



**Mbeneka v Kioko & another (Environment and Land Appeal
E014 of 2023) [2023] KEELC 19243 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19243 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E014 OF 2023**

A NYUKURI, J

JULY 24, 2023

BETWEEN

REGINA MBENEKA APPELLANT

AND

MICO NZIVU KIOKO 1ST RESPONDENT

KATELEMBO ATHIANI MUVUTI COOPERATIVE SOCIETY

LIMITED SOCIETY LIMITED 2ND RESPONDENT

*(Being an application for stay of execution of the judgment delivered on March
17, 2023 in Machakos Chief Magistrates Court Civil Suit No 274 of 2015.)*

RULING

Introduction

1. Before court is the application dated April 26, 2023 filed by the Appellant seeking stay of execution of the judgment delivered on March 17, 2023 in Machakos Chief Magistrates Court Civil Suit No 274 of 2015 pending hearing and determination of this appeal.
2. The application is supported by the grounds on its face as well as the supporting affidavit sworn by the Appellant on April 26, 2023. The Applicant averred that upon delivery of judgment in the lower court, which was in favour of the Respondent, the Respondent has threatened to extract a decree and may proceed with execution which includes cancellation of the title deed and that the 1st Respondent will be put into possession of the suit property hence exposing the property to the risk of being disposed.
3. The Applicant further stated that she has immensely invested in the suit property and that if execution is levied, she will suffer irreparable loss and damage and that her appeal will be rendered nugatory. She averred that she had brought the application timeously.



4. The application was opposed. In response Mico Nzivu the 1st Respondent herein filed a replying affidavit dated May 8, 2023. He averred that there is no threat of execution as no decree has been extracted. He stated that the Applicant had not demonstrated the threshold for grant of stay pending appeal as no security had been offered. His position was that no sufficient cause had been shown by the Applicant and that the title deed shown by the Applicant was non-existent. He stated that he was the one in occupation since 2002 and that therefore the application was not merited.

Submissions

5. The application was canvassed by way of written submissions. On record are the Applicant's submissions dated June 26, 2023. Counsel for the Applicant submitted that the Applicant has an arguable appeal with high chances of success. Reliance was placed on the case of *Stanley Kangethe Kinyanjui v. Tony Keter & 5 others* [2013] eKLR, for the proposition that where the Applicant for stay of execution pending appeal demonstrates an arguable appeal and that if stay is not granted, the appeal will be rendered nugatory, the court ought to grant the same.

Analysis and Determination

6. I have considered the application, the response and the submissions filed. The only issue that arises for determination is whether the Applicant deserves orders of stay of execution pending appeal.
7. Order 42 Rule 6 of the *Civil Procedure Rules* grants this court jurisdiction to grant stay of execution where an Applicant demonstrates that they stand to suffer substantial loss if stay is denied; that they are ready and willing to provide security for the due performance of the decree; and that they have brought the application without undue delay.
8. It is therefore upon an Applicant for stay pending appeal to demonstrate to the court's satisfaction that they face substantial loss and their appeal may be rendered nugatory if stay of execution is not granted.
9. In the case of *James Wanyalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, the court held as follows:

No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create or negate the very essential core of the applicant as the successful party in the appeal....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.
10. In the instant application, the Applicant stated that the lower court ordered for cancellation of his name from the title and the same be registered in the 1st Respondent's name. She is apprehensive that if that happens, then the property is at risk of being disposed of.
11. Having considered the judgment of the trial court, I note that indeed the court ordered cancellation of the Appellant's title and further ordered that the suit property be registered in the 1st Respondent's name. I agree with the Applicant herein that once the property is in the name of the 1st Respondent, he will have all the rights to dispose of the same and in the event the Applicant herein is successful, then the success will be nugatory as the substratum of the appeal may no longer be available. I therefore



hold and find that the Applicant has demonstrated that she stands to suffer substantial loss if the orders sought are not granted.

12. In the premises, I find and hold that the Notice of Motion dated April 26, 2023 is merited and I allow the same as prayed.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Mulu for Appellant/Applicant

Mr. Muema for 1st Respondent

No appearance for 2nd Respondent

Abdisalam – Court Assistant

