



**Nyabera v Nyabera (Environment and Land Appeal E014 of 2023)  
[2023] KEELC 21523 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21523 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E014 OF 2023**

**M SILA, J**

**NOVEMBER 14, 2023**

**BETWEEN**

**MILKAH MORAA NYABERA ..... APPLICANT**

**AND**

**JOYCE NYABERA ..... RESPONDENT**

**RULING**

1. Application for stay pending appeal; principles to be considered; applicant having been sued by the respondent for eviction on the basis that the respondent holds title to the disputed land; applicant contesting the title of the respondent and insisting that she is the one holding the original title thereto on land that has never been subdivided; judgment entered in favour of the respondent hence this appeal; stay granted since execution of the decree may lead to eviction of the applicant; status quo on both title and possession ordered to be maintained.
2. The application before me is that dated May 9, 2023 filed by the appellant. It is an application seeking orders of stay of execution of judgment pending appeal. The judgment in issue is that delivered on April 26, 2023 in the case Kisii CMCC (ELC) No 104 of 2019 in which the appellant/applicant was the defendant and the respondent the plaintiff. In that case, the respondent had sued the applicant and sought orders for a declaration that she is the rightful owner of the land parcel Nyaribari Chache/B/B/Boburia/13111, eviction of the applicant from the said land, and a permanent injunction to restrain her from it.
3. The facts of the case are fairly interesting. The applicant is grandmother to the respondent and in the suit the respondent claimed that she (her grandmother) had trespassed into the suit land and she wanted her out of it. This land parcel No 13111 is a subdivision of the land parcel No 1650 which was subdivided into two portions bringing forth the land parcels No 13110 and 13111. While the respondent asserted title to the parcel No 13111, the applicant on her part contended that she still holds title to the original parcel No 1650, and that the respondent's title No 13111 was a fraud. The



matter was heard, culminating into the impugned judgment where the trial court held in favour of the respondent, upheld the title No 13111, and directed the applicant to vacate the disputed land within 60 days. Aggrieved, the applicant filed this appeal and she now seeks orders of stay of execution pending hearing of the said appeal.

4. In the Supporting Affidavit, the applicant deposed that she has serious issues to raise in this appeal. She states that the appeal will be rendered nugatory if stay is not granted. She has annexed a search indicating that the land parcel No 1650 exists and contends that the land parcel No 13111 is inexistent.
5. The respondent opposes the application and has filed a replying affidavit. She asserts that the applicant has trespassed into her land parcel No 13111 and avers that the applicant failed to prove her allegations in the trial court. She insists that she needs to be given vacant possession of the land. She has attached her own search certificate for the land parcel No 13111 indicating her to be the owner thereof.
6. The applicant filed a supplementary affidavit to assert that the title of the respondent was cancelled and that it reverted back to the original parcel No. 1650.
7. I directed counsel to file submissions towards the application and I have seen the submissions of Mr Ochoki, learned counsel for the applicant, and Mr Ochwangi, learned counsel for the respondent. I have taken these into account before arriving at my decision.
8. This being an application for stay pending appeal, I stand guided by the provisions of order 42 rule 6 (2) which provides as follows :-
  - (2) No order for stay of execution shall be made under subrule (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.
9. From the above, it will be seen that the court ought to consider three issues, being:-
  - (i) Whether the application has been made without unreasonable delay;
  - (ii) Whether the applicant stands to suffer substantial loss if the order for stay is not made;
  - (iii) Whether there is provision of security as the court may order for the due performance of the decree.
10. Although both applicant and respondent went to great lengths to try and demonstrate that the title that each holds is the genuine one, I cannot go into that at the moment, as that is indeed the gist of the appeal. I remain focused on the principles laid down in order 42 rule 6 (2).
11. On delay, the judgment was delivered on April 26, 2023. This application was filed on May 15, 2023. I see no delay, especially given that the applicant had a period of 60 days to give vacant possession.
12. As to substantial loss, I am persuaded that the applicant may stand to be evicted from the suit land and she stands to suffer substantial loss. Indeed, she believes that she is on land to which she holds title to.



13. On security, there is really nothing, in the circumstances of this case, that I can see which needs to be provided as security. All I will order is for both applicant and respondent not to deal with either land parcel Nyaribari Chache/B/B/Boburia/13111 and Nyaribari Chache/B/B/Boburia/650 until this appeal is heard and determined. The status quo as to possession also needs to be maintained until this appeal is disposed of. There was an order for costs for the lower court suit in favour of the respondent. If the same have not been assessed, let them not be assessed until this appeal is finalized. If they have been assessed, let execution thereof not proceed until this appeal is completed.
14. The costs of this application will be costs in the appeal.
15. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 14 DAY OF NOVEMBER 2023.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

**In the presence of: -**

Mr. Marita for the applicant

Mr. Ochwangi for the respondent

Court Assistant – Lawrence Chomba

