



Kamau v Chege & another; Meenye (Third party) (Environment and Land Case Civil Suit 173 of 2004) [2023] KEELC 18036 (KLR) (15 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18036 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 173 OF 2004**

JA MOGENI, J

MAY 15, 2023

BETWEEN

STEPHEN MBUGUA KAMAU PLAINTIFF

AND

WATIRI CHEGE 1ST DEFENDANT

GIDEON KAUMBUTHU MEENYE 2ND DEFENDANT

AND

GIDEON KAUMBUTHU MEENYE THIRD PARTY

RULING

1. Before this Court for determination is the 1st Defendant/Applicant's Notice of Motion Application dated December 29, 2022 brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 & 10 of the *Civil Procedure Rules*, Sections 3 & 19 of the *Environment and Land Act*, Article 159 (2) of the *Constitution* of Kenya and all other enabling provisions of the law. The 1st Defendant/Applicant is seeking for the following orders: -
 - a. Spent.
 - b. That there be a stay of execution of the Judgment herein together with the resultant Decrees and any other order consequential or incidental thereto pending hearing and determination of this Application.
 - c. That there be a stay of execution of the Judgment herein together with the resultant Decrees and any other order consequential or incidental thereto pending hearing and determination of the appeal.
 - d. That the costs be provided for.



2. The application is premised on the grounds stated on the face of the application together with the Supporting Affidavit of Watiri Chege, the 1st Defendant/Applicant herein sworn on December 29, 2022 and a Further Affidavit sworn on February 24, 2023. I do not need to reproduce the same.
3. The application is opposed. There is a Replying Affidavit by Stephen Mbugua Kamau, the Plaintiff/Respondent herein, sworn on February 8, 2023.
4. On February 13, 2023, counsels agreed to file written submissions to the application and the Court gave directions on the same. The parties duly submitted, and I have considered them. The 1st Defendant/Applicant filed her written submissions dated February 24, 2023 and the Plaintiff/Respondent filed his written submissions dated March 4, 2023.

Issues for determination

5. I have considered the Applicant's Application for stay of execution of the decree in this matter pending the hearing and determination of her intended Appeal.
6. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

“No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except 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 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.

7. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which:
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered.
 - ii. The application is brought without undue delay and
 - iii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on her has been given by the Applicant.



8. I have considered the instant application, the annexures thereto, the written submissions and the cited authorities together with the relevant provisions of law and found that the issues for determination before this Court are whether the orders for stay of execution pending appeal are merited.

Analysis and determination

Whether the orders for stay of execution pending appeal are merited.

9. I have considered the Applicant's application in view of the aforementioned conditions. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine. -vs- Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that: -

“The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

10. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A (2):

“The Court shall, in the exercise of its powers under this Act or the Interpretation of any of its provisions, seek to give effect to the overriding objective.”

11. While under section 1B some of the aims of the said objective are:

“The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

12. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

13. On the first condition of proving that substantial loss may result unless stay order is made, Applicant has submitted that has her matrimonial home in the suit premises where she lives with her children. That pursuant to the impugned judgment, she is aware that execution herein will entail demolishing the permanent structures on the suit premises. That further she is advanced in age, sickly, a widow and unemployed and I do not know or have any other home other than the suit premises and she knows that if her permanent house is demolished the Plaintiff/Respondent will not be able to build for her another house should her appeal succeed, and she will therefore have suffered monumental irreparable loss and damage.

14. On the second condition, there is no dispute that the impugned judgment was delivered on December 5, 2022 wherein the Applicant sought for stay of execution vide the current application dated December 29, 2022. I find that the said application is brought without undue delay.

15. On the last condition, the applicant contended that she is willing to provide such security for the performance of the decree as the Court may direct but taking into account that she is a jobless widow. However, the Plaintiff/Respondent avers that the Applicant has not offered any security for the due



performance of the decree. That the Honourable Court already made its orders by allowing the 1st Defendant 30 days' stay of execution to enable her to vacate the suit property and the instant application is asking the Court to sit on its own appeal.

16. Despite the above contention by the Respondent, I opine that the court has discretion to order that security be furnished in any case where it thinks fit.
17. In the foregoing the Court finds that the Applicant has demonstrated a reasonable likelihood of loss if stay is not granted. The Respondent on the other hand does not stand to suffer any loss if stay is granted. This effect the Court orders as follows:
 - a. The Application dated December 29, 2022 is allowed in terms of Prayers (3) and (4).
 - b. The Applicant/1st Defendant shall deposit Kshs 100,000.00 (Kenya Shillings One Hundred Thousand Only) in Court as security for the due performance of the decree within thirty (30) days from the date of this Ruling.
 - c. Failure to comply with order (b) hereinabove, Order (a) hereinabove shall automatically lapse.
 - d. That the 1st Defendant/Applicant shall within 60 days from the date of this ruling compile, file and serve upon the Respondent a complete record of appeal.
 - e. There shall be no costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2023.

.....

MOGENI J

JUDGE

In the virtual presence of:-

Mr Njogu for the 1st Defendant / Applicant

No appearance for the Plaintiff/Respondent

No appearance for the 2nd Defendant

No appearance for the Third Party

Ms. Caroline Sagina : Court Assistant

.....

MOGENI J

JUDGE

