



**Gathumbi v Gathumbi (Environment and Land Appeal
003 of 2022) [2022] KEELC 15687 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 15687 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 003 OF 2022**

EC CHERONO, J

JULY 22, 2022

BETWEEN

GEORGE MUCHIRA GATHUMBI APPELLANT

AND

MONICAH NJOKI GATHUMBI RESPONDENT

RULING

1. The Appellant preferred this appeal vide a Memorandum of Appeal dated February 22, 2022 and fled on February 23, 2022. According to the Appellant, he was dissatisfied with the judgment/decree of the Honourable Mr AK Ithuku, Chief Magistrate issued in Kerugoya CMCC No 299 of 2013. On April 4, 2022, the Appellant filed a Notice of Motion application under Order 42 Rule (6) [CPR](#) and Sections 1A, 1B & 3A [CPA](#) seeking the following orders:-
 1. (spent).
 2. That, this Honourable Court be pleased to grant the Appellant orders of stay of Execution of the Judgment/Decree in Kerugoya CMCC No 299 of 2013 dated January 27, 2022 pending the hearing and determination of this application.
 3. That, this Honourable Court be pleased to grant the Appellant orders of stay of Execution of the Judgment/Decree in Kerugoya CMCC No 299 of 2013 dated January 27, 2022 pending the hearing and determination of the intended Appeal.
 4. That, the costs of this application abide the results of the intended Appeal.
2. By way of a response, the Respondent filed a Memorandum of Cross-Appeal to the Appeal and a Replying affidavit to the Notice of Motion application dated April 20, 2022 respectively. When the Notice of Motion application came up for hearing on 21/4/2022, the parties agreed to canvass the same by written submissions.



3. The Appellant filed his written submissions on May 10, 2022. By the time of writing this Ruling, the Respondent had not filed her submissions.

Applicants Summary of Facts

4. The applicant/Appellant in his supporting affidavit deposed that he has been advised by his advocate that his appeal has high chances of success and that if stay is not granted, the appeal will be rendered nugatory.
5. The applicant also stated that he has given undertaking to abide by any conditions this Honourable Court might impose for the due performance of the Decree in the lower court.

Respondents Summary of Facts

6. The Respondent on the other hand stated that the intended appeal has no chance of success as the trial magistrate analysed the evidence before him and confirmed that she was the bonafide owner of the suit property having legally obtained the same from her late father who had caused her to be registered as a joint tenant and the property reverting to her as a sole proprietor by operation of the law after the demise of her father.
7. She further deposed that the trial court did not find any commission of fraud in their registration of the suit land parcel No Kabare/Ngiroche/454 as joint tenants with her late father.
8. She stated that despite the existence of injunction orders issued on 27/1/2021, the Applicant has continued to build on the suit land with reckless abandon and impunity. She deposed that the trial court in its Judgment further barred the appellant/applicant permanently from entering or interfering with the suit land. The Respondent also stated that the Appellant/applicant was ordered to vacate the suit land within 60 days failing which he shall be evicted.
9. The Respondent stated that the Applicant/Appellant has continued to remain in the suit land in total disobedience of the court orders and that he has approached this Court with unclean hands. She stated that the actions by the applicant has made her and her children destitute and homeless squatters.
10. She further deposed that the impugned judgment was delivered on January 27, 2022 and this application was filed on April 4, 2022 which is three months later. She said that the application is clearly brought after a long and unexplained delay which should be dismissed. She stated that as the successful party, she has a right to enjoy the fruits of the judgment and that the Applicant has not shown any evidence that his intended appeal will be rendered nugatory if the application is not granted.
11. In conclusion, the Respondent stated that the Applicant/Appellant has not satisfied the grant of stay of execution pending appeal under Order 42 Rule 6 [CPR](#) and that the application must fail.

Analysis and Decision

12. I have considered the Notice of Motion application, the affidavits, both in support and in opposition thereto and the submissions as well as the applicable law. Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) which is the applicable law provides as follows;

- "(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



(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”

13. The first requirement for an application for stay pending appeal is whether the application has been brought without unreasonable delay. From the materials annexed to the supporting affidavit, the impugned judgment was delivered by the trial Magistrate on January 27, 2022 and this application was filed more than two (2) months later on April 4, 2022. Filing an application more than two (2) months after judgment without explanation in my view is unreasonable delay.
14. The second condition for the grant of stay pending appeal is that the applicant must satisfy the Court that substantial loss may result to him unless the order is made. Substantial loss has been defined in numerous decisions by the superior courts to mean a state of affairs that would render the intended appeal superfluous or nugatory. I have looked at the supporting affidavit and the annexures thereto and find nowhere the applicant has stated how the appeal will be rendered nugatory if the stay order is not granted. The only way an appeal can be rendered nugatory in my view is where the appellant/applicant eventually succeeds and finds that the subject of the appeal may have been sold to third parties for value without notice. The applicant in this application has not alluded that the Respondent is planning to execute the decree by disposing off the subject property of the appeal. In Bungoma High Court Misc Application No 42 of 2011 between *James Wangalwa & Another Vs Agnes Naliaka Cheseto*, Gikonyo J held as follows;

“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”.

15. To my mind, the applicant has not demonstrated to the satisfaction of this court the nature of the substantial loss he would suffer. This limb of the application fails and that being the cornerstone for an application for stay pending appeal, I need not delve into the other third condition.
16. While considering an application for stay pending appeal under Order 42 R 6 (2), the Court must balance between the rights of the applicant as the unsuccessful litigant vis-à-vis the rights of the Respondent who is the successful party. In doing so, the court must take into consideration the twin overriding principles of proportionality and equality of arms aimed at placing the parties on equal footing and weigh where the scales of justice lie. The Court in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. That position was aptly captured in the case of *Machira T/A Machira & Co Advocates Vs East African Standard (No 2)* (2002) KLR 63 where it was held;

“To be obsessed with the protection of an appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principles for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases



in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

17. I entirely agree with the above decision. The Respondent in her Replying affidavit deposed that despite the trial court issuing a permanent injunction restraining the Applicant/appellant from entering into the suit land or interfering with her possession in any manner, the applicant has disobeyed those orders and continued to build with impunity. Those averments on oath have not been controverted.
18. For all the reason given herein above, I find that the Applicant has not shown to the satisfaction of this Honourable Court that the intended appeal will be rendered nugatory unless the application is allowed.
19. The upshot of my finding is that the Notice of Motion dated April 4, 2022 is devoid of merit and the same is hereby dismissed with costs. Orders accordingly.

RULING READ AND DELIVERED VIRTUALLY AT KERUGOYA THIS 22ND JULY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

