



**Kanyeki & another v Gichenge & 3 others (Environment & Land Case
108 of 2017) [2022] KEELC 3035 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3035 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 108 OF 2017**

EC CHERONO, J

MAY 31, 2022

BETWEEN

ANN MUTHONI KANYEKI 1ST PLAINTIFF

**DANIEL MAINA KINYUA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF CECILIA GACHUI KINYUA (DECEASED)) 2ND PLAINTIFF**

AND

NYAGA GICHENGE 1ST DEFENDANT

VIRGINIA NJOKI NJANJA 2ND DEFENDANT

ANN MARGARET WAMAITHA 3RD DEFENDANT

LAND REGISTRAR, KIRINYAGA 4TH DEFENDANT

RULING

1. The Applicants who are also 1st & 2nd defendants in this case have moved this Court seeking the following orders-;
 - 1 (spent).
 2. That this Court do stay execution of the Orders given on 23/7/2021 and order that the status quo regarding land parcel No. Inoi/kariko/930 be maintained pending inter-parte hearing of this application.
 3. That this Court do stay execution of the orders given on 23/7/2021 and an order that the status quo regarding land parcel No. Inoi/kariko/930 be maintained and stay of further proceedings in this case pending hearing and determination of the intended appeal.
 4. Costs be provided for.



2. The application is supported by the Affidavit of Nyaga Gichenge and grounds shown on the face thereof.
3. The said application is opposed by Daniel Maina Kinyua, the 2nd Respondent herein vide a replying Affidavit sworn on 25th March, 2022. When the application came up for hearing on 11/5/2022, the parties agreed to proceed orally.

Applicant's summary of facts

4. According to the Applicant, this Honourable Court delivered a Judgment in this case on 23/7/2021 in which he was aggrieved and has preferred an Appeal to the Court of Appeal. He annexed a copy of the Notice of Appeal and marked GN1.
5. The Applicant further stated that the Respondent herein has already started threatening that they will evict him from his portion and bring surveyors to the land and subdivide the same.
6. He further stated that his Appeal is likely to be rendered nugatory unless the application is allowed and that the Respondents will not be prejudiced as they occupy part of the suit land.

The 2nd respondent's summary of facts

7. The 2nd Respondent in his replying affidavit stated that the intended Appeal and the application herein have no foundation as the same are not arguable at all with no chances of success.
8. He deposed that the application herein is frivolous, vexatious scandalous and an abuse of the court process which embarrass the court and delay the fair trial of this case. The Respondents also deposed that the Applicants have not shown how the intended appeal will be rendered nugatory if the application is not allowed.

Analysis and decision

9. I have considered the Notice of Motion dated 27/7/2021, the supporting affidavit and the grounds shown on the face of the said application. I have also considered the Replying affidavit by the Respondents, the rival submissions and the applicable law.
10. This application is brought under Order 42 Rule 6 *CPR* which is the applicable law. Order 42 Rule 6 (2) provides three conditions an applicant must satisfy before an application for stay pending appeal can be allowed. First, he must show that he will suffer substantial loss unless the application is allowed. Substantial loss in its various forms has been defined as a state of affairs that has the effect of rendering the intended appeal nugatory. Execution of a Judgment/Decree of a Court of competent jurisdiction in itself does not render an appeal nugatory. This is because execution is the enforcement of a judgment/decree that has crystallized. It is incumbent upon the Applicant to demonstrate how execution will render the intended appeal nugatory. That was the observation by Gikonyo J. in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where he held-;

“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 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstain v Chesoni* [2002] 1 KLR 867. The issue of substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. I agree with the above decision. The applicant at paragraph 6 of the supporting affidavit deposed as follows:-

“ 6. That the appellant herein has already started threatening that they will evict me from my portion and bring surveyors to the land and subdivided the same and it is clear that they are busy executing and enforcing the judgment of this court.”

12. It is clear from the above decision that execution of a Judgment/Decree in itself does not amount to substantial loss. The applicant must establish other factors that will create a state of affairs that will negate the very essential core of the applicant as the successful party in the intended appeal. He has to show or demonstrate how execution of the Judgment/Decree will render his appeal nugatory in the event he becomes successful.

13. In the absence of substantial loss which is the cornerstone of stay pending appeal, the other ingredients in my view will make no difference. The upshot of my finding is that the Notice of Motion dated 27th July, 2021 lack merit and the same is hereby dismissed with costs. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 31ST DAY OF MAY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of;-

- 1) Mabonga H/B Ann Thungu for applicant--present
- 2) Wanjao for Respondent--present
- 3) Kabut, C/A---present.

