



**Muli v Gichohi (Environment and Land Appeal E3 of 2020)
[2022] KEELC 3219 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E3 OF 2020**

**JO OLOLA, J
MAY 26, 2022**

BETWEEN

BERNARD MUSEMBI MULI APPELLANT

AND

JOSEPH GATHECA GICHOHI RESPONDENT

RULING

1. By the notice of motion dated 24th September 2020, Bernard Musembi Muli (the appellant) prays for a stay of execution of the Judgment and orders issued on August 20, 2019 in Nanyuki CMCC No 141 of 2018. The application which is supported by an Affidavit sworn by the appellant is based on the grounds:
 - (i) That on August 20, 2019, the court delivered a Judgment in default in favour of the Respondent;
 - (ii) That the appellant had instructed a Firm of Advocates to represent him in the matter but the law firm never informed him that the matter had been heard and orders issued for his eviction;
 - (iii) That the appellant only learnt about the Judgment on September 21, 2020 when he was summoned to Umande Police Station and was told there were orders requiring him to vacate the suit land;
 - (iv) That it was only then that upon perusal of the court file, the appellant learnt that the Law Firm he had previously instructed never made any appearance in court and hence judgment was issued in default;
 - (v) That the appellant has been staying in the suit property for over 30 years and he stands to suffer substantial loss and damages if the execution is not stayed; and



- (vi) The appellant is prepared to deposit in court any security as the court may order pending the hearing of the appeal.
2. Joseph Gatheca Gichohi (the respondent) is opposed to the application. In his replying affidavit sworn on October 7, 2020, the respondent avers that the application is misconceived, mischievous and otherwise legally untenable. The respondent avers that he instituted the case against the appellant in Nyeri in the year 2016 before the matter was transferred to Nanyuki on June 27, 2018.
 3. The respondent avers that the appellant has not been keen in defending the case and that on May 11, 2017 Judgment was entered against the applicant for non-appearance and failure to file a defence. The appellant then brought an application to set aside the Judgment but the same was dismissed on May 9, 2018 for non-attendance.
 4. The respondent further avers that on June 27, 2018, the appellant filed another application to set aside the orders issued on May 9, 2018 and the same was allowed by consent on condition that he pays thrown away costs of Kshs 9,000 within 21 days. The appellant thereafter filed his Statement of defence on August 13, 2018.
 5. The respondent avers that on July 9, 2019 when the matter came up for hearing, both the appellant and his counsel failed to attend court and his counterclaim was thereafter dismissed and judgment entered against him.
 6. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the learned advocates for the parties.
 7. The appellant herein prays for stay of execution of the Judgment issued on August 20, 2019 in Nanyuki CMCC No 141 of 2018. It is his case that he had previously engaged a Firm of Advocates to represent him in the said case but the law firm failed to appear in court and that he was unaware when the suit proceeded and Judgment was entered against himself.
 8. As was stated in [RWW v EKW](#) (2019) eKLR:

“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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”
 9. In the matter before me, it is not contested that the matter proceeded to hearing in the absence of the appellant. The appellant blames his absence in court on his previous Advocate whom he states failed to inform him on the date when the matter came up for hearing. It is also not contested that the appellant is in occupation of the suit land whereon he has built his home and has been residing in for a number of years with his family.
 10. That being the case, this court is persuaded that the appellant stands to suffer substantial loss if the eviction orders issued against him are not stayed pending the hearing of his appeal.



11. Accordingly I allow the Motion dated September 24, 2020 in terms of Prayer No 4 thereof.

12. The costs of the application shall be in the appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 26TH DAY OF MAY, 2022.

In the presence of:

Ms Wangechi for the Appellant

No appearance for the Respondent

Court assistant - Kendi

.....

J. O. Olola

JUDGE

