



**Kangaru v Wachira & 4 others (Environment & Land Petition E001 of 2020) [2023] KEELC 22503 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22503 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND PETITION E001 OF 2020**

**EK WABWOTO, J**

**DECEMBER 19, 2023**

**IN THE MATTER OF ARTICLES 2, 10, 19, 22, 23, 35, 40, 47, 162(2) (B) AND 165 (3) (B) OF THE CONSTITUTION OF KENYA [2010]**

**AND**

**IN THE MATTER OF THE LAND ACT (NO. 6 OF 2012)**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT (NO. 3 OF 2012)**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**GICO KANGARU ..... PETITIONER**

**AND**

**ANDREW MURIUKI WACHIRA ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF, ROYSAMBU LOCATION ..... 3<sup>RD</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**DCIO KASARANI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner seeks a stay of execution of the judgment and decree issued by this Court on 13<sup>th</sup> July, 2023. The Petitioner vide his application dated 18<sup>th</sup> July, 2023 argues that the Petitioner is the registered



owner of land title number Nairobi/Block 110/62, the 1<sup>st</sup> Respondent has illegally encroached onto the Petitioner's parcel of land being land title number Nairobi/Block 110/62, on 13th July, 2023, the Honourable Court delivered its ruling whereby it dismissed the Petitioner and ordered the Petitioner's title deed to be cancelled and a certificate of title issued in the name of Berrien Company Ltd, the Petitioner being dissatisfied with the decision of the court intends to appeal against the entire judgment and has filed a Notice of Appeal, should the subject title deed be cancelled and a new one issued in favour of a third party the intended appeal is likely to be rendered nugatory, substantial loss may result to the Applicant unless the order for stay is granted and the subject application has been made without unreasonable delay.

2. It was also argued that the 1<sup>st</sup> Respondent shall not be prejudiced in any way since the suit parcel of land is in his possession and he has been utilizing it and there is a moratorium in place against the transfer of any parcel of land within Nairobi Block 110. It was also argued that the Petitioner has an arguable appeal with high chances of success and it is in the interest of justice that the Application be allowed.
3. The application was opposed by the 1<sup>st</sup> Respondent vide a Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 5<sup>th</sup> September, 2023. It was averred that the application is defective in that it seeks stay of execution orders and decree which decree has not been annexed to the application. It was also argued that the application was filed well after three months of judgment and further that the appeal is not arguable. There is no single bona fide ground raised to warrant ventilation before this Court. The Court was urged to dismiss the application.
4. The application was canvassed by way of written submissions. The Petitioner filed written submissions dated 11<sup>th</sup> October, 2023 in support of the application while the 1<sup>st</sup> Respondent filed written submissions dated 24<sup>th</sup> October, 2023 in opposition to the same. The Court has duly considered the written submissions filed by the parties and notes that the key issue for determination is whether the Petitioner has met the threshold for granting the orders of stay of execution of the judgment pending appeal.
5. In respect as to whether or not the Petitioner has satisfied the Conditions for granting of stay of execution, it is worth noting that the issue of whether to grant stay pending appeal is a matter of discretion of the court. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.
6. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*, which provides:
  - (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



- (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 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

7. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right. Further The Court of Appeal in the case of *Visbram Ravji Halai v Thornton & Turpin* [1990] KLR 365 stated that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.
8. In considering an application for stay of execution I am guided by the case of *Butt v Rent Restriction Tribunal* Civil App No NAI 6 of 1979 (Madan, Miller and Porter JJA) where the following guidelines were given:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

9. In the instant case, the court has considered the fact that the Petition stands to suffer substantial loss should the suit parcel be transferred to a third party by the 1<sup>st</sup> Respondent who is in possession of the same before the hearing and disposal of the appeal and in view of the foregoing the Court is satisfied that the appellant has met the threshold for grant of the stay orders sought.
10. In conclusion, the application dated 18<sup>th</sup> July, 2023 is hereby allowed in the following terms:
- i. A stay of execution of the judgment and decree issued by this Court on 13<sup>th</sup> July, 2023 is hereby granted for 45 days pending hearing and determination of the appeal.
  - ii. Each party to bear own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**E.K. WABWOTO**

**JUDGE**

In the presence of:



Mr. Kamwaro for the Petitioner.

No appearance for the 1<sup>st</sup> Respondent.

Court Assistant: Caroline Nafuna.

