



REPUBLIC OF KENYA



**Ololchike v Ntimama (Environment & Land Case 81 of 2017)
[2023] KEELC 20671 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 81 OF 2017
CG MBOGO, J
OCTOBER 16, 2023**

BETWEEN

STANLEY MBIRIKA OLOLCHIKE PLAINTIFF

AND

NAMINTI NTIMAMA DEFENDANT

RULING

1. On 5th July 2023, the Defendant/Applicant filed a Notice of Motion Application dated 26th June, 2023 expressed to be brought under Order 40, 42 Rule 6 and Order 51 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to issue an order of stay of execution of the judgment delivered on 13th June 2023 pending the hearing and determination of an intended appeal preferred against it.
 4. That costs of this application be in the cause.
2. The application is premised on the grounds inter alia that the Defendant/Applicant being dissatisfied with the judgment of this court, has preferred an appeal and has already initiated the same through the process of filing an appeal which intended appeal has high chances of success.
3. The application is supported by the affidavit of the Defendant/Applicant sworn on even date. The Defendant/Applicant deposed that judgment was delivered by this court in this matter on 13th June, 2023 which ordered that the suit land be subdivided and 3 acres be transferred to the Plaintiff/ Respondent. Further, that being aggrieved with the outcome, he has instructed his counsel on record



to pursue an appeal and is yet to be supplied with certified copies of the typed proceedings to enable him fully prepare for the appeal.

4. The Defendant/Applicant further deposed that he is apprehensive that unless restrained by this court, the Plaintiff/Respondent shall proceed with the execution and render the intended appeal nugatory thus occasioning a substantial miscarriage of justice and given the fact that he is currently in active possession and occupation of the suit land, the balance of convenience tilts in favour of granting a stay of execution. Also, that he is willing to comply with any conditions set by this court such as paying security for costs.
5. In conclusion, the Defendant/Applicant deposed that the application has been brought in good faith and meets the legal threshold for grant of the orders sought.
6. The application was opposed by the replying affidavit of the Plaintiff/Respondent sworn on 18th July, 2023 and filed in court on 20th July, 2023. The Plaintiff/Respondent deposed that the intended appeal has minimal chances of success as it is manifestly clear that there was an error in the Narok Tribunal proceedings which the Defendant/Applicant participated in. Further, that the suit is related to Narok CMCC ELC Suit No. 14 of 2010 Naminti Ntimama v Stanley Mbirika which was held in abeyance pending hearing and determination of the present suit and thus continued stay of execution will be of great prejudice to her.
7. The Plaintiff/Respondent further deposed that the application is premature for the reason that she has not commenced execution proceedings against him and that should this application be allowed, she will suffer irreparably since the Defendant/Applicant is still in occupation of the suit land whereas she ought to be enjoying the fruits of the judgment.
8. In conclusion, the Plaintiff/Respondent deposed that the assertion that the Defendant/Applicant has built a homestead is misleading as it is not supported by photographic evidence and should this court be obliged to grant a temporary stay of execution, she prays that security of costs be provided.
9. The application was canvassed by way of written submissions. On 9th August, 2023, the Defendant/Applicant filed his written submissions dated 7th August, 2023 and raised five issues for determination as listed below: -
 - a. Whether the applicant will suffer substantial loss should the court decline to grant a stay of execution of the judgment and decree in question.
 - b. Whether the present application has been made without unreasonable delay.
 - c. Whether the intended appeal will be rendered nugatory should the court decline to a stay of execution of the judgment and decree in question.
 - d. Whether the applicant has made an offer for security for costs.
 - e. Who should pay costs of this application.
10. On the first issue, the Defendant/Applicant submitted that he will suffer substantial loss as he is currently in active possession and occupation of the suit land and, therefore, the balance of convenience tilts in his favour. Also, that it is imperative that a stay of execution is granted so as to preserve the subject matter in dispute and to safeguard the rights of the Defendant/Applicant on appeal. To buttress this position, the Defendant/Applicant relied on the cases of *RWW v EKW* [2019] eKLR and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2021] eKLR.



11. On the second issue, the Defendant/Applicant submitted that there was no delay on his part in filing the instant application since judgment was delivered on 13th June, 2023 and a Notice of Appeal dated 20th June, 2023.
12. On the third issue, the Defendant/Applicant submitted that he has already lodged his Notice of Appeal as well as the draft memorandum of appeal which raises several arguable issues of facts and law that require this honourable's court determination. The Defendant/Applicant relied on the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
13. On the fourth and fifth issue, the Defendant/Applicant submitted that he is indeed willing and ready to comply with any terms and conditions set by this court in allowing the application and is willing to pay the security for costs to ensure that the ends of justice is met. Also, that he is inevitably entitled to costs. Reliance was placed in the case of *Focin Motorcycle Company Limited v Ann Wambui Wangui & Another* [2018] eKLR.
14. The Plaintiff/Respondent filed her written submissions dated 29th August, 2023 submitted that the law concerning stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules* and while relying on the case of *Charles Wahome Gethi v Angela Wairimu Gethi* [2008] eKLR, the Plaintiff/Respondent submitted that the Defendant/Applicant has not shown the particular and substantial damages that he would suffer if stay is not granted for the reason that the subject land measures approximately 14 acres out of which the court awarded only 3 acres, and that he will have 11 acres of land to live in and carry out his agricultural activities. The Plaintiff/Respondent further submitted that the effect of the instant application is to deny her the fruits of her judgment as she has litigated over this parcel of land for approximately 13 years.
15. I have considered the application, replying affidavit and the written submissions filed by both parties and the issue for determination is whether the defendant/applicant has satisfied the conditions for grant of stay of execution pending appeal.
16. Order 42 Rule (6) of the *Civil Procedure Rules* 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 orders set aside.

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 Applicant.”



17. In the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, the Court of Appeal held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another v Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Court’s discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo v Straman E.A. Ltd.[2013] as follows:-

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of Vishram Rouji Halal v Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,”

18. For the court to order a stay of execution there must be: -

- i. Sufficient cause;
- ii. Substantial loss
- iii. No unreasonable delay.
- iv. Security and the grant of stay is discretionary.

19. On whether there is sufficient cause and substantial loss, the Defendant/Applicant contended that he is in possession and occupation of the suit land and therefore the balance of convenience tilts in his favour. It should be noted that the matter before this court emanated from the lower court which adopted the decision of the Narok Land Dispute Tribunal as a judgment of the court. In essence, what the Plaintiff/Respondent sought was a rectification of the parcel number of the property. The Defendant/Applicant having stated that he is in occupation of the suit property is not sufficient evidence that he will suffer substantial loss to persuade this court that he is entitled to stay. There is no evidence of any loss said to be incurred that has been provided.

20. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, substantial loss was discussed as follows: - “...the applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a successful part 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.”

21. On whether there is unreasonable delay, this court is satisfied that there is no unreasonable delay. This court delivered judgment in this matter on 13th June, 2023. The Defendant/Applicant filed the instant application dated 26th June, 2023 and a notice of appeal dated 20th June, 2023.

22. On whether security for costs has been provided, the Defendant/Applicant contended that he was willing to abide with any terms and conditions that will be issued by this court. From the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is evident that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously. In



exercising its discretion, court should therefore always opt for the lower rather than the highest risk of injustice. The court is to weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of judgement.

23. More importantly, the Defendant/Applicant has not supplied this court with a decree to enable this court make an informed decision on security for costs. In any case, the Plaintiff/Respondent's averment that she is yet to commence execution proceedings against the Defendant/Applicant is uncontroverted. This brings me to the conclusion that the Defendant/Applicant has come to court only in anticipation that execution proceedings will ensue.
24. In my view, the Defendant/Applicant has not established that he would suffer substantial loss if the application is not granted. In the case of *Macharia T/A Macharia & Co Advocates v East African Standard (No. 2)* (2002) KLR 63, it was held: -

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to the principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled.’

25. Arising from the above, I find that the Notice of Motion Application dated 26th June, 2023 lacks merit and the same is dismissed with costs to the Paintiff/Respondent. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 16TH DAY OF OCTOBER, 2023.

HON. MBOGO C.G.

JUDGE

16/10/2023

In the presence of:

CA:Meyoki

