



**Giathi v Mwirika (Environment and Land Appeal E020 of 2022)
[2023] KEELC 19142 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19142 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E020 OF 2022**

**YM ANGIMA, J
JULY 27, 2023**

BETWEEN

SAMUEL KAHIA GIATHI APPELLANT

AND

ISAAC MUORIA MWIRIKA RESPONDENT

RULING

A. The Appellant's Application

1. *Vide* a notice of motion dated March 2, 2023 expressed to be based upon sections 1A and 3A of the *Civil Procedure Act* (cap 21) order 22 rule 22(1), order 51 rule 1 of the *Civil Procedure Rules, 2010* (the rules) and all enabling provisions of the law, the appellant sought a stay of execution of the judgment and decree of the trial court dated September 20, 2022 in Nyahururu CM ELC No 60 of 2018 – Isaac Muoria Mwirikia v Samuel Kahia Giathi. The decretal amount was in the region of Kshs 2,000,000/= by the time the decree was extracted.
2. The application was based upon the grounds set out on the face of the motion and the contents of the appellant's supporting affidavit sworn on March 2, 2023 together with the exhibits thereto. The appellant contended that the respondent had extracted a decree in preparation for execution and he was apprehensive that if the decretal amount was paid to the respondent then he may not be able to recover the same should his appeal ultimately succeed. It was contended that the pending appeal stood good chances of success and that the respondent shall not suffer any prejudice if the orders sought were granted. The appellant further offered a title deed for his matrimonial property as security for due performance of any decree which may ultimately be binding upon him.

B. The Respondent's Response

3. The Respondent filed a replying affidavit sworn on March 10, 2023 in opposition to the application. He stated that the decree before the trial court was a money decree hence the appellant had not satisfied



the requirements for the grant of a stay for such a decree. It was also contended that the application had been filed after undue delay without a proper explanation for such delay.

4. The Respondent further stated that there was no evidence to demonstrate that the appeal stood good chances of success and the security offered was matrimonial property which was not free from all encumbrances. It was contended that the suit before the trial court had been pending for 10 years hence he was entitled to execute the decree by all lawful means including committal of the appellant to civil jail.
5. On the issue of his alleged inability to refund the decretal amount in the event of the appeal being successful, he contended that he was a large scale farmer hence he would be in a position to refund the decretal amount. He did not, however, exhibit any evidence of such farming or statement of accounts to demonstrate the income derived from farming.

C. The Appellant's Rejoinder

6. The Appellant filed a supplementary affidavit sworn on March 21, 2023 in response to the respondent's replying affidavit. It was contended that the respondent was a peasant farmer with about 2 acres of land which he depended upon with his 2 wives and children. It was further contended that the respondent had no other known source of income hence there was a real danger of the pending appeal being rendered nugatory if successful.
7. The Appellant asserted that although the title deed he had offered as security was for matrimonial property he had obtained the consent of his spouse. He consequently annexed a copy of an affidavit sworn by his wife granting spousal consent for the title to be offered as security.

D. Directions on Submissions

8. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the appellant's submissions were filed on March 28, 2023 whereas the respondent's submissions were filed on May 22, 2023.

E. Issue for Determination

9. The court has perused the appellant's notice of motion dated March 2, 2023, the respondent's replying affidavit in opposition thereto as well as the appellant's supplementary affidavit. The court is of the view that the key question for determination is whether or not the appellant has satisfied the requirements for the grant of an order for stay of execution of the decree of the trial court pending appeal.

F. Analysis and Determination

10. The court has considered the material and submissions on record on this issue of stay. Whereas the appellant submitted that he had satisfied the requirements for the grant of stay of execution pending appeal, the respondent contended otherwise.
11. There is contest that the decree of the trial court was a money decree for the payment of an amount slightly above Kshs 2,000,000/=. The only issue in contention is whether the respondent once paid shall be in a position to refund the entire decretal amount should the appeal succeed. As was held in the case of *Kenya Shell Limited v Benjamin Karuga & another* [1986] eKLR it is not normal for a money decree to be rendered nugatory in the absence of a stay unless it is demonstrated that the decree



holder is a person of straw who would not be in a position to refund the decretal amount when called upon to do so.

12. The Appellant contended that the respondent had no ability to refund the sum of Kshs 2,000,000/= since he had no known viable sources of income. It was contended that he was a peasant farmer who depended on 2 acres of land together with his 2 wives and children for survival. The respondent countered this claim by claiming that he was a large scale farmer in milangine.
13. It was held in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR that where a question arises as to the ability or inability of the decree holder to refund the decretal amount, it is upon the decree holder to discharge the evidential burden by demonstrating the means available to him to refund the decretal amount when called upon to do so. In the instant application, the respondent has failed to demonstrate that he is a large scale farmer and that he derives reasonable income from it. He has failed to exhibit a statement of his income from whatever sources. He has also failed to exhibit his bank statements or evidence of other assets which may be liquidated for recovery of the decretal amount.
14. The court is thus satisfied that there is a risk of the appeal being rendered nugatory should it ultimately succeed. The court is further satisfied that such an eventuality would constitute substantial loss within the meaning of order 42 rule 6(2) of the Rules. The court is consequently inclined to grant the application for stay. However, the appellant will have to top up the deposit of Kshs 400,000/= to Kshs 500,000/= as a condition for temporary stay. The balance of the decretal amount may be secured by the title deed offered by the appellant.

G. Conclusion and Disposal Order

15. The upshot of the foregoing is that the court finds merit in the appellant's application for stay of execution. Accordingly, the court makes the following orders for disposal of the application dated March 2, 2023:
 - a. There shall be a stay of execution of the judgment and decree of the trial court in Nyahururu CM ELC No 60 of 2018 for a period of 2 years or upon determination of the appeal, whichever comes first.
 - b. The Appellant shall enhance the initial court deposit of Kshs 400,000/= to Kshs 500,000/= within 21 days from the date hereof as a condition for stay of execution.
 - c. The Appellant shall deposit the original title deed for LR No Nyandarua/Melangine/2087 in court within 7 days from the date hereof as security for due performance of the decree.
 - d. The Appellant shall file and serve the record of appeal within 90 days from the date hereof and fix the appeal for directions.
 - e. Costs of the application shall be costs in the appeal.
 - f. Mention on November 6, 2023 for further orders.

Orders accordingly.

Ruling dated and signed at Nyahururu and delivered via Microsoft Teams platform this 27th day of **July, 2023**.

In the presence of:

Mr. Ndegwa Wahome for the Appellant

Mr. Waichungo for the Respondent



C/A - Carol

.....

Y. M. ANGIMA

JUDGE

