



**Gituma v Gituma (Environment and Land Appeal E031 of 2023)
[2023] KEELC 19056 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E031 OF 2023**

**CK NZILI, J
JULY 26, 2023**

BETWEEN

EVALYNE NKIROTE GITUMA APPLICANT

AND

GACHUU M'NKARACHIE GITUMA RESPONDENT

RULING

1. The court is asked to issue an order for the maintenance of the status quo in terms of occupation possession and use of LR No Nyayo/Sirimon Scheme/5754 and for stay of execution of the judgment delivered on October 22, 2021 by the lower court. The application is based on the grounds on its face and the supporting affidavit of Evalyne Nkirote Gituma sworn on May 2, 2023. The applicant avers that she has been in possession and utilization of the suit property where she has been living with her family since 2002.
2. It is averred that an exparte judgment was delivered against her on October 22, 2021 together with orders of eviction. That by a ruling delivered on April 20, 2023 her application dated November 29, 2022 seeking to set aside the judgment was dismissed by the lower court. That the execution of the decree was in progress and unless the court intervenes there will be an eviction, her appeal would be rendered nugatory and the substratum of the appeal extinguished.
3. The applicant further avers that she is willing to offer security as the court may direct and that it is in the interest of justice and equity to grant the orders sought.
4. The application is opposed by a replying affidavit sworn by Gachuu M'Nkarachie Kaburu on May 19, 2023. It is averred that the maintenance of status quo would lead to a loss of mesne profits since no undertaking has been given to compensate him. That the character of the land would change if new alterations or constructions were to occur. Further, the respondent avers that the appeal is not merited, since the applicant had instructed counsel in the lower court who filed a memorandum of appeal on



- February 6, 2020, but failed to file a defence for over 32 months as per the annexed memorandum of appearance vacation notice and a ruling marked GNG 1-3, respectively.
5. Additionally, the respondent avers that no concrete evidence is before the court on the alleged homestead on the suit land belonging to the applicant.
 6. By written submissions dated May 22, 2023, the applicant submitted that she has met the ingredients of stay of execution as per Order 42 Rule 6 *Civil Procedure Rules* since the eviction was due the property may change hands and that the substratum of the appeal may dissipate to her detriment. Reliance was placed on *James Thomas Andata vs Joseph Makhokha Akhalunga (2018) eKLR*, *Consolidated Marine vs Nampija & another Nairobi Civil Appeal No 93 of 1989* and *Monica Mukubi Khirrecu & another vs Caleb Omboga Moturi (2021) eKLR*.
 7. Order 42 Rule 6 of the Civil Procedure Rules provides that a party seeking a stay of execution must file the application without delay, demonstrate substantial loss, offer security for the due realization of the decree should the appeal not succeed and lastly establish that it is in the interest of justice to grant the orders sought. The decree appealed against was issued after a judgment was rendered on October 22, 2021. The application for setting aside was declined on April 20, 2023. The appeal before court was filed on May 4, 2022 alongside this application. The main decree is yet to be appealed against. The applicant has not sought for extension of time to appeal against the decree or judgment made on October 22, 2021.
 8. The applicant applied for the setting aside of the judgment on November 29, 2022 which was over a year after the delivery of the judgment. So there has been an inordinate delay in applying for stay of execution.
 9. On the aspect of substantial loss, a party has to demonstrate more other than merely saying that the execution was imminent. In *James Wangalwa & another vs Agnes Naliaka Cheseto (2012) eKLR*, the court observed that an execution was a lawful process and that more must be shown by an applicant by way of tangible evidence of a loss or damage if execution was to take place.
 10. In this application, the applicant merely states that she is in occupation on the suit land alongside her family. No evidence has been tendered by way of a valuation report or land surveyor's report over the alleged occupation. The loss or damage likely to be incurred has also not been quantified or substantiated as held in *Butt vs Rent Restriction Tribunal (1979) eKLR* and *Jeny Luesby vs Standard Group Ltd (2014) eKLR*.
 11. As to security, whereas the applicant has offered to provide the same, she has not mentioned the nature of the security and or its value. The respondent on the other hand averred that the character and nature of the subject land was likely to be interfered with especially the mesne profits should the orders sought be granted.
 12. The applicant has not given any assurance that she will not interfere with the suit land to the detriment of the respondent. Again, the applicant has not undertaken to surrender the title deed or deposit any security commensurate to the costs and the subject land before the court.
 13. On the aspect of the interest of justice, the applicant has not explained why there was an inordinate delay in applying for the setting aside and or for the stay of execution more so when she knew of the pending suit but failed to file a defence on time or at all and or participate in the lower court suit.
 14. The upshot is that the application lacks merits. The same is dismissed with costs. The lower court file be availed for mention on September 14, 2023.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU



ON THIS 26TH DAY OF JULY 2023

In presence of

C.A John Paul

Mrs. Maheli for respondent

Mwirigi B for applicant

HON. CK NZILI

ELC JUDGE

