



**Muriu & another v Mboce & another (Environment and Land
Appeal 93 of 2021) [2022] KEELC 49 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 49 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 93 OF 2021**

JO MBOYA, J

MAY 12, 2022

BETWEEN

STEPHEN WAMBUGU MURIU 1ST APPLICANT

JAMES KAMAU WANYOIKE 2ND APPLICANT

AND

ELIZABETH NJAGO MBOCE 1ST RESPONDENT

EMBAKASI RANCHING COMPANY LIMITED 2ND RESPONDENT

(The applicant moved to the Environmental and Land Court for an order of stay of execution of the Judgment and Decree of the Chief Magistrate vide MCELC 1359 of 2016, pending the inter parties hearing of this Application.)

RULING

1. Vide Notice of Motion dated the 8th December 2021, the Appellants/Applicants have sought the following Orders:
 - a.(Spent)
 - b. The Honourable Court be pleased to grant an order of Stay of execution of the Judgment and Decree of the Chief Magistrate vide MCELC 1359 of 2016, pending the inter parties hearing of this Application.
 - c. The Honourable Court be pleased to grant an order of stay of execution of the Judgment and Decree of the Chief Magistrate vide MCELC 1359 of 2016, pending the hearing of the Appeal.
 - d. Cost of the Application be provided for.



2. The subject Application is premised on the grounds contained at the foot thereof and same is further supported by the affidavit of one James Kamau Wanyoike, namely, the 2nd Appellant/Applicant herein.
3. Upon being served with the subject Application, the Respondents herein proceeded to and filed their responses. For clarity, the 1st Respondent filed a Replying affidavit by one Walter Kiger Wairiri and which was sworn on the 24th December 2021.
4. On the other hand, the 2nd Respondent filed and relied on the Replying affidavit sworn by her self on the 20th December 2021.

Deposition by the parties:

The Appellants' Case:

5. Vide Supporting affidavit sworn by the 2nd Appellant, the deponent has averred that same entered into a Land Sale Agreement with the 1st Appellant, whereupon same was sold the property known as Plot No. P4647-Embakasi Ranching Company Limited.
6. It was further averred that upon the purchase of the suit property, the deponent entered upon the said property and remained in occupation thereof since the year 1993.
7. However, the deponent has further averred that on or about the year 2016, the 2ND Respondent herein started interfering with his ownership and occupation of the suit property and as a result of the actions by the 2nd Respondent, same was constrained to file and/or lodge civil proceedings before the Chief Magistrates' Court.
8. It was further averred that the civil suit which was filed before the Chief Magistrate's court was thereafter heard and disposed of vide judgment rendered on 23rd November 2021 whereupon the deponent suit was dismissed.
9. On the other hand, the deponent has further averred that other than dismissing the Deponent's suit, the trial court proceeded to and decreed his eviction from the suit property.
10. Further, the deponent has averred that as a result of the judgment and decree of the court, same felt aggrieved and/or dissatisfied and thereby lodged the subject appeal.
11. On the other hand, the deponent has averred that unless the orders sought vide the subject Application are granted, the 2nd Respondent, who was decreed to be the owner of the suit Plot, is disposed to levy Eviction and thereby expose the deponent to extreme prejudice and substantial loss.
12. Based on the foregoing, the Applicants herein, have therefore implored the court to grant the orders of stay of execution pending the hearing and determination of the Appeal.

Response by the respondents:

13. On her part, the 2nd Respondent has averred that same has been the owner of property known as Plot No P4421 situate within Ruai Area, Nairobi, which upon registration is now known as LR NO. Nairobi/Block 105/8657.
14. The 2nd Respondent has further averred that by virtue of being the registered owner and/or proprietor of the suit plot, same is obliged to enter upon, occupy and use same to the exclusion to the Appellants.
15. Nevertheless, the 2nd Respondent has averred that despite her lawful rights to the suit property, the 2nd Appellant herein has been interfering with the suit property and such interference were determined



vide judgment rendered on the 23rd November 2021, when the court found and held that she (2nd Respondent) is the lawful proprietor of the suit property.

16. Besides, the 2nd Respondent has averred that during the trial in the Chief Magistrates court, the court granted an order of status quo, which denied and/or deprived her of the enjoyment of the suit property.
17. Based on the foregoing and coupled with the Judgment of the Chief Magistrates' court, the 2nd Respondent has therefore averred that it is now appropriate and/or expedient to allow the same to benefit from ownership of the suit property and in this regard the 2nd respondent has opposed the grant of the orders of stay, in the manner sought by the Appellants.
18. In any event, the 2nd Respondent has further averred that the Appellants herein have not established and/or proven that same are disposed to suffer any Substantial loss.

Submissions by the Parties:

19. The subject Application came up for hearing on the 31st January 2022, on which date the Court directed that the Application under reference be disposed of by way of written submissions.
20. Pursuant to the directions of the court, the Parties herein proceeded to and filed their respective submissions and the two sets of submissions are on record. For clarity, the court has appraised, considered and taken into account the submissions that have been duly filed.

Issues for determination:

21. Having reviewed the Notice of Motion Application dated the 8th December 2021, the Supporting affidavit thereto, the responses filed by the Respondents and having similarly taken into account the written submissions filed on behalf of the Parties, the following issues do arise and are pertinent for Determination;
 - i. Whether the Appellant/Applicants are disposed to suffer substantial loss if the orders sought are not granted.
 - ii. Whether the Appellants/Applicants are entitled to orders of stay and if so what security ought the Appellants/Applicants provide.

Analysis and determination

Issue Number 1

Whether the Appellants'/Applicants' are disposed to suffer Substantial Loss if the orders sought are not granted.

22. The 2nd Appellant/Applicant herein has averred that upon purchase and/or acquisition of the suit property from the 1st Appellant, same entered upon and took possession thereof since 1993.
23. It has also been averred that while occupying the suit property, the 2nd Respondent herein commenced interfering with the rights of the 2nd Appellant and as a result of such interference, the Appellants were constrained to file the proceedings before the Chief Magistrates' court.
24. On the other hand, the 2nd Respondent has posited that same is the one in occupation and possession of the suit property and in this regard, the 2nd Appellant is not disposed to suffer any prejudice and/or loss, let alone Substantial loss.



25. Despite the contradictory arguments and/or positions that have been taken by the two Parties, it is worthy to note that the learned trial court found and held in favor of the 2nd Respondent.
26. On the other hand, it is common ground that one of the reliefs which was granted in favor of the 2nd Respondent was an order of Eviction, whose import and tenor was/is geared towards removing the Appellants' from the suit property.
27. Whereas the 2nd Respondent contends that she is the one in occupation of the suit property, such averment and/or statement is negated and/or contradicted by the orders that same sought and procured from the court.
28. In any event, the 2nd Appellant has posited that the 2nd Respondent is now on the verge of extracting and executing the orders of Eviction, but this averment has not attracted any response from the 2nd Respondent.
29. In the premises, it is my finding and holding that if the 2nd Respondent proceeds to and executes the Eviction order which was granted by the Chief Magistrates' court, then the Appellants and more particularly, the 2nd Appellant herein, shall be forcefully and/or forcibly removed from the suit property.
30. On the other hand, the structures and/or premises, which the 2nd Appellant had constructed on the suit property or a portion thereof, shall similarly be exposed to demolition.
31. Suffice it to note, that the imminent Eviction and demolition, at the instance of the Decree of the Chief Magistrates' court, shall be carried out and/or undertaken during the pendency of this Appeal.
32. In my humble view, the Appellants herein have an undoubted Right of Appeal, in terms of the Provisions of Article 48 of *the Constitution*, 2010 and therefore whenever same are exercising that right, which is part of the right to access to justice, it behooves this court to ensure that the substratum of the appeal is preserved and/or conserved.
33. In support of the foregoing statement, I beg to adopt and restate the ratio in the famous case of *Butt v Rent Restriction Tribunal* (1979) eKLR, where the court observed as hereunder;

“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 nugatory.”
34. Other than the foregoing observation, it is also imperative to note that the nature of damage, namely eviction and demolition, that are likely to accrue if the decree of the Chief Magistrates' court is executed, are such that the Appellant shall suffer substantial loss.
35. Perhaps, it is worthy to take cognizance of the decision in the case of *Kenya Shell Limited v Benjamin Karoga Kibiru & Another* (1986) eKLR, where the Court of Appeal held as hereunder;

“Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.
36. In a nutshell, it is my finding and holding that the Appellants herein shall be disposed to suffer substantial loss if the judgment and decree which is the subject of this appeal, is not stayed.



Issue Number 2

Whether the Appellants/Applicants are entitled to orders of stay and if so, what security ought the Appellants/Applicants provide.

37. Notwithstanding the foregoing, there is also another perspective that may arise and which will substantially prejudice the hearing of the appeal and even the consequential outcomes thereof.
38. For coherence, this perspective relates to the likelihood that the 2nd Respondent who has since been declared to be the owner of the suit property, shall be at liberty to sell, alienate, dispose of, part with possession, charge or otherwise encumber the title of the suit property.
39. It must not be taken that the 2nd Respondent is likely to do so, but given the fact that the Ownership of the suit property is being tussled on, temptations may and do often arise, which may culminate into the 2nd Respondent nurturing such a thought.
40. Consequently, the middle ground in respect of the subject matter and which accords with the Interest of justice, entails the grant of an order of stay of execution of the Judgment and decree being appealed against.
41. In support of the foregoing observation and to alleviate fear of extinction of the suit property either as a result of sale or disposition thereof, it is worthy to invoke and rely in the decision in the case [*Malcom Bell v Daniel Toroitich Arap Moi & Another*](#) [2006] eKLR, where the Court of Appeal observed as hereunder;

‘ It is quite clear from the facts and circumstances of this case that neither the applicant nor the 2nd respondent is comfortable with the situation as it is on the ground. The applicant is apprehensive that unless he is granted a stay there is the danger that the 2nd respondent may execute decree in its favour and thus deprive him of land which he claims rightly belongs to him. He fears that in the event the property may be disposed of thereafter to third parties and he will thereby lose it permanently.

Likewise, the 2nd Respondent fears that since the Applicant is the registered owner of the disputed land, there is nothing to stop him from alienating it and thus permanently deprive it of the same, with the result that it will be left with a bare decree. In either case the suit land needs to be preserved.

42. In a nutshell, I find and hold that the grant of an order of stay of Execution pending appeal is just, expedient and appropriate.
43. As pertains to security, it must not be lost on the court that the 2nd Respondent is the holder of a lawful decree emanating from the Due process of the court.
44. Consequently, even as the Appellants are pursuing their undoubted Right of Appeal, it must be noted that the 2nd Respondent, similarly requires vindication and/ or protection, on account of the Rights that have since accrued on the basis of the Decree.
45. In the premises, the rights of the 2nd Respondent/Decree Holder can only be protected and/or vindicated vide an order for provision of security, in line with Order 42 Rule 6(2) of the [*Civil Procedure Rules*](#), 2010.



46. For clarity, the importance of provision of security cannot be over emphasized. In this regard, I beg to adopt and endorse the holding in the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, where the court state as hereunder;

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

Final disposition:

47. Having addressed the issues raised hereinbefore, I come to the conclusion that the Application for stay of execution pending appeal is meritorious.

48. In the premises, I do make the following orders;

- a. The Application dated 8th December 2021 be and is hereby allowed.
- b. There be and is hereby granted an order of stay of execution of the Judgment and Decree of the Chief Magistrates’ court dated the 23rd November 2021 and issued vide MCELC 1359 of 2016, pending the hearing of this Appeal.
- c. The Appellants/Applicants herein shall provide security in the sum of Kshs.300, 000/= only, which shall be deposited in an Escrow accounts in the names of the Advocates for the Appellants and the 2ND Respondent herein and the Escrow account shall be opened and operationalized within thirty (30) days from the date hereof.
- d. In default to comply with clause c hereof by facilitating the opening and operationalized of the escrow account, the order of stay herein shall lapse automatically.
- e. In the event that the condition stipulated in c above is met and complied with, the Appellants herein shall compile, prepare and file the Record of Appeal within 90 days from the date hereof.
- f. Costs of the Application shall abide the outcome of the Appeal.

49. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms Mogaka h/ b for Nduati for the Appellants

Mr. Thuita h/b for Mr. Ngata for the 1st Respondent

Mr Mr. Thuita for the 2nd Respondent

