



Njuguna v Kahuha (Acting as the Legal Representative of the Estate of James Kahuha Thuo (Deceased)) & another (Environment and Land Appeal E099 of 2024) [2025] KEELC 3252 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E099 OF 2024**

JM ONYANGO, J

APRIL 8, 2025

BETWEEN

PETER THIONGO NJUGUNA APPELLANT

AND

TERESIAH NJOKI KAHUHA (ACTING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES KAHUHA THUO (DECEASED)) 1ST RESPONDENT

GEORGE MBUGUA KAHUHA 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 9th September, 2024, brought pursuant to section 10 of the *Judicature Act*, Rule 3 (1) and (2) of the High Court (Practice and Procedure) Rules, Order 52, 40, 51 of the Civil Procedure Rules 2010 and section 3 A of the *Civil Procedure Act*, the Appellant filed an application seeking a stay of execution of the judgment delivered on 8th August, 2024 by Hon. P. Muholi in Githunguri CMELC No. 14 of 2021 pending appeal.
2. The application is premised on grounds set out on the face of the Notice of Motion and the supporting affidavit of Peter Thiongo Njuguna the Appellant herein.
3. In the said affidavit the Appellant avers that he is the owner of land parcel number Githunguri/Gathangari/2242 having been gifted the same by his late grandfather. He contends that in the year 2007 he entered into an agreement for sale of the suit property with the Respondents' father, James Kahuha Thuo (deceased). However, before transfer could be effected, parties rescinded the agreement and entered into a 10 year lease agreement dated 1st March 2010. He deposes that he refunded the purchase price paid. He further deposes that the deceased transferred the suit property to himself on 21st April 2010 and took a bank loan against it. Upon confrontation of the deceased, they agreed that



- he would transfer the suit property back to the Plaintiff upon completion of the lease unconditionally. The parties executed an agreement dated 30th December 2011 to that effect.
4. He maintains that upon the deceased's death, the Respondents refused to honour the agreement dated 30th December 2011 compelling him to file MCELC No. 14 of 2021 in the Principal Magistrate's Court at Githunguri seeking a declaratory order that he is the legal owner of the suit property.
 5. However, on 8th August 2024 the trial magistrate delivered a judgment in favour of the Respondents. The Appellant contends that he is aggrieved by the said judgment and he is apprehensive that if the judgment is effected, he will suffer irreparable loss as he will be evicted from the suit property. He further avers that if a stay of execution is not granted, his appeal shall be rendered nugatory. It is his averment that it is in the interest of justice that this court grants him the reliefs sought.
 6. The application is opposed by the Respondents through a replying affidavit sworn by the 1st Respondent on 30th September 2024 in which he maintains that this application is frivolous and devoid of merit.
 7. She avers that the suit in the lower court was determined on merit, and as a result an order for eviction of the Appellant from the suit property was granted. She further avers that the Appellant must satisfy this court that the appeal is arguable, is not frivolous and that the appeal would be rendered nugatory if the orders sought are not granted. She faults the Appellant for merely giving a history of the trial court's proceedings, arguing the appeal and failing to give this court reasons it should rely on his favour in granting the order of stay of execution.
 8. The 1st Respondent contends that the trial court having found that she is the legitimate owner of the suit property, then she is entitled to enjoy the fruits of the judgment. She further contends that the Appellant has been in illegal and unlawful occupation of the suit property and that it would be unfair to her and the beneficiaries of the estate of the deceased if the reliefs sought are granted.
 9. The 1st Respondent contends that the Appellant has failed to demonstrate that there is any just cause to warrant staying execution of the impugned judgment. She urges this court to dismiss this application with costs.
 10. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

Analysis and Determination

11. The only issue for determination is whether a stay of execution should be granted.
12. Order 42 Rule 6 (2) of the Civil Procedure Rules (2010) provides that;
 - a. "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
 - b. that the application has been made without undue delay; and
 - c. such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."



13. In *Elena D. Korir vs Kenyatta University* (2014) eKLR Justice Nzioki wa Makau stated as follows;

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd* where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd*[11] (2013)”

14. I will now proceed to determine whether the Appellant has met the above-mentioned conditions.

Substantial loss

15. What constitutes substantial loss was discussed by Gikonyo J in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR where it was held inter alia that:

“...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 of the 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.”

16. The court, in *RWW v EKW* [2019] eKLR, considered 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.

9. 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.”

17. In the instant case the court issued an order evicting the Appellant from the suit property which he has been in occupation of since before the year 2007.

18. If the Appellant were to be evicted from the suit property, this would result in substantial loss to the Appellant as the Respondents would deal with the suit property as they wish. This includes selling or constructing on the suit property. If this were to happen, before the appeal is heard, the appeal would be rendered nugatory. In the circumstances, I am of the view that the Appellant has established that he stands to suffer substantial loss if execution is not stayed.



Delay

19. Regarding the question of delay, the judgment was delivered on 8th August 2024 while the application for stay was filed on 9th September 2024. The Appellant contended that he filed this application immediately he received a copy of the judgment on the CTS portal. It is therefore not in dispute that the application was filed timeously.

Security for costs

20. The Appellant has not mentioned whether he is willing to provide security for costs, however, the court has a discretion to make appropriate orders which serve the interest of justice.
21. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the Appellant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules
22. Accordingly, I allow the application and make the following orders:
- a. A stay of execution is hereby granted on condition that the Appellant deposit the sum of Kshs. 100,000/- in court within 21 days from the date of this ruling failing which the order for stay shall automatically lapse.
 - b. The Appellant shall file a Record of Appeal within 60 days.
 - c. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 8TH DAY OF APRIL 2025

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J. M ONYANGO

JUDGE

In the presence of:

Miss Ng'ang'a for the Appellant

No appearance for the Respondent

Court Assistant: Hinga

