



**Gilgil Cultural Association & another (Suing Through its Officials) Harrison Waweru Nganga) v Naivasha Land Registrar & 6 others (Environment & Land Case 444 of 2016 & 165 of 2019 (Consolidated)) [2023] KEELC 21026 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21026 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ENVIRONMENT & LAND CASE 444 OF 2016 & 165 OF 2019 (CONSOLIDATED)**  
**A OMBWAYO, J**  
**OCTOBER 19, 2023**

**BETWEEN**

**GILGIL CULTURAL ASSOCIATION ..... PLAINTIFF**  
**SUING THROUGH ITS OFFICIALS) HARRISON WAWERU NGANGA**

**AND**

**NAIVASHA LAND REGISTRAR ..... 1<sup>ST</sup> DEFENDANT**  
**ELIZABETH NJOROGE ..... 2<sup>ND</sup> DEFENDANT**  
**SIMON PATRICK NJOROGE ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH**  
**ENVIRONMENT & LAND CASE 165 OF 2019**

**BETWEEN**

**PATRICK SIMON NJOROGE ..... PLAINTIFF**

**AND**

**HARRISON WAWERU NGANGA ..... 1<sup>ST</sup> DEFENDANT**  
**JAMES KIANJA KARANJA ..... 2<sup>ND</sup> DEFENDANT**  
**JOSEPH KIHARA ..... 3<sup>RD</sup> DEFENDANT**  
**GILGIL CULTURAL ASSOCIATION ..... 4<sup>TH</sup> DEFENDANT**



## RULING

### Brief Facts

1. The appellants filed the instant application dated May 4, 2023 seeking the following orders:
  1. Spent.
  2. Spent.
  3. That the honourable court be pleased to stay execution of the judgment and decree pending the hearing and final determination of the intended appeal.
  4. That cost of this Application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of Patrick Simon Njoroge sworn on July 6, 2023.
3. It was stated that by a judgment delivered on April 27, 2023 this court cancelled the entries made by the 1<sup>st</sup> defendant in respect of all those parcels of land known as Gilgil/gilgil Block 1/27977 (Kekopey) and Gilgil/Gilgil Block 1 (Kekopey Ranch)/9937. That the court granted the plaintiff permanent injunction restraining the defendants and their agents from trespassing into the parcel of land known as Gilgil/gilgil Block 1/27977 (kekopey)
4. That aggrieved by the said judgment the 2<sup>nd</sup> and 3<sup>rd</sup> defendants lodged a notice of appeal against the said decision. He added that the plaintiff is in the process of executing the decree and if not stayed immediately the intended appeal will be rendered nugatory and the applicants will suffer substantial loss since they are in occupation of the suit property.
5. That there is likelihood that the plaintiffs/respondents would use it to enter the suit property which interference would be a security threat to the students at the school. He stated that they are willing to give any security which the court may order for the due performance of the decree.

### Response

6. The plaintiffs/respondents through their chairman herein filed their replying affidavit dated June 22, 2023 in opposition to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants'/applicants' Notice of Motion Application dated May 4, 2023.
7. He averred that the application is misconceived and without any basis. He further averred that the applicants' have not established that they shall suffer any irreparable loss as the land herein is an immovable asset and the boundary can always be changed in case the applicants are successful in their appeal.
8. He averred that the assertions by the applicants that their school is adjacent to the disputed portion of the suit property is false as they have never been in occupation hence they would not suffer any substantial loss.
9. He further averred that the said portion is vacant with no developments by the applicants. He instead stated that the Respondent would suffer substantial loss as they have been in possession of the disputed portion. He further stated that the rights of the members of the respondents association would be curtailed if orders of stay of execution are granted.



10. The respondent seeks that the application be dismissed with costs.
11. The applicants filed a further affidavit dated July 5, 2023 where he stated that through their advocates they sent a draft decree for approval and/or amendment to the plaintiff/respondent's advocates. That after the lapse of seven days their advocates forwarded the decree for execution. He added that there is likelihood that the respondent will now use the decree to enter the suit land and cause interference thus threatening the security and operations of the CBC Junior Secondary School of Wellspring School.
12. In conclusion, he stated that the Respondents are not in occupation of the suit property and that the balance of convenience tilts in their favour for the grant of the stay of execution pending appeal.

### Submissions

13. The applicants filed their submissions dated July 5, 2023 where they gave a summary of the case and identified one issue for determination:
  - a. Whether the Applicant has satisfied the conditions for grant of stay of execution pending the hearing and determination of the intended appeal.
14. They relied on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which sets down the conditions a party ought to fulfill before granting an order of stay of execution pending appeal.
15. They cited several authorities including Butt v Rent Restriction Tribunal [1979] eKLR and Philip Mutinda v Lady Lori (K) Limited [2021] eKLR and submitted that judgment was delivered on April 27, 2023 in favour of the respondents and aggrieved by the said judgment, they lodged a notice of appeal and had the same served on all parties. They further submitted that they are likely to incur substantial loss as the respondent will enter the suit property yet the said land has a school. They argued that any such interference will cause security threat to the school hence the need to have the status quo maintained pending the hearing and determination of the intended appeal.
16. The applicants relied on the case of Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR and submitted that they are willing and ready to abide by any conditions and terms this court may impose as security for the due performance of the decree.

### Analysis and Determination

17. This court has perused the application, replying and further affidavit and submissions filed by the parties and is of the view that the main issue for determination is whether the instant application meets the threshold to grant orders for stay of execution pending appeal.
18. The law on stay of execution pending Appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

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 1st 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 1st Applicant.”

19. The above three conditions ought to be met by the applicants for this court to grant the said orders. The applicants contend that substantial loss as the respondent will enter the suit property and the said land has a school. They argued that any such interference will cause security threat to the school. The respondents on the other hand argued that the assertion by the applicants that their school is adjacent to the disputed portion of the suit property is false as they have never been in occupation hence they would not suffer any substantial loss.
20. This court has perused the annexed photos and it is clear that the disputed portion of the suit property is not close to the school as alleged by the applicants. The applicants fear is that, not granting them the stay may result in them losing school going children. In my view, I do not see how this can result to that since the portion of the suit land does not show any school on it. If the Applicants were to succeed in the appeal, I do not think that the same would be rendered nugatory if the prayers sought are not granted because the land does not face any imminent threat as it is. Furthermore, in any event if the applicants succeed in their appeal they can be compensated through costs if any.
21. The Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR 645 stated that;
- Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
22. In the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018 the Court of Appeal pronounced itself to the effect that:
- "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
23. In the case of *RWW v EKW* (2019) eKLR it was held that:-
- ...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.”[Emphasis mine]
24. The Applicants must also satisfy the court that the application was made without unreasonable delay. It is not in dispute that the judgment was delivered on April 27, 2023 while the application for stay was filed on May 5, 2023. This is a difference of only one week and this court finds that the same was brought without unreasonable delay.



25. On security, the Applicants stated that they are willing to offer any conditions and terms this court may impose as security for the due performance of the decree. It is this court's view that it is not sufficient for the Appellants to be willing to offer any security for the due performance of the decree but they should specifically state the said security.
26. In addition, Order 42 Rule 6 of the *Civil Procedure Rules* provides that all the three conditions are read conjunctively meaning that all the three conditions must be met in order for this court to grant the stay orders. This therefore means that in the event the Applicant does not meet one of the conditions, the stay orders should not be granted as in this case.
27. In view of the foregoing, this court finds that the appellants have not established sufficient cause to warrant the court grant them a stay of execution. In the upshot, the Notice of Motion application dated May 4, 2023 is not merited and consequently, the said application is dismissed entirely with costs to the respondents. It is so ordered.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19<sup>TH</sup> DAY OF OCTOBER 2023**

**A. O. OMBWAYO**

**JUDGE**

