



**Richard v Mbali & another (Civil Appeal E016 of 2021)  
[2022] KEELC 3875 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3875 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
CIVIL APPEAL E016 OF 2021  
TW MURIGI, J  
JULY 27, 2022**

**BETWEEN**

**ELIZABETH NDUKI RICHARD ..... APPELLANT**

**AND**

**ARISON KYUMA MBALI ..... 1<sup>ST</sup> RESPONDENT**

**KENNEDY SULI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated December 14, 2021 brought pursuant to the provisions of section 3A of the *Civil Procedure Act*, order 50 rule 6, order 42 rule 6 of the *Civil Procedure Rules*, article 50 of the *Constitution* and all other enabling provisions of the law the applicant is seeking for the following orders: -
  - a) Spent.
  - b) That pending the hearing and determination of this application inter-partes, there be temporary conservatory orders restraining the respondents from trespassing, evicting or otherwise interfering in any other way with the applicant's occupation and use of the suit premises.
  - c) That pending the hearing and final determination of this appeal, this honourable court do issue conservatory orders restraining the respondents from trespassing, evicting or otherwise interfering in any other way with the applicant's occupation and use of the suit premises.
  - d) That pending the hearing and final determination of the appeal, there be a stay of hearing and determination of ELC Case No E035 of 2021 being heard before Hon JN Mwaniki pending the hearing and final determination of Makueni Succession Cause No E051 of 2021.



2. The application is premised on the grounds on its face together with the supporting affidavit of the applicant sworn on the even date.

### **Applicant's Case**

3. A summary of the grounds and the averments is that vide the ruling delivered in CMCC E035 of 2021, the court issued an eviction order which was couched as a prohibition order against the applicant at the interlocutory stage. The applicant averred that the orders were issued on the basis of concealment and misrepresentation of material facts presented by the respondents. The applicant maintains that she has been in occupation of the suit property since 1996. The applicant argued that the lower court having correctly established that the distribution of the suit premises was an issue for determination in Makueni Succession Cause No E051 of 2021, it should have proceeded to stay the proceedings in ELC No E035 of 2021 until the determination of Succession Cause No E051 of 2021.
4. The applicant contends that she is an innocent purchaser for value who has been dragged in a succession dispute. She stated that the decision by the lower court was biased and that she stood to suffer if she is evicted. She went on to state that the appeal had high chances of success and that no prejudice would be occasioned to the respondents as she has been in occupation of 2 acres within the suit property since 1996.
5. Opposing the application, the 1<sup>st</sup> respondent *vide* the replying affidavit sworn on January 25, 2022 stated that he is the administrator of the estate of Muombe Tele. He averred that the court's ruling did not amount to the eviction of the applicant. He averred that it was evident that the applicant had trespassed on the estate of the deceased which amounts to intermeddling with the property of the deceased. He maintains that the applicant is neither a beneficiary nor a creditor of the estate of the late Muombe Tele and that she can only demand for land purchased from the family of the late Nzuve Kalu. The respondent urged the court to dismiss the application.
6. The application was canvassed by way of written submissions

### **Applicant's Submissions**

7. The applicant's submissions were filed on January 31, 2022.
8. The applicant gave an elaborate background of the case. Counsel submitted that land parcel number Nzaui/Kilili/159 was owned and used by the two houses of Tele Kalu and Nzuve Kalu who were brothers. She stated that Muombe Tele, the registered owner of the property, was holding the same in trust for the two families. Counsel submitted that in 1999, the elders of Ethanga clan sub-divided the property into two portions for use between the two families.
9. Counsel went on to submit that after the sub division, the house of Nzuve Kalu sold to the appellant and her husband two acres which was excised from the suit property. That the appellant and her husband proceeded to fence the 2 acres and have been farming on that portion of the suit land. Counsel submitted that when the applicant purchased the 2 acres, the respondents did not raise any objection during the lifetime of the late Muombe Tele. That in 2019 some of Muombe Tele's grandchildren laid a claim to the portion of the land that she had purchased but did not lay a claim on a portion of land sold to Mutua Tele an uncle to the respondents.
10. Counsel submitted that the lower court erred in issuing a mandatory injunction in the guise of a Prohibitory injunction by failing to consider that the applicant was in possession of 2 acres excised from the suit property for the last 25 years. Counsel placed reliance on the case of [\*Lucy Wangui Gachara v Muindi Okemba\*](#) [2015] eKLR.



11. Counsel urged the Court to discharge the orders of the lower court dated October 13, 2021 and in its place issue conservatory orders restraining the respondents from interfering with the appellants use of 2 acres pending the hearing of the succession cause.
12. Counsel further submitted that the lower court erred in failing to appreciate that the case before it was a succession dispute clothed as a claim of rights in land.
13. Counsel further submitted that the house of Nzuve are opposed to the deprivation of the appellant of the two acres and in that regard they had filed objection proceedings in Succession Cause No E051 of 2021. That in view of the objection proceedings in which the grant of letters of administration granted to the respondents has been challenged, it would be prudent for the court to stay the proceedings in the lower court until the succession proceedings are heard and determined. Counsel maintains that it will be in the interest of justice to stay the proceedings in ELC E035 of 2021 pending the hearing and determination of Succession Cause No E051 of 2021.

### **The Respondents Submissions**

14. The respondents submissions were filed on March 7, 2022.
15. Counsel for the respondents identified the following issues for the court's determination: -
  - 1) Whether the court should vacate the orders issued on October 13, 2021 pending the hearing and determination of this appeal.
  - 2) Whether the court should grant a stay of hearing and determination of ELC Case No E035 of 2021 pending the hearing and determination of Makueni Succession Cause No E051 of 2021.
16. Counsel submitted that the law that governs interlocutory injunctions is set out in order 40 rule 1 (a) and (b) of the [Civil Procedure Rules](#) while the case of *Giella v Cassman Brown & Co Ltd (1973)* EA sets out the conditions to be considered when granting an injunction. Counsel submitted that the trial court in granting the order of injunction, protected the respondents and the estate of the deceased from further misappropriation and interference of the disputed property by the appellants until the main suit is heard and determined. Counsel submitted that the allegation that the orders amounted to an eviction was incorrect as the order did not determine the entire suit at the interlocutory stage. Counsel contends that setting aside the orders would amount to exposing the parties to violation of their rights pending the hearing and determination of the appeal.
17. As regards to the issue whether the court should grant a stay of the hearing and determination of ELC Case No E035 of 2021 pending the hearing and determination of Makueni Succession Cause No E051 of 2021, counsel submitted that the present application is an abuse of the court process since the cause of action in the two matters is completely different as the ELC case seeks for a permanent injunction while the succession cause seeks to administer and distribute the Estate of the deceased to the rightful beneficiaries.
18. Counsel submitted that the stay of the ELC case will cause grave prejudice and miscarriage of justice upon the defendants. Counsel further submitted that the applicant has not demonstrates that she will suffer any loss should the ELC case proceed to be heard and determined or the correlation between the two matters in terms of the subject matter and the reliefs and prayers sought.

### **Analysis And Determination**

19. Having considered the application, affidavits and the rival submissions, I find that the issue for determination is: -



- i) Whether the applicant has satisfied the conditions set out in order 42 rule 6 of the Civil Procedure Rules for the grant of stay of execution pending appeal.
20. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides that;
- 6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- 6(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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by applicant.
21. Going by the above provisions of the law, it is clear that in an application for stay of execution pending appeal, the applicant must satisfy the following three conditions: -
- 1) The court is satisfied that substantial loss may result to the applicant unless the order is made.
  - 2) The application has been made without unreasonable delay.
  - 3) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
22. In considering an application for stay of execution, I am guided by the case of Butt v Rent Restriction Tribunal [1982] KLR 417 where the Court of Appeal gave the following guidelines;
- “The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
23. The grant of an order of stay of execution is a discretionary one. In the case of RWW v EKW [2019] eKLR the court held that;
- “...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”

24. The court is therefore called upon to balance both the rights of the successful party so as not to hinder him from his fruits of judgment and those of the appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
25. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine v Nampijja & another* Civil App No 93 of 1989 (Nairobi) the court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
26. The issue for determination is whether the applicant has satisfactorily discharged the conditions for the grant of stay of execution pending appeal.
27. The applicant is seeking to stay the ruling by Hon J Mwaniki delivered on December 1, 2021.
28. The court will now determine whether the applicant has satisfied the conditions upon which the orders can be granted.
29. On the first condition of proving that substantial loss may result unless stay orders are granted, the applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted. In so finding, I am persuaded by the Court of Appeal decision in the case of *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR where the court held that;

“...it is not enough for the applicants to say that they live or reside on the suit land and they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent execute the decree in this suit against them.”
30. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR where the court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
31. The applicant has expressed the fear that she will be evicted from the suit premises where she has been in occupation since 1996. The applicant averred that the trial court issued an eviction order which was couched as prohibitory order at the interlocutory stage. She averred that she is a bonafide purchase for value and would suffer immensely if evicted from the suit premises.
32. The respondents on the other hand argued that the court in issuing the prohibitory order against the applicant protected the estate from being wasted or being alienated. The respondent contends that the prohibitory orders did not determine the suit as the issues on ownership were yet to be heard and determined.
33. In the case of *Machira T/A Machira & Co Advocates v East African Standard* [2002] eKLR, the court held that;

“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars. Where no



pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant stay.”

34. It is evident from the ruling dated December 1, 2021 that the applicant vide her application dated February 21, 2021, had sought for an order of stay of proceedings amongst other orders. In the ruling, the court stated as follows: -

“(1) It is evident that it’s the succession cause that may need to be stayed to allow determination of these issues first.

(2) As regards the applicants application to set aside the prohibitory order against her and granting a similar order against the respondents, the same cannot be granted as doing so will only create a circus over the issue of occupation and use of the land which issues cannot and will not conclusively be determined at an interlocutory stage.”

35. From the proceedings presented before the court it is evident that the applicant has not annexed the prohibitory order issued against her. The applicant has merely stated that she will suffer if she is evicted from the suit premises. The applicant has not demonstrated that there is an imminent danger of eviction from the portion of land that she occupies.

36. The applicant has not demonstrated the loss that she is likely to suffer if the orders sought are not granted. It is my finding that the applicant has failed to satisfy this condition.

37. In an application for stay of execution pending appeal, an applicant must also satisfy the court that the application has been made without unreasonable delay. It is not in dispute that the ruling was delivered on December 1, 2021. The present application was filed in court on December 15, 2021. I find that the application was filed without undue delay.

38. On the last condition as to the provision of security for costs, order 42 rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the applicant must furnish security for the due performance of the order or decree. In the case of Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co Advocates & 2 others [2014] eKLR, the court held that;

“The purpose of the security under order 42 is to guarantee 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 Applicant 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 a security for the 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.”

39. The applicant has not provided security for the due performance of the order or expressed her willingness to provide security for the due performance of any decree that may be binding on her.

40. In the case of Trust Bank Kenya Ltd v Ajay Shah and 3 others [2012] eKLR the court held that;

“The conditions set out in order 42 rule (2)(a) are cumulative. All three must be satisfied before a stay can be granted. The appellant satisfied one condition and failed to satisfy others.”

41. I find that apart from the condition regarding delay, the applicant has not satisfied the other two conditions required for the grant of an order of stay of execution pending appeal.



42. The upshot of the foregoing is that the application dated December 14, 2021 is devoid of merit and the same is dismissed with costs to the respondents.

.....

**HON T MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27<sup>TH</sup> DAY OF JULY, 2022.**

**IN THE PRESENCE OF: --**

**Court assistant – Mr Kwemboi.**

Mutuku for the applicant.

Ms Kyalo for the respondents.

