



**Kuria v Kuria (Environment and Land Miscellaneous Application
E004 of 2023) [2023] KEELC 21989 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2023
AK BOR, J
NOVEMBER 21, 2023**

BETWEEN

NICHOLAS NGATIA KURIA APPLICANT

AND

EDWARD MUREITHI KURIA RESPONDENT

RULING

1. Through the application dated 1/3/2023, the applicant seeks stay of execution of the judgment delivered by Hon. Mr. Mararo on 28/2/2023 in Nanyuki CMELC No. 59 of 2019 pending hearing and determination of the appeal. The application was premised on the grounds that the Learned Magistrate delivered a judgment ordering removal of the caution registered against the land known as Laikipia/Ngobit Supuko Block 2/1328 (Wiyumiririe) and awarded the respondent general damages of Kshs. 500,000/=. The applicant was apprehensive that the respondent may proceed to execute and sell the suit property. He added that his appeal had a reasonable chance of success and if execution were carried out it would render the appeal nugatory.
2. The appellant swore the affidavit opposing the application and argued that the memorandum of appeal was not annexed to enable this court evaluate whether the intended appeal was arguable or that it stood any chance of success. He urged that the applicant had failed to establish the irreparable damage or loss he stood to suffer and had not offered security for the due performance of the decree. He maintained that he was the registered owner of the suit property.
3. The applicant swore a supplementary affidavit on 17/4/2023 to explain that he could not annex the memorandum of appeal because his lawyers had not accessed a copy of the judgment. That once he was supplied with the judgment he would make an application to appeal out of time after which he would file the memorandum of appeal. He expounded that the substantial loss he stood to suffer was that the suit land belonged to his father and should be included in his estate to be distributed among all his beneficiaries.



4. The applicant swore a further affidavit on 22/10/2023 and exhibited the judgment. He stated that he was ready and willing to offer security of Kshs. 60,000/= which is what he could afford being a retiree with a pension of Kshs. 15,000/= with no other income. He added that he was sickly and was always on medication while urging the court to factor in the aspect that this was a family dispute.
5. The court directed parties to file submissions which it has considered. The applicant contended that the suit property belonged to their father who was the respondent's stepfather and that it should be distributed among all the beneficiaries including the parties while pointing out that the respondent wanted to keep the whole parcel to himself. He argued that he had satisfied the conditions for the grant of the orders sought. He relied on a decision on a Court of Appeal dealing with applications under Rule 5 (2) (b) of the Court of Appeal Rules.
6. The respondent submitted that the operative law was Order 42 Rule 6 (2) of the Civil Procedure Rules which lays down the conditions a party must establish for grant of stay of execution pending appeal. He submitted that the applicant only contended that the appeal would be rendered nugatory if the orders were not granted without demonstrating how that would happen. He added that no evidence had been tendered before the court to support the applicant's contention that he was retired and sickly. The respondent expressed the view that if this court were minded to grant the orders sought then the applicant should deposit security in the sum of Kshs. 500,000/= which was the amount he was awarded as general damages.
7. The issue for determination is whether the court should grant orders staying execution of the decree issued by the Learned Magistrate pursuant to the judgment delivered on 28/2/2023. Under Section 79 G of the Civil Procedure Act an appeal from Subordinate Court to the High Court should be filed within 30 days of the date of the decree or order appealed against excluding from such period the time which the Magistrates Court may certify as having been required for the preparation and delivery to the appellant of a copy of the decree or order. The proviso allows the court to admit an appeal out of time where it is satisfied that the appellant had good and sufficient cause for not filing the appeal in time. The applicant did not comply with this legal requirement.
8. Order 42 of the Civil Procedure Rules deals with appeals with Rule 6 dealing with stay in case of appeal. The applicant has not lodged an appeal before this court against the decision of the Learned Magistrate issued on 28/2/2023. Order 42 in this court's view cannot therefore be invoked by the applicant without an appeal first being filed in court.
9. There is no appeal on which the court can base the orders for stay of execution sought by the Applicant, who the court notes has not applied to enlarge the time within which to lodge his appeal despite the fact that he got a copy of the judgment. Judgment was delivered on 28/2/2023. The Applicant annexed a letter dated 14/3/2023 vide which his advocates requested for a copy of the judgement from the court. There is nothing to show that that letter was received in court or that there was any follow up until October when the Applicant filed his further affidavit and exhibited a copy of the judgment.
10. The court declines to grant the orders sought in the application dated 1/3/2023. Each party will bear his costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 21ST DAY OF NOVEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Ms. Poline Mwangi for the Respondent



Ms. Stella Gakii- Court Assistant

No appearance for the Applicant

