



**Muema v Mwende & another (Environment and Land Appeal
37 of 2023) [2023] KEELC 22341 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 37 OF 2023
A NYUKURI, J
DECEMBER 20, 2023**

BETWEEN

FESTUS NGEI MUEMA APPELLANT

AND

JOSEPHINE MWENDE 1ST RESPONDENT

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING CO-OPERATIVE
SOCIETY LTD 2ND RESPONDENT**

RULING

Introduction

1. By a Notice of Motion dated 11th December 2023, the appellant sought stay of execution of judgment delivered on 22nd November 2023 in Machakos ELC no 56 of 2020 pending hearing and determination of the appeal herein.
2. The application is anchored on the supporting affidavit sworn by Festus Ngei Muema the applicant. The applicant's case is that if the respondent executes the decree, the effect will be to dispossess the appellant of his property known as Plot no 3294 situated in Katelembo Athiani Muputi Farming & Ranching Co-operative Society ltd (suit property) and eventually take possession of the same, which property the respondent has now developed and planted avacado trees on reliance of the judgment delivered by the lower court. He stated that the appeal was meritorious with high chances of success. He stated that if execution proceeds, then the appellant will suffer irreparable damage and the appeal will be rendered nugatory. He stated that he was ready and willing to comply with any orders granted in regard to security.
3. The application is opposed. Josephine Mwende the 1st respondent filed replying affidavit sworn on 18th December 2023. She alleged that the application does not satisfy the conditions in Order 42 Rule 6 (2) of the *Civil Procedure Rules*. She stated that she was owner of Plot no 3295 while the appellant



owned Plot no 3294 and that the court visited the two plots and noted that the appellant had put up a permanent home on Plot no 3294 while Plot no 3295 was vacant. She maintained that it was the appellant who had trespassed on Plot no 3295. She stated that granting a stay will prejudice her as the appellant will continue occupying the suit property.

4. She further deponed that the applicant had not demonstrated that he will suffer substantive loss if judgment is not stayed. Further that the applicant had not provided security for due performance of decree and that if the application is allowed, the applicant should deposit the costs of ksh 283,614/- in court or in a joint account pending determination of the appeal.

Analysis and determination

5. The court has carefully considered the application and the response, and the issue that arise for determination is whether the applicant has met the threshold for stay of execution pending appeal.
6. Order 42 Rule 6 of the *Civil Procedure Rules* grants this court power to grant stay of execution pending appeal and provides as follows;

Stay in case of appeal

6. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.
3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a



temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

7. Therefore to obtain stay of execution pending appeal, an applicant must show that he or she may suffer substantial loss if stay is not granted.
8. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court held as follows;

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party 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.

9. In the instant matter, the applicant alleged that if stay is granted, he will be dispossessed of the suit property and that the respondent will take possession of the same. It is not denied that the suit property is vacant and that the applicant stays on the adjacent property being Plot no 3294 which is not in dispute. There is no evidence to show that the applicant is in possession of the suit property. Having considered the reasons for stay, it is my view that the applicant has not demonstrated that he stands to suffer substantial loss if stay is not granted.
10. In the premises, I find no merit in the Notice of Motion dated 11th December 2023 and the same is hereby dismissed with costs to the respondent.
11. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20TH DAY OF DECEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of:

Ms. Muia holding brief for Mr. Kitindio for appellant/applicant

Mr. Sila for respondent

Josephine - Court Assistant

