



**Irungu v Thiya (Environment and Land Appeal 49 of 2021)
[2023] KEELC 18799 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 49 OF 2021**

JO OLOLA, J

JULY 14, 2023

BETWEEN

JOHN CHEGE IRUNGU APPELLANT

AND

GEORGE IRUNGU THIYA RESPONDENT

RULING

1. By the undated Notice of Motion filed herein on September 20, 2022, John Chege Irungu (the Appellant) prays for orders:
 2. That pending the hearing and determination of the Appeal, this Honourable Court be pleased to grant an order of stay, staying the execution of the Judgment and decree of the Learned Hon. Nelly Kariuki delivered on the 11th November, 2021 in the Chief Magistrates Court at Nyeri;
 3. That the honourable court be pleased to disallow some items in the decree namely interest on the principal amount, Party and Party costs, attendances and other disbursements; and
 4. That the costs of and incidental to this application do abide the outcome of the Appeal.
2. The application which is supported by an affidavit sworn by the appellant is premised on the grounds that:
 - (a) The Judgment delivered on November 11, 2021 may be executed and render the Appeal nugatory;
 - (b) The Appeal has already been filed;
 - (c) A warrant of arrest has been issued against the appellant without his knowledge or that of his Advocates;
 - (d) That it is in the interest of justice that this application be granted; and



- (e) That some of the items in the decree and certificate of costs have been exaggerated and/or inflated.
3. George Irungu Thiya (the Respondent) is opposed to the application. In his replying affidavit sworn and filed herein on October 21, 2022, the respondent avers that the application is an afterthought, mischievous, misconceived, bad in law and a gross abuse of the court process.
 4. The respondent asserts that he sued the appellant together with his wife after they sold to him L.R No. Aguthi/Gatitu/3457 for Kshs.360,000/- on July 5, 2013 which sum he paid in full before the Appellant and his wife refused to transfer the land. The respondent further avers that the judgment merely ordered the appellant and his wife to refund the purchase price plus 20% compound interest which was in accordance with the terms of the sale agreement executed by the Parties.
 5. The respondent avers that it would be unfair for the appellant to keep both the land and the money the respondent had paid for the purchase thereof. He states that the Appellant did transfer the land to his children during the pendency of the case so as to frustrate the respondent's claim and it is therefore only fair and just that he refunds the money plus interest and/or that he deposits the same in court.
 6. The respondent asserts that the Appeal as filed is frivolous and is only meant to cause delay in the conclusion of the matter. It is his case that the Warrant of Arrest was issued against the Appellant after the appellant failed to attend court upon being served with the Notice to Show Cause.
 7. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the written submissions placed before the court by the Learned Advocates representing the Parties herein.
 8. By the application before the court, the appellant has urged the court to be pleased to grant an order of stay of execution of the Judgment delivered on November 11, 2021 in Nyeri CMCL & E Case No. 30 of 2018. He also prays for an order that the Court disallows some items in the decree such as interest on the principal sum, Party and Party costs as well as attendances and disbursements.
 9. The principles guiding the Court in an application for stay of execution pending Appeal are to be found under Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule (2) of the said Rule 6 provides as follows:
 - “(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.”
 10. As correctly submitted by the appellant, the power of the court to grant a stay of execution is discretionary. That discretionary power is not to be exercised capriciously or whimsically. As was stated in *RWW-v- EKW* (2019) eKLR:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who



should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

11. In the matter before me, I note that Judgment was rendered almost one (1) year before the application for stay was instituted. Indeed it is apparent that the process of execution had commenced and that that is what prompted the Appellant to file the instant application seeking orders of stay.
12. From the material placed before me, it is apparent that the dispute herein arises from a sale agreement said to have been executed by the appellant and his wife on the one side and the respondent herein by which agreement the respondent is said to have purchased the parcel of land known as Aguthi/Gatitu/3457 at a consideration of Kshs.360,000/- on 5th July, 2013.
13. While the respondent and his witnesses testified that he paid the full purchase price in cash on the same date of the agreement, the appellant on the other hand denies entering into the sale agreement and appears to accuse his now apparently estranged wife, one Esther Njoki Chege of having colluded with the Respondent to alienate the land when he says he was away on rehabilitation.
14. As it were, the appellant’s said wife never entered appearance and did not participate in the proceedings before the Trial court despite service of summons upon her. From a perusal of the Judgment and the decree, it was clear to me that the decretal amount is merely comprising of the alleged purchase price together with interest which per the terms of the agreement were to be 20% compounded interest.
15. As the appellant has not denied that during the pendency of the proceedings he did transfer the suit property to his children, it was apparent to me that the respondent would be greatly prejudiced if the appellant and his family were to be left in both possession of the suit land as well as the purchase price if indeed it was paid to either both the appellant jointly with his wife or to his wife alone as he asserts.
16. In the circumstances, the order that is most appealing to me is to grant a conditional stay. As the Certificate of Costs had been issued herein in February, 2022 I hereby grant a stay of execution of the decree on condition that the Appellant deposits the sum of Kshs.2,168,796/- being the certified costs in a joint interest earning account in the joint names of the Advocates for the Appellant and the Advocates representing the Respondent within 45 days from today.
17. In default this application shall stand dismissed with costs.
18. The costs of the application shall otherwise be in the Appeal.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 14TH DAY OF JULY, 2023.**

In the presence of:

Mr. Makura for the Appellant

No appearance for the Respondent

Court assistant – Kendi

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J. O. Olola

JUDGE

