



REPUBLIC OF KENYA



**Jaganath Grower Limited v Njiru (Environment and Land Appeal
E018 of 2021) [2023] KEELC 22621 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 22621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E018 OF 2021
A KANIARU, J
MAY 25, 2023**

BETWEEN

JAGANATH GROWER LIMITED APPELLANT

AND

BENSON NTHIGA NJIRU RESPONDENT

*(Being an appeal against the Judgement of Hon. Edwin N.
Wasike PM delivered on 4.11.2021 at PM's Court Siakago)*

RULING

1. This is a ruling on a motion on notice dated 15/12/2021 and filed on 21/12/2021. The motion is expressed to brought under sections 63(e), 1A, and 3A of *Civil Procedure Act*, Order 40 Rules 2, 3 and 4, Order 51 Rule 1 of *Civil Procedure Rules*, section 13 of the *Environment and Land Court*, Act 2011 and all other enabling law. The parties – Jaganath Grower Limited – and Benson Nthiga Njiru – are before this court as appellant and respondent respectively. They had their first round of dispute in the lower court at Siakago where Benson Nthiga Njiru was the plaintiff while Jaganath Grower Limited was the defendant.
2. The application under consideration now was filed here by the appellant and what is sought is stay of enforcement and execution of the lower courts judgement dated 4/11/2021 delivered in civil suit No MCL & E No 94 of 2020. The judgement was in favour of the respondent. The dispute related to land parcel No Mbeere/Kirima/4223.



3. More specifically, the application came with five (5) prayers but at this stage two of the prayers – prayers 1 and 2 – are now moot, having been considered at the *ex parte* stage. The prayers for consideration are therefore 3, 4, and 5 which appear on the face of the application as follows:

Prayer 3: That this honourable court be pleased to stay the enforcement and execution of the judgement dated November 4, 2021 in Siakago MCL & E No. 94 of 2020, Benson Nthiga Njiru vs Jaganath Grower Ltd pending the hearing and determination of this appeal.

Prayer 4: That this honourable court do make such orders that it deems fit in the interest of justice.

Prayer 5: That costs of this application be provided for.

4. The application is premised on the grounds, *inter alia*, that the respondent has extracted a decree from the judgement of the lower court and is intending to evict the respondent; that the area local police boss has already communicated intention to evict; that the intended eviction is unlawful as the requisite notice has not been given; that the appeal herein will be rendered nugatory if execution proceeds; and that the appellant is likely to suffer irreparable loss that can not be compensated with damages.
5. The application came with a supporting affidavit containing depositions that more elaborately set out the circumstances surrounding the matter.
6. In response to the application, the respondent filed a replying affidavit on 15/3/2022. According to the respondent, the application is “vexatious, misconceived, an abuse of the court process, a waste of the court’s jealously guarded time and inept”. Further the appellant was faulted for not depositing security “for the appeal” and it was averred that the intended execution is lawful. To the respondent, no damages will be occasioned to the appellant if it can choose to voluntarily vacate the land. It was proposed that the appellant deposits 5 million shillings as security for costs.
7. The replying affidavit filed by the respondent triggered the filing of a supplementary affidavit by the appellant on 15/6/2022. The appellant emphasized that the risk of being evicted is real and immense; that it has not been served with the notice of eviction; that its appeal will be rendered nugatory if the order of stay is not granted; and that its appeal is arguable and not frivolous.
8. The application was canvassed by way of written submissions. The appellants submissions were filed on 9/3/2023. The appellant emphasized that the respondent has already obtained a decree and eviction can be carried out any time. To drive home the point concerning the merits of the application, the appellant cited the cases of *Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 others* [2013] eKLR, *Reliance Bank Ltd (in liquidation) v Norlake Investments Ltd*: Civil Appeal No. Nai 93/02 (ur) *Antoine Ndiaye v African Virtual University* [2015] Eklr and *Butt v Rent Restriction Tribunal* [1979] eKLR. Some of the cases were even quoted as deemed appropriate. It was emphasized that the application is merited as the intended appeal is arguable and the appellant is likely to suffer irreparable damages if the application is not allowed.
9. The respondents submissions were filed on 6/2/2023. The respondent submitted that he is the registered owner of the land in dispute and that the lower court made a finding to that effect. He sought to rely on the case of *James Mathuva Makewa v Nzavi Ngului* [2021] eKLR where orders of eviction were granted and execution of the order directed to be done much in the same way as was ordered by the lower court in this matter.



10. I have considered the application, the response and counter-response made, rival submissions, and the court record generally. The issue before me for determination is whether the appellant has demonstrated the merits of its application. The respondent has alleged that the appellant has not filed a memorandum of appeal. The truth of the matter is that there is a memorandum of appeal on record. It has six (6) grounds of appeal. This court itself admitted the appeal for hearing on 24/5/2022. The court is awaiting the filing of the record of appeal in order to give further directions.

11. The law applicable to an application for an order of stay is not the one cited by the appellant on the face of the application. When the order of stay sought is meant to apply pending the hearing of an appeal, the law applicable is to be found in order 42 rule 6 (2) of the Civil Procedure Rules which provides as follows:

42 (6)(2)

“No order for stay of execution shall be made under sub rule (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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”

12. There is abundant case law on this issue. In RWW v EKW [2019] eKLR the purpose of an application for stay of execution was stated as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so the court must weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The court is also called upon to ensure that no party suffers prejudice that can not be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

13. Further, in Richard Kubondi v Ndung'u Waweru [2019] eKLR, the court also expressed itself as follows:

“The appellants need to satisfy the court on the following conditions before they can be granted stay orders.

1. substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the respondent has been given by the applicant”



14. I have looked at the judgement rendered by the lower court. I have also looked at the grounds of appeal. My view is that some of the grounds are arguable. To say they are arguable does not mean that they will succeed. It is merely to take the position that they are not frivolous. It is to say also that they deserve judicial scrutiny and consideration.
15. Having found that some of the grounds of the intended appeal are arguable, the other issue is about the likelihood of the appellant to suffer loss. It appears to me that the appellant is carrying out the business of farming. Obviously, that is something that is being done for profit. If eviction is carried out, it appears to me plain that the appellant will suffer loss. I am persuaded that some loss is likely to occur. It is not good to allow this to happen when the appeal is pending.
16. The law requires however that security for costs has to be made available. In the respondent's response to the application, he proposed Kshs. 5,000,000 as the suitable amount to be deposited. In *Butt v Rent Restrictin Tribunal* (*supra*) the court expressed itself as follows on the issue of security for costs:

“The court in exercising its powers under order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to pay security for costs as ordered will cause the order for stay of execution to lapse.”
17. The appellant therefore has to deposit some security for costs. But the amount of Kshs. 5,000,000 proposed by the respondent seems to me to be way too high. The matter before the lower court was not a very complex one and the costs involved would not reach that amount in my view. I take the position that a deposit of Kshs. 100,000 would be reasonable as security for costs.
18. In the light of the foregoing, I make a finding that the appellant has on balance demonstrated the merits of the application herein. I therefore grant the order of stay as sought in prayer 3 of the application. I further order that the appellant shall deposit Kshs. 100,000/- as security for costs within sixty (60) days after delivery of this ruling. Costs of this application shall abide the outcome of the appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF MAY, 2023.

In the presence of Mugane for Mugendi for appellant and respondent in person and present.

Court assistant: Leadys

A.K. KANIARU

JUDGE

