearing and determination of the appeal.
7. The 1st Respondent stated that no appeal had been filed neither has any Memorandum of Appeal and or any other pleading relating to a purported appeal been filed.
8. He was of the view that in the foregoing the Notice of Motion remains defective, vexatious, frivolous bad in law and with fatal contradictions.
9. Further the 1st Respondent averred that he bought the land with all the developments including the napier grass and the developments therein belong to him.
10. On granting of stay of execution the 1st Respondent contended that the Application must fail for the following reasons; The Applicant has not established sufficient cause to order for stay of execution; no basis of substantial loss; no appeal has been lodged; the Application is devoid of merit and merely serves as a delaying tactic meant to deny the 1st Defendant the fruits of his Judgment.
11. On October 12, 2022 parties elected to file and exchange written submissions on the Application. It is only the 1st Respondent who complied with the directions of the Court. I have read and considered the said written submissions.
12. The issues for determination is whether the Notice of Motion is merited.
13. Stay of execution is governed by Order 42 rule (6) of the *Civil Procedure Rules* as follows:-
 - “(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 Applicants 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 Applicants”.
14. I have carefully and diligently perused the file and I find no Notice of Appeal or even draft Memorandum of Appeal on record. In this matter there having found no evidence of an appeal having been filed, I agree with the 1st Respondent that the Application is frivolous. An order for stay of



execution is granted to allow the preservation of the subject matter and allow the Appellant to advance her appeal. In this case the Applicant has not filed any appeal. The provisions of Order 42 rules 2 and 6 of the Civil Procedure Rules are therefore not complied with.

15. It is also evident that the impugned Judgment was delivered on March 28, 2022 and the Application was filed on September 20, 2022; almost six months later. No plausible explanation for this delay has been proffered by the Applicant. Similarly as rightly pointed out by the 1st Respondent, no offer for security of costs has been given by the Applicant.
16. The Application before me is thus incompetent.
17. It is struck out with costs in favour of the 1st Defendant.
18. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff / Applicant – Absent

1st, 2nd, 3rd and 4th Respondents – Absent

Ruling date given in the presence of Plaintiff and 1st Respondent

Court Assistant – Kelvin/Lilian

