



**Kabigo & 4 others v Gitau & another (Environment and Land Appeal E094 of 2022) [2023] KEELC 17406 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17406 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E094 OF 2022**

**JG KEMEI, J  
MAY 11, 2023**

**BETWEEN**

**FRANCIS KAMAU KABIGO ..... 1<sup>ST</sup> APPELLANT  
GABRIEL GACHIE KABIGO ..... 2<sup>ND</sup> APPELLANT  
PETER NDUNGU KABIGO ..... 3<sup>RD</sup> APPELLANT  
FRANCIS KANYA MWANGI ..... 4<sup>TH</sup> APPELLANT  
JAMES MUREITHI MWANGI ..... 5<sup>TH</sup> APPELLANT**

**AND**

**MARGARET NJERI GITAU ..... 1<sup>ST</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion dated 31/10/2022 filed pursuant to Sections 3 & 13(7) (a) of the [Environment and Land Court Act](#) and Order 51 Rules 1 & 3 [Civil Procedure Rules](#), the appellants/applicants seek orders that;
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. The Judgment made on October 12, 2022 herein issued by the trial Court be stayed pending hearing and determination of this appeal as arising from ELC No 25 of 2020 – Gatundu.
  - e. Costs of this Application be provided for.



2. The Application is based on the grounds that the impugned Judgment was delivered on October 12, 2022 and interim stay of execution for 30 days was granted and it was set to lapse on November 12, 2022 hence the urgency of the Application.
3. The Application is further anchored on the Supporting Affidavit of even date of Francis Kamau Kabigo, the 1<sup>st</sup> Appellant. He averred that he is apprehensive that the 2<sup>nd</sup> Respondent might collect the compensation money from the 2<sup>nd</sup> Respondent to the Appellants' detriment and if stay orders are not granted, the appeal will be rendered nugatory. Copies of the trial Court Judgment and Memorandum of Appeal are annexed as A and B respectively.
4. The Application is opposed by the 1<sup>st</sup> Respondent only. The 2<sup>nd</sup> Respondent did not oppose the Application.
5. Margaret Njeri Gitau swore her Replying Affidavit on November 9, 2022 and termed the Application as unmerited and made in bad faith for want of material disclosure. She averred that the Appellants have not established any irreparable injury or substantive loss they stand to suffer if the Application is declined. That a right to appeal is not commensurate with a successful appeal. That the gist of the appeal is a liquidated claim by way of compensation for value and thus the appeal cannot be rendered nugatory. That the Appellants have failed to disclose that they have been partly compensated by the 2<sup>nd</sup> Respondent despite MNG1; copy of a Court order dated September 8, 2020 barring the 2<sup>nd</sup> Respondent from releasing any funds in respect of land parcel Chania/Matara/654. She beseeched the Court to dismiss the Application and allow her to enjoy the fruits of her Judgement.
6. In a rejoinder, the 1<sup>st</sup> Appellant on November 11, 2022 deponed that if the compensation money is paid to the 1<sup>st</sup> Respondent their appeal will be rendered nugatory since it is the compensation that is contested. That the compensation paid to the Appellants was not in breach of the aforementioned Court order and the monies held by the 2<sup>nd</sup> Respondent remain with it pending the determination of their appeal.
7. The Application was argued orally before Court on March 27, 2023.
8. Learned Counsel Waweru Nyambura on behalf of the Appellants submitted that the subject matter of the appeal is the compensation money held by the 2<sup>nd</sup> Respondent. That if the money is paid to the 1<sup>st</sup> Respondent, the appeal will be rendered nugatory and no prejudice will be meted on any party if the 2<sup>nd</sup> Respondent continues to hold the money.
9. Opposing the Motion, Learned Counsel Maina for the 1<sup>st</sup> Respondent contended that the dispute on appeal revolves around a liquidated amount which can be ascertained. That the appeal shall not be rendered nugatory and the Appellants have not demonstrated any irreparable injury they stand to suffer. That no offer for security either to the Respondents or to the Court has been offered and therefore the Application should be dismissed.
10. The main issue for determination is whether the Application is merited.
11. The legal provisions for stay of execution are anchored in Order 42 rule 6 of the *Civil Procedure Rules* that;

“ 6. Stay in case of appeal [Order 42, rule 6.]

- (1) 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.”

12. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the Application and the furnishing of security.
13. The Appellants aver that they have appealed against the Judgment of the trial Court delivered on October 12, 2022. Copy of the impugned Judgment is annexed as ‘A’ in their Supporting Affidavit. On the issue of substantial loss, the Appellants submitted that the interim stay of execution of thirty days already lapsed hence the urgency of this Application. That if the compensation money is collected by the 1<sup>st</sup> Respondent, this appeal will be moot hence an academic exercise.
14. Was the Application filed timeously? The Application was filed on October 31, 2022, barely three weeks after delivery of the impugned Judgment. The trial Court was gracious enough to grant 30 days for interim stay of execution of its Judgment within which period the Application was filed. The answer to this issue is thus in the affirmative.
15. The ingredients of substantial loss were well captured in the case of *Machira T/A Machira & Company Advocates -v- East African Standard* (No 2) 2002 2 KLR as follows: -

“If the Applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the Applicant’s business (eg appeal or intended appeal).”



16. The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence ..... Another common factor in favour of the Applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the Appellant or intended Appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not granted, save in exceptional circumstances.”

17. This Court is guided by the decision in the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -

- a. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion.
- c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
- d. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.

18. I have perused the Judgment of the trial Court in which the Appellants were the Plaintiffs. In the said Judgement the Court held that the Plaintiffs failed to prove any interest in the land including by way of adverse possession. For emphasis the trial Court concluded as follows;

“From the above analysis I find the Plaintiffs have failed to prove the claim for adverse possession. I accordingly find the claim not merited and dismiss the originating summons with costs to the 1<sup>st</sup> Defendant. I also find that the 1<sup>st</sup> Defendant as the registered owner is entitled to compensation funds due from the 2<sup>nd</sup> Defendant, the National Land Commission.”

19. In the overall, I find that the Court’s Judgement was generally a negative order in the main save for the limb on compensation. The Appellants have argued that if stay is not granted they stand to suffer prejudice if the payments are released to the 1<sup>st</sup> Defendant before the conclusion of their appeal. I find that to the extent that the Applicant’s Application is limited to stay of payment of compensation, substantial loss is founded.

20. The last limb under Order 42 rule 2(b) *Civil Procedure Rules* above relates to an offer for security, as rightly submitted by the 1<sup>st</sup> Respondent, none was offered by the Appellants and thus the Court has no material before it to consider the same. However I must add that it is trite that the provision of security for the due performance of the decree is within the discretionary jurisdiction of the Court. The Court shall exercise its discretion on whether or not to grant even where the Applicant has not offered any. This discretion is intended not to fetter the powers of the Court to do justice as required. I shall make the final orders in the end.

21. In the end the Application has merit and it is hereby allowed on terms set out hereunder.



22. Final orders for disposal;

- a. The Application is allowed on terms that the Applicants shall provide the sum of Kshs 100,000/- (Kenya Shillings One Hundred Thousand Only) for the due performance of the decree which sums shall be deposited in Court within 15 days from the date of this Ruling.
- b. In default the orders shall automatically lapse with no further orders of this Court.
- c. No orders as to costs.

23. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 11<sup>TH</sup> DAY OF MAY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of ;**

Waweru Nyambura for 1<sup>st</sup> – 5<sup>th</sup> Appellants

1<sup>st</sup> and 2<sup>nd</sup> Respondents – Absent

**Court Assistants – Kevin/Lilian**

