



REPUBLIC OF KENYA



**Muchiri v Rutere (Environment & Land Case 319 & 316 of 2017
(Consolidated)) [2023] KEELC 22377 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 319 & 316 OF 2017 (CONSOLIDATED)**

CK YANO, J

DECEMBER 14, 2023

BETWEEN

LUCIA NTIGAU MUCHIRI PLAINTIFF

AND

FREDRICK T. PHARES RUTERE DEFENDANT

RULING

1. By a notice dated 3rd July 2023, the plaintiff/applicant mainly seeks orders of stay of execution of the judgment and decree of this court delivered on 25th January, 2023 and any consequential proceedings and orders arising therefrom as well as an order of temporary injunction restraining the defendant, his agents, servants or whosoever claiming or working under his instructions from entering, using, transferring, wasting, selling, charging, leasing or otherwise interfering with the plaintiff's possession of parcel of land No. Kiirua/Nkando/326 pending hearing and determination of the application of the plaintiff's intended appeal. The application is brought pursuant to section 1A, 1B, 3, 3A of the *Civil Procedure Act*, section 3 and 13 of the *Environment and Land Court Act*, order 40 rule 1, order 42 rule 6(1) of the *Civil Procedure Rules* and all other enabling provisions of the law.
2. The application is supported by the affidavit of Lucia Ntigau Muchiri, the applicant sworn on July 3, 2023 and supplementary affidavit dated September 18, 2023. The applicant avers that she filed a notice of appeal against the judgment of the court on February 2, 2023 to the Court of Appeal and that the intended appeal raises arguable appeal with good chances of success which will be rendered nugatory unless this application is granted.
3. The applicant further avers that subsequent to the said judgment and more particularly on diverse dates on 27th, 28th and June 30, 2023, the defendant/respondent who was served with the notice of appeal and request for certified proceedings in the suit, invaded the suit property with hired goons who interfered with boundary beacons of the land, cut down some trees and threatened to return and evict the plaintiff from the suit property with intent to render the appeal nugatory. That although the plaintiff reported



the said invasion and destruction of property to the police, the plaintiff is apprehensive that unless the application is granted, the defendant will violently and forcefully return onto the property, destroy, waste away the plaintiff's homestead and property, evict the plaintiff and render her homeless and thereafter charge, lease, dispose off and transfer the suit property consequently causing the plaintiff irreparable and substantial loss and render the intended appeal nugatory. That should the decree herein be executed, the plaintiff may not recover from the defendant whose means and assets are unknown, and the plaintiff will suffer irreparable loss.

4. The plaintiff avers that the application has been made without unreasonable delay and that the defendant will suffer no prejudice if the orders sought are granted as he has never been in occupation or use of the property since 1969 when the plaintiff entered the property and has at all material time to-date been in possession and use thereof. The plaintiff further avers that she is ready and willing to abide by the terms of the order preserving the appeal.
5. The plaintiff refuted the defendant's allegations that the orders of this court have been executed and finalized and that the appeal was filed out of time and accused the respondent for subverting the cause of justice. The applicant has annexed copies of photographs, the decree of this court, notice of appeal dated January 31, 2023 and filed on February 2, 2023, a letter dated February 6, 2023, and a draft memorandum of appeal, to the affidavit in support of the application.
6. In opposing the application, the defendant/respondent filed a replying affidavit sworn by Fredrick T. Phares Rutere on August 30, 2023 whereof he has annexed copies of the judgment, decree, a letter dated May 3, 2023, and scene visit report dated July 17, 2018. It is the respondent's contention that he commenced the execution of the orders issued on January 25, 2023 and took occupation of the suit property. That the judgment of the court was in the nature of a restraining order as opposed to an eviction, as such the applicant was not evicted and is under no threat of eviction from the respondent. The respondent avers that the applicant's house and all her properties sit on a 3 acres land parcel No. Kiirua/Nkando/3406 which is separate and adjacent to land parcel No. Kiirua/Nkando/326 that belongs to the respondent as was confirmed by the findings of the court scene visit report dated July 17, 2018, therefore there exists no threat of destroying or wasting away the plaintiff's homestead and property while executing the judgment of the court as alleged by the applicant.
7. It is also the respondent's contention that the application has been overtaken by events as the execution process had already been finalized by the time the application and subsequent orders of temporary stay were issued. The respondent further contends that the intended appeal was filed out of time and has no chances of success. The respondent states that equity does not help the indolent and that both the intended appeal and the current application is an orchestration by the applicant to subvert justice and deny the respondent the right to enjoy the fruits of his judgment. The respondent argued that there was nothing precluding him from executing the decree and orders issued herein on January 25, 2023 in ELC No. 319 of 2017 (O.S) consolidated with 316 of 2017. It is therefore the respondent's contention that the application is overtaken by events, unmerited, frivolous and vexatious and a delay tactic to deny the respondent the chance to enjoy the fruits of the judgment delivered herein and the respondent beseeched the court to dismiss the application with costs.
8. Both parties filed written submissions which I have read and considered. The court has also taken into account the authorities relied on by the parties to support their rival positions. The issues for determination are whether orders of temporary injunction and stay of execution should be issued pending hearing and determination of the plaintiff's appeal.
9. The plaintiff filed an originating summons No 319 of 2017 (OS) which was consolidated with ELC No. 316 of 2017 lodged by the defendant. The plaintiff was claiming to have become entitled to the



whole of LR. No. Kiirua/Nkando/326 by adverse possession while the defendant's claim was that the plaintiff had trespassed on the suit land and sought orders of a declaration that the land belongs to him and a permanent injunction. By a judgment delivered by this court on January 25, 2023, the plaintiff's suit was dismissed and an order of permanent injunction was granted to the defendant against the plaintiff. The plaintiff avers that he was aggrieved by the whole of the said judgment and intends to appeal to the Court of Appeal. The plaintiff now prays for an order of temporary injunction and stay of execution pending the hearing and determination of the appeal. The plaintiff has exhibited a notice of appeal dated January 31, 2023 and a draft memorandum of appeal.

10. In the case of *Venture Capital and Credit v Consolidated Bank of Kenya*, (2004) 1 EA 357, the Court of Appeal stated as follows;

“As regards the second prayer, the court's jurisdiction to grant an injunction pending an appeal is discretionary and such discretion is exercised judicially and not in whimsical or arbitrary fashion. (see *Madhupaper International Ltd v Kerr* 1985) KLR 840 at 847 paragraph 35). In that case, Madhupaper) the court said at 846 paragraph 30;

“There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet. As a general rule, a court ought to exercise its best discretion in a way so as to prevent the appeal, if successful, from being nugatory. (See *Butt v Rent Restriction Tribunal* (1982) KLR 417). And in order to be entitled to an order for maintenance of status quo pending appeal, the applicant must show that a reasonable argument can be put forward in support of the appeal – *J.K Industries Ltd v Kenya Commercial Bank Ltd* (1982 – 88) 1 KAR 1088. Moreover, the case of *Shitukha Mwamodo and others* (1986) KLR 445 shows that the principle stated in *Giella v Cassman Brown Co. Ltd* (1973) EA at 360 guide both the High Court and the Court of Appeal in deciding whether or not to grant a temporary injunction.”

11. In the case of *Madhupaper International Ltd v Kerr* (1985) KLR 480, the Court of Appeal held as follows;

“Where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges may decide cases even if they are hesitant in their conclusions, and at the other extreme a judge may be very clear in his conclusion and yet an appeal be held to be wrong. No human is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A Judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending appeal are such that it would be right to preserve the status quo pending an appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the trial judge becomes functus officio quoad granting an injunction at all.”

12. Therefore the object of an injunction is to keep things in status quo so that if after the determination of the appeal the appellant obtains judgment in his favour, the respondent will have been prevented from



dealing in the meantime in the property in such a way as to make the judgment ineffectual. It is however clear that in deciding whether or not to grant the injunction the court would exercise discretion and take into consideration a number of factors, including whether the appeal is frivolous or not whether granting the injunction would inflict greater hardship against the respondent than it would avoid. The applicant must also show that to refuse the injunction would render the appeal nugatory. In addition, the court should be guided by the principles in the Giella case.

13. In this case, the appeal or intended appeal is against the judgment of this court delivered on January 25, 2023. The court, while determining the plaintiff's case as consolidated with that filed by the defendant arrived at a finding that the plaintiff's suit for adverse possession over LR No. Kiirua/Nkando/326 was not proved to the required standard. The court relied on an amended scene visit report which confirmed that the plaintiff's house was constructed on parcel No. Kiirua/Nkando/3406 and not LR. No. Kiirua/Nkando /326, the suit property herein. Further, the evidence adduced indicated that the plaintiff's occupation of a portion of the suit land if any, was with the permission of the owner and was riddled with interruptions and disputes. The plaintiff has stated that she has been aggrieved by that decision and has expressed her natural and undoubted right to seek the intervention of the Court of Appeal. I am not competent to determine whether the appeal is not frivolous or otherwise. However, the question to ask is whether the appeal would be rendered nugatory in the event the plaintiff's appeal is successful?
14. In this case, the plaintiff has alluded that the defendant has invaded the suit land. If that be the case, then this court's intervention in my considered view has been overtaken by events as argued by the defendant. In my considered view, should the plaintiff succeed in her appeal, an order can still be made to reinstate her into the land since the land would still be there post the appeal decision. I am also of the view that an award of damages will be an adequate remedy, and the balance of convenience in the case if I had doubt tilts in favour of the respondent who is the registered owner of the land. I am therefore not persuaded that an order of injunction shall be granted as prayed.
15. The other issue to determine is whether stay of execution should be issued against the judgment and decree of this court pending the hearing and determination of the intended appeal. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows;
 - “(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 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 the application has made without undue 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.”

16. Stay of execution pending appeal is a discretionary power bestowed upon this court by law. In *Butt v Rent Restriction Tribunal* (1982) KLR 417, the Court of Appeal gave guidance on how a court should exercise the said discretion and held that -;

- “ 1. The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle 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 reserve the judge’s decision.
3. A Judge should not refuse a stay if there are good grounds for it granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances in this case were that there was a larger amount of rent in dispute and the appellant had an undoubted right of appeal.
5. the court in exercising its power under order XLI rule 4(2) (b) of the Civil Procedure Rules, can Order Security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

17. Therefore, for an applicant to move the court into exercising its discretion in his/her favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security for the due performance of the decree. On the other hand, granting a stay would be denying a successful litigant of the fruits of his judgment. Therefore, the court must balance the interests of both parties.

18. In this case, the judgment was delivered on January 25, 2023 while this application was filed on July 4, 2023. That is a period of over five months. The applicant has stated that the application has been made without unreasonable delay in the circumstances since the threatened acts of interference happened or were threatened by the defendant. In my considered view, the applicant filed the application only as an afterthought when the defendant commenced execution process. By her own admission, the applicant has stated that she was jolted into filing the application only when the defendant threatened to execute or commenced the execution process. In my view the delay in bringing the application was inordinate and the applicant has not given sufficient reason for not filing the application timeously.

19. As for substantial loss, the applicant has the burden to show the substantial loss she is likely to suffer if no stay is ordered. In this case the applicant has stated that she may be evicted from the suit property which she has been using since 1969 and rendered homeless. However, the evidence on record and in particular the scene visit report, confirmed that the applicant is on parcel LR No. Kiirua/Nkando/3406 and not on the suit land. I am therefore not persuaded that the applicant would suffer any substantial loss. In any case and as I have already stated, the applicant can still be compensated in



damages and given possession of the land should her appeal succeed. This is so because the land would still be there even post the judgment by the Court of Appeal.

20. By reason of the foregoing, I find that the application dated July 3, 2023 is devoid of merit and the same is dismissed with costs.

21. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF DECEMBER, 2023

In the presence of

Court Assistant – V.Kiragu/Lena M

Litoro for plaintiff/applicant

Ms Kiendi for defendant/respondent

C.K YANO

JUDGE

