



**Njue v Opiyo (Environment and Land Appeal 25 of 2024)  
[2025] KEELC 3663 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3663 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 25 OF 2024**

**AK BOR, J**

**APRIL 24, 2025**

**BETWEEN**

**BENSON NYAGA NJUE ..... APPELLANT**

**AND**

**DAVID ODERO OPIYO ..... RESPONDENT**

**RULING**

1. Through the application dated 13<sup>th</sup> June 2024, the Appellant seeks stay of execution of the decree emanating from the judgment delivered on 27/10/2023 pending hearing and determination of this appeal. He also sought to have this court set aside the judgment of the trial court delivered on 25/10/2023 and to be granted leave to defend the suit. The application is made on the grounds that on the 25/10/2023, the trial court delivered an ex parte judgment directing the eviction of the Appellant from the land known as Makima/ Adjudication/475 (the suit land) within 90 days and that the Appellant unsuccessfully applied to set aside that judgment for lack of proper service of pleadings. His application was dismissed vide the ruling of the court delivered on 12/6/2024 which prompted him to file this appeal.
2. The Appellant contended that there were attempts by the Respondents and his agents to evict him from the suit land which resulted in his property being destroyed even though he did not move out of the suit land. He urged that if stay orders were not granted, he would be evicted from the suit land which would result in him suffering irreparable loss and damage. The Appellant swore the affidavit in support of the application of stay of execution and exhibited copies of the judgment and the ruling from the trial court. He also exhibited a copy of the memorandum of appeal.
3. The Respondent opposed the application and averred in the replying affidavit that the Appellant failed to challenge the suit before the trial court despite being aware of the proceedings. He added that the Appellant had stated in an affidavit before the trial court that he was evicted from the suit land on



- 14/3/2024 by unknown people. He maintained that the Appellant had already been evicted from the suit land.
4. The Appellant filed a supplementary affidavit in which he averred that he was still residing on the suit land with his family. He reiterated that he was not served with the plaint and accompanying documents. He exhibited photographs showing animals grazing on some parcel of land with crops and household items.
  5. The court directed parties to file written submission on the application. The Appellant cited Order 42 Rule 6(1) of the Civil Procedure Rules and submitted that he stood to suffer substantial loss if execution is not stayed because he has lived in the suit land for over 20 years. He invited the court to note that he is still in occupation of the suit land and resided on it with his family and that he practices farming on the land and had made substantial investments on the land. He argued that eviction would result in the loss of shelter and other material losses to him and his family.
  6. On the limb regarding an application for stay being made without unreasonable delay, he submitted that the trial court delivered judgment on 25/10/2023 and he filed the application to set aside the judgment of that court on 30/10/2023. The trial court delivered its ruling on that application on 12/6/2023 precipitating this appeal and the filing of the instant application. He submitted that he had filed the application without delay.
  7. On the requirement to provide security, the Appellant submitted that he had already provided security of Kshs. 50,000/= as stipulated by Order 42 Rule 6(1) (b) of the Civil Procedure Rules and as ordered by the court on 19/6/2024. He urged the court to grant stay of execution.
  8. In his submissions, the Respondent also relied on Order 42 Rule 6 of the Civil Procedure Rules on the conditions upon which stay of execution pending appeal may be granted by the court. He pointed out that the judgment was delivered on 25/10/2023, and the application for stay was filed on 13/6/2024. It was therefore his contention that there had been delay in bringing the application for stay of execution. Regarding the issue of substantial loss, the Respondent submitted that the Appellant had not exhibited proof of ownership of the suit land which the Respondent maintained had always been in Respondent's fathers' name and that he had been issued the grant in the succession cause.
  9. The Respondent invited the court to take into consideration the fact that the Appellant had been denied stay of execution twice by the trial court because he did not satisfy the court that it ought to grant the orders of stay and that he had already been evicted. The Respondent maintained that the Appellant was not in the occupation of the suit land and relied on the Appellant's affidavit dated 25/3/2024, filed at the Siakago Law Court to the effect that the Appellant was evicted from the suit land on 14/3/2024.
  10. The issue for determination is whether the court should grant stay of execution to the Appellant pending determination of the appeal. The prayer seeking the setting aside of the judgment of the trial court will be addressed during the appeal. The court notes that the Appellant exhibited a copy of the originating summons in respect of Siakago ELC Case No. 100 of 2021 (OS) in which the Appellant alongside Eufurath Wangari Nyaga sought to be declared to have become entitled to the suit land through advance possession. In the supporting affidavit sworn on 8/6/2024, the Appellant deponed that he was still residing on the suit land and that he had his house and cattle on the land.
  11. The Respondent did not lead any evidence to show that he had taken possession of the suit land. Weighing the affidavits and submissions of the Respondent against the Appellant's assertion that he is still in occupation of the suit land, the court is inclined to accept the Appellant's contention and give him the benefit of doubt that he is still in occupation of the suit land.



12. After the delivery of that judgement, the Appellant filed an application seeking to set aside the judgement which explains the length of time it took for the application of stay to be made to this court. The court notes that the ruling on the application dated 27/10/2023, which sought to set aside the judgement, was delivered on 12/6/2024. In this courts view the delay was not reasonable.
13. The court is satisfied that the Appellant will suffer substantial loss unless the court stays execution of the judgment delivered on 25/10/2023.
14. Since the Appellant had already furnished security, the court allows the application dated 27/10/2023, in terms of prayer 5. The costs of the application will abide the outcome of the appeal.

**DELIVERED VIRTUALLY AT EMBU THIS 24<sup>TH</sup> DAY OF APRIL 2025.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Eric Gitonga for the Appellant

Mr. Timothy Mwaura for the Respondent

Diana Kemboi- Court Assistant

