



Ngeeti (Substituted By Nicholas Mulei Wambua) v Wambua (Environment and Land Appeal E009 of 2022) [2023] KEELC 21683 (KLR) (15 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E009 OF 2022
TW MURIGI, J
NOVEMBER 15, 2023**

BETWEEN

SAMUEL WAMBUA NGEETI APPELLANT

SUBSTITUTED BY NICHOLAS MULEI WAMBUA

AND

PHILIS NDOTI WAMBUA RESPONDENT

RULING

1. By a Notice of Motion dated 15th December, 2022 brought under Order 42 Rule 6(1) of the Civil Procedure Rules and Sections 3A, 1B of the *Civil Procedure Act*, Article 159 of *the Constitution* and all other enabling provisions of the law, the Applicant seeks the following orders:-
 1. That there be a stay of execution of the judgment delivered on 11th May, 2022 pending the hearing of the application.
 2. That there be a stay of execution of the judgment delivered on 11th May, 2022 pending the hearing and determination of the Appeal.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Nicholas Mulei Wambua sworn on even date.

The Applicant's Case

3. The Applicant averred being aggrieved by the judgment delivered by Hon. J. O. Magori on 11th May 2022, he lodged an appeal which has overwhelming chances of success.
4. He averred That the Respondent has commenced execution and if the order of stay is not granted the appeal will be rendered nugatory. In addition, the Applicant averred That he will suffer substantial



loss as the permanent structures erected on the suit property will be demolished if the order of stay is not granted.

The Respondent's Case

5. The Respondent filed a replying affidavit sworn on 16th February in opposition to the application.
6. It was averred That for an application of stay of execution pending appeal to succeed, the Applicant must satisfy the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules. The Respondent averred That the Applicant has not demonstrated That he will suffer substantial loss if the orders sought are not granted since his allegation That his permanent structures erected on the suit property will be demolished is based on assumption. He further averred That the orders sought are unwarranted since the execution process has not commenced.
7. The Respondent contended That the Appeal does not raise any triable issues as the judgment delivered by Hon Magori is well reasoned and based on cogent evidence. It was averred That should the court be inclined to allow the application the Applicant should be ordered to deposit security for costs.
8. Lastly, it was averred That the application is frivolous, vexatious and an abuse of the court process and it ought to be dismissed with costs.
9. The application was canvassed by way of written submission.

The Applicant's Submissions

10. The Applicant's submissions were filed on 4th April, 2023.
11. On his behalf, Counsel submitted That the instant application is premised on Order 42 Rule 6 of the Civil Procedure Rules which sets out the conditions to be satisfied in an application for stay of execution pending appeal. Counsel submitted That the main factors to be considered in an application for stay pending appeal were set out in the case of Paul Njunge Vs Samuel Gatonye Robert & 2 Others (2006) eKLR where the court stated as follows;

“This court must be satisfied That the applicant would suffer substantial loss unless stay of execution is granted. The application for stay of execution must be made without unreasonable delay and further the applicant must provide such security the court may order for the due performance of such decree or order.”
12. Counsel submitted That the Applicant will suffer substantial loss if stay of execution is not granted as the permanent buildings erected on the suit property will demolished.
13. Counsel further submitted That the purpose of stay of execution pending appeal is to preserve the subject matter of an appeal so That the appeal if successful is not rendered nugatory. To buttress this point counsel relied on the case of Consolidated Marine vs Nampija & Another CA No. 93 of 1989.
14. On the second condition, Counsel submitted That the delay in filing the present application was due to the time it took to avail the file from Limuru law courts to Makindu Law courts. Counsel submitted That the application was made without unreasonable delay.
15. On the third condition, Counsel submitted That Courts have previously held That security is not required in matters involving land. Counsel left the issue of costs at the discretion of the court. To



buttress this point, Counsel relied on the case of NM VS EMN (2019) eKLR where the judge stated as follows:-

“The subject matter being land, the deposit of security is not necessary.”

16. To buttress his submissions, Counsel relied on the following authorities:-
 1. Paul Njunge Vs Samuel Gatonye Robert & 2 Others (2006) eKLR.
 2. NM Vs EMN (2019) eKLR.

The Respondents Submissions

17. The Respondents submissions were filed on 24th March, 2023.
18. In his submissions, Counsel reiterated the contents of the Respondent's replying affidavit.
19. In addition, Counsel submitted That the overriding objective of the court is to do justice in accordance with the law and prevent abuse of the court process. Counsel submitted That the instant application is meant to frustrate the Respondent from enjoying the fruits of his judgment. He urged the court to dismiss the application with costs to the Respondent.
20. To buttress his submissions Counsel relied on the following authorities:-
 1. Kinyunjuri Muguta Vs Wotuk Muguta (2018) eKLR.
 2. James Simiyu Mukenya Vs Agnes Naliaka Cheseto (2012) eKLR.

Analysis And Detemination

21. Having considered the application, the affidavits and the rival submissions, the only issue That arises for determination is whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending appeal.
22. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides That;
 - 6(1). 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.
 - 6(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 of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
23. In considering an application for stay of execution, I am guided by the case of *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so That an appeal may not be rendered nugatory should That appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
24. The grant of an order of stay of execution is a discretionary one. In the case of *RWW Vs EKW* (2019) eKLR the court held That;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”
25. The court is therefore called upon to balance the rights of both the successful party so as not to hinder him from his fruits of judgment and those of the appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
26. Going by the above provisions of the law, it is clear That in an application for stay of execution pending appeal the Applicant must satisfy the following three conditions: -
 - a. The court is satisfied That substantial loss may result to the Applicant unless the order is made.
 - b. The application has been made without unreasonable delay.
 - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.
27. The Applicant is seeking for an order of stay of execution of the judgment delivered on 11th of May, 2022 pending the hearing and determination of the appeal.
28. The court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.
29. On the first condition of proving That substantial loss may result unless stay orders are granted, the Applicant should not only state That he is likely to suffer substantial loss, he must prove That he will suffer substantial loss if stay orders are not granted.



30. In so finding, I am persuaded by the decision in the case of Charles Wahome Gethi vs Angela Wairimu Gethi (2008) eKLR where the Court of Appeal held That;

“...it is not enough for the Applicants to say That they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss That the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

31. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma Vs Abuoga (1988) KLR where it was held That;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

32. The Applicant contended That he is apprehensive That the Respondent will demolish his permanent buildings erected on the suit property if an order of stay of execution is not granted. In addition, the Applicant asserted That the Respondent has commenced the process of executing the judgment.

33. I have read the judgment delivered by Hon. J. O. Magori on 11th May, 2022; In his findings, the Learned Trial Magistrate stated as follows;

“ Accordingly, I enter judgment in favour of the Plaintiff against the Defendant as follows:-

- a. An order of injunction is hereby issued restraining the first defendant by himself, his servants and/or agents from trespassing, constructing on, wasting and/or otherwise interfering or dealing with plot N. 33 Mutyambua Market.
- b. A declaration is hereby issued That plot No. 33 Mutyambua Market belongs to Philies Ndoti Wambua the Plaintiff herein and That the first defendant to demolish any structures That he has built therein.
- c. The Plaintiff is granted costs of this suit against the 1st Defendant together with interest.
- d. The Plaintiff's claim against the second Defendant is dismissed with costs to the second Defendant.
- e. The counterclaim by the first Defendant against the Plaintiff is dismissed with costs to the Plaintiff.”

34. The judgment of Hon. J.O. Magori shows That the Applicant was ordered to demolish the structures erected on the suit property. That being the case, I find That the Applicant's fears That the Respondent will demolish the structures if an order of stay is not granted is not baseless as the subject matter of the appeal can be interfered with.

35. The trial court having declared That the Respondent is the owner of the suit property, I find That it is the duty of this court to preserve the subject property of this Appeal.

36. I find That the Applicant has satisfied this court That he is likely to suffer substantial loss if the substratum of the appeal is demolished.



37. As regards the second requirement which requires That the application be made without unreasonable delay, it is not in dispute That the judgment was delivered on 11th May, 2022. The present application was filed on 15th December, 2022. I find That the application was brought without undue delay.
38. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect That the Applicant must furnish security for the performance of the order or decree. In the case of Arun C Sharma Vs Ashana Rikundalia T/A Raikundalia & Co. Advocates & 4 Others (2014) eKLR, the court held That;
- “The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve That purpose.”
39. The Applicant submitted That security for costs is not necessary in matters involving land and left the issue of costs at the discretion of the court. On the other hand, the Respondent contended That if the court is inclined to allow the application, the Applicant should be ordered to deposit security for cost of the appeal.
40. Although the Applicant has not furnished security for costs, he can be directed by the court to do so. In the end I find That the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.
41. The upshot of the foregoing is That the application dated 15th of December, 2022 is merited and the same is allowed in the following terms;
1. Stay of execution of the judgment/decree herein is granted pending the hearing and determination of the Applicant’s Appeal.
 2. The Applicant shall deposit Kshs 200,000/= as security for costs in court within 30 days from the date of this ruling in default the stay orders shall automatically lapse.
 3. Each party to bear its own costs.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF NOVEMBER, 2023.

.....

HON. T. MURIGI

JUDGE

In the presence of: -

Court Assistant – Mr. Kwemboi.

Muia for the Appellant/Applicant.

Muthiani for the Respondent.

