



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CIVIL APPEAL NUMBER E26 OF 2021

HARUN GIKONYO.....1<sup>ST</sup> APPELLANT/APPLICANT

TERESIA WAIRIMU.....2<sup>ND</sup> APPELLANT/APPLICANT

VERSUS

MARTHA WACHUKA KAMAU.....RESPONDENT

*(Being an appeal against the Judgement of the Honorable magistrate Hon. L. Arika (CM) delivered on 17<sup>th</sup> November 2021 in Nakuru CM ELC 170 of 2019)*

BETWEEN

MARTHA WACHUKA KAMAU.....PLAINTIFF

VERSUS

HARUN GIKONYO.....1<sup>ST</sup> DEFENDANT

TERESIA WAIRIMU.....2<sup>ND</sup> DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the Appellants Notice of Motion application dated 10<sup>th</sup> January 2022. The said application expressed to be brought under Section 63(e) of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule of the Procedure Rules 2010.

2. The application seeks the following Orders:

1. ...Spent

2. ...Spent

3. ***THAT pending the hearing and determination of this Appeal, this honorable court be pleased to issue orders of stay of execution of the Judgement delivered by this Honorable court on the 17<sup>th</sup> November, 2021 against the Applicants, the resultant order directing the eviction of the Applicants from the suit piece of land; land parcel NAKURU MUNICIPALITY BLOCK 27/767, and/or in any way dealing with the parcel NAKURU MUNICIPALITY BLOCK 27/767, and/or any other orders issued therein and/or incidentals therefrom.***

4. ***That the costs of this application be paid by the Respondent.***

3. The application is based on the grounds on its face and supported by the affidavit sworn by Harun Gikonyo (the 1<sup>st</sup> Appellant/Applicant) sworn on 10<sup>th</sup> January 2022.

FACTUAL BACKGROUND.

4. This appeal was commenced by the Memorandum of Appeal dated 2<sup>nd</sup> December, 2021 where the Appellants are seeking judgement as follows:

*a) THAT the Appeal be allowed in its entirety.*

*b) THAT the judgement of the trial court in NAKURU CM ELC NO. 170 OF 2019 be set aside, vacated and/discharged and its place judgment be entered dismissing the Respondent's suit in its entirety and thereafter allow the Appellants counterclaim dated 28<sup>th</sup> February, 2018 as prayed.*

*c) THAT the costs of this Appeal and the lower court suit be awarded to the Appellant.*

*d) Any other orders in the interest of justice.*

5. This background is set out so as to understand the nature of proceedings and appreciate the orders sought in the current application.

#### **THE APPELLANTS/ APPLICANTS CONTENTION.**

6. The Appellants/Applicants contend that they are beneficial owners of the suit property as they have been in possession of the same together with their late mother Damaris Waitheera upon John Kamau Gikonyo surrendering it to them, on or about around the year 1990.

7. It is their contention that on 17<sup>th</sup> November 2021, the court issued orders that the Respondent herein be declared the rightful proprietor of land parcel No. NAKURU MUNICIPALITY BLOCK 27/767 that they be evicted and a permanent injunction issued restraining them from trespassing on the suit property.

8. The Appellants/Applicants contend further that they have filed a Memorandum of Appeal, have requested for typed proceedings and that their advocates on record are in the process of filing their record of appeal to challenge the decision in Nakuru CM ELC 170 of 2019.

9. They also contend that they are apprehensive that the Respondent shall act on the said orders issued by the court to their detriment as they have been in occupation of the suit property for over thirty years.

10. It is their contention that if the judgement is enforced, the Respondent will wrongfully and illegally evict them and alienate the suit property which will be irreversible as the land has both financial and sentimental value to them.

11. The Appellants/Applicants contend that the execution of the said order would be detrimental as it would alienate the substratum of the suit rendering it an academic exercise.

12. They also contend that the enforcement of the order subject to this appeal would be prejudicial to them as it was given in utter disregard to the evidence, they tendered adding that the trial court relied solely on the evidence and testimony of the Respondent.

13. It is their contention that does it is in the interest of justice that the court intervenes and stays the execution of the said judgement and the resultant decree so as to protect their rights and interests.

14. The appellants further contend that they have an arguable Appeal that they should be allowed to pursue without the threat of execution in terms of their eviction.

15. They end their deposition by stating that they are willing to abide by any reasonable conditions set by the court as a pre-requisite to the granting of the orders sought.

#### **THE RESPONDENT'S RESPONSE.**

16. In response to the application, the Respondent filed a replying affidavit sworn on 26<sup>th</sup> January, 2022.

17. She deposes that judgement was delivered on 17<sup>th</sup> November, 2021, the Memorandum of Appeal filed in this court on 8<sup>th</sup> December 2021 and the present application filed on 11<sup>th</sup> January, 2022.

18. She deposes further that her advocates on record have informed her that the Appellants/Applicant are guilty of laches and further that she has not begun the execution proceedings in relation to the judgement and therefore there is no urgency or risk of execution which makes the application premature.

19. The Respondent deposes that her advocates on record have informed her that the Appellant/Applicant has not placed any evidence before the court to warrant the orders sought and that it ought to have been filed in the court of first instance.

20. It is her contention that the subject matter of this suit is land whose value can be ascertained through valuation.

21. She deposes that the Appellants/Applicants case before the trial court was based on allegations with no documentary evidence or witness to support the allegations and therefore the Appeal only intends to deny her the fruits of her judgement in the trial court.

22. The Respondent deposes further that the Appellants/Applicants have come to court with unclean hands, are in contempt of the Judgement delivered on 17<sup>th</sup> November, 2021 for the reason that they have failed to abide by the orders.

23. She concludes her deposition by stating that her advocates on record have informed her that the Appellants/Applicants have not offered any security as required by law.

#### **ISSUES FOR DETERMINATION**

24. Both the Appellants/Applicants and the Respondent filed their submissions on 7<sup>th</sup> February, 2022.

25. The Appellants/Applicants identified the following issues for determination:

***1) Whether the Applicant has made out a case for stay of execution of the judgement and especially the order as to costs, pending determination of the Appeal.***

***2) Who should bear the costs of this application?***

26. The Respondent in her submissions makes reference to Order 42 Rule 6 of the Civil Procedure Rules. Her submissions seek to answer the question whether the conditions for grant of orders of stay pending Appeal have been met.

#### **ISSUES FOR DETERMINATION.**

27. In my view, the issues for determination are follows:

***a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.***

***b. Who shall bear costs of the application?***

#### **ANALYSIS AND DETERMINATION.**

28. I have considered the application, the affidavit in support of the application, the replying affidavit, the rival submissions filed by both parties and judicial decisions relied upon.

#### **A. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal**

29. The law relating to stay pending Appeal is Order 42 Rule 6 (2). It is also important to state that the power to grant an order of stay is discretionary and is dependent on certain conditions being met.

30. Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 provides as follows: -

**(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.***

31. In **Victory Construction Vs BM (a minor suing through next friend one PMM) [2019] eKLR**, the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, should also be taken into consideration. He stated that the Court is no longer limited to the provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions.

32. Section 1A of the **Civil Procedure Act** provides as follows:

***1) The overriding objective of the Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by this Act***

***2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub section 1.***

33. Section 1B of the Civil Procedure Act explains some of the aims of the overriding objectives as:

***a) the just determination of the proceedings;***

**b) the efficient disposal of the business of the Court;**

**c) the efficient use of the available judicial and administrative resources;**

**d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and**

**e) the use of suitable technology.**

34. In **Vishram Ravji Halai Vs. Thornton & Turpin Civil Application No. 15 of 1990 [1990] KLR 365**, the Court of Appeal held 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 Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

35. In **Butt Vs. Rent Restriction Tribunal [1979]**, the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:

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

***ii. 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 the Appeal court reverse the judge's discretion.***

***iii. Thirdly, 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.***

***iv. Finally, 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.***

36. On the first criterion as set out in Order 42 Rule 6 (2) i.e. Whether Applicants/Appellants have brought this application without unreasonable delay. The Judgement was delivered on 17<sup>th</sup> November, 2021. The Memorandum of Appeal were filed on 8<sup>th</sup> December, 2021 and this application on 11<sup>th</sup> January, 2022.

37. The Respondent is of the view that there was a delay in filing the application for stay pending Appeal. She has referred to the decision in **Jaber Mohsen Ali & Another Vs Priscilla Boit & Another 2014 eKLR** in which the court held that failure to apply for stay within the period given for compliance with the judgment is unreasonable delay.

38. I wish to distinguish this decision from the circumstances presenting in this case. The Appellants filed a memorandum of Appeal on 8<sup>th</sup> December, 2021. This, in my view, was an indication that the Appellants were dissatisfied with the judgment of the court and had appealed against it. Needless to say, therefore, that they would not be complying with it.

39. The appellants/applicants in their submissions have stated that the slight delay in filing the Appeal was on account of the Christmas break and the Covid-19 pandemic.

40. In the circumstances, I find that though there was a slight delay in filing the application for stay pending Appeal, it is not unreasonable for the reason that the Applicants/Appellant have explained it.

41. The second criterion is whether the Applicants/Appellants have demonstrated that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In **Silverstein Vs Chesoni (2002)1 KLR 867** it was held that

***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"***

42. The Appellants/Applicants have deposed that if the judgement is enforced, the Respondent will wrongfully and illegally evict them and alienate the suit property which will be irreversible as the land has both financial and sentimental value to them. They have further submitted that if the Respondents are allowed to continue with execution then they will be evicted from a place that they have called home and have lived on for decades.

43. The Respondents, on the other hand, submit that the suit parcel can be subjected to valuation and that in the event this application is dismissed, they can be reimbursed the value of the land.

44. It is my considered view that the applicants/appellants have established substantial loss. If the judgment of the subordinate court were to be executed, it would be tantamount to eviction of the Appellants from the suit property. This court has a duty to preserve the status quo failure of which this Appeal would be rendered nugatory.

45. The third criterion is that the Applicants/Appellants must furnish security for the due performance of the decree. I am reminded that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy

the fruits of his judgement.

46. The Court of Appeal in *Nduhiu Gitahi and Another Vs Anna Wambui Warugongo* [1988] 2 KAR 621, while affirming the decision of Sir John Donaldson M. R. in *Rosengrens Vs Safe Deposit Centers Limited* [1984] 3 ALLER 198 stated:

*“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending Appeal the court is faced with a situation where judgment has been given. It is subject to Appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that Appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the Appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the Defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the Appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the Appeal. Nor will either party lose if the sum is actually paid with interest at court rates...”*

47. In *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, it was stated:

*“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”*

48. In *Mwaura Karuga t/a Limit Enterprises Vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was observed:

*“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the Appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”*

49. In *Gianfranco Manenthi & another Vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, the court. observed:

*“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of Appeal from money decree of the lower court for an order of stay must satisfy this condition on security.*

50. The decision in *RWW Vs. EKW* [2019] eKLR reminds me of the purpose of a stay of execution order pending Appeal, in the following words:

*“The purpose of an application for stay of execution pending an Appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of Appeal are safeguarded and the Appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.*

51. In *Cotton L J in Wilson -Vs- Church* (No 2) (1879) 12ChD 454 at page 458, Hancox JA stated,

*“I will state my opinion that when a party is appealing, exercising his undoubted right of Appeal, this court ought to see that the Appeal, if successful, is not rendered nugatory.”*

*As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”*

## **B. Who should bear the cost of this application?**

52. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. In *Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR*. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

**CONCLUSION AND DISPOSITION.**

53. It is not lost on me, therefore, that the power to grant or refuse an application for stay of execution pending Appeal is discretionary and that while at it, I should balance the competing interests of both the Appellant and the Respondent; focusing on their reconciliation.

54. Keeping this in mind and taking into consideration the submissions of parties, the provisions of section 1A and 1B of the Civil procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and judicial decisions cited in preceding paragraphs. I now make the following orders:

*a) THAT pending the hearing and determination of this Appeal, there shall be a stay of execution of the Judgement delivered on the 17<sup>th</sup> November, 2021 in Nakuru CM ELC 170 of 2019.*

*b) The Appellant shall furnish security of Kshs. 100, 000 for performance of the decree. The said amount shall be deposited in court within 60 days.*

*a) That in the event of failure to comply with the order in (b) above, the order in (a) shall stand vacated.*

*b) The cost of this application shall be in the Appeal.*

55. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Mr. Kibet for the Appellant/Applicant.**

**No appearance for the Respondent.**

**Court Assistant:- Ms Jeniffer Chepkorir**