



**Ndoro v George (Environment & Land Case 374 of 2013)  
[2022] KEELC 15703 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 15703 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 374 OF 2013  
EC CHERONO, J  
JULY 22, 2022**

**BETWEEN**

**LAZARUS MITHAMO NDORO ..... PLAINTIFF**

**AND**

**GICHOBI GEORGE ..... DEFENDANT**

**RULING**

- 1 The plaintiff/applicant vide a notice of motion dated January 17, 2022, and filed in court on February 10, 2022 seeks the following orders;  
(Spent).
  2. That the honourable court be pleased to issue an interim order for stay of execution of the Judgment made in Kerugoya E.L.C Case No. 374 of 2013 by the court on December 10, 2021 pending the hearing of this application interpartes.
  3. That the honourable court be pleased to issue an order of stay of execution of the judgment made in Kerugoya E.L.C Case No. 374 of 2013 by the Court on December 10, 2021 pending the hearing and determination of the intended appeal.
  4. That the costs of this application be in the cause.
- 2 The application is supported by the affidavit of the applicant and grounds shown on the face of the said application.
  - 3 The application is opposed with a replying affidavit by the respondent sworn and filed in court on March 17, 2022. When the said application came up for hearing on May 4, 2022, the parties agreed to dispose the same by written submissions. Pursuant to the court's directions, the plaintiff/applicant filed his submissions on May 16, 2022 while the respondent filed his on May 13, 2022.



### **Plaintiff's/applicant's Summary of facts and submissions**

- 4 The plaintiff/applicant who is also the judgment debtor(JD) in this case deposed that he was aggrieved by the Judgment of this honourable court delivered on December 10, 2021. He stated that he intends to appeal against the entire judgment of the court and now seeks orders for stay of execution pending the intended appeal. According to the applicant, the respondent herein are into the process of executing the decree and if the orders sought are not granted, he will suffer irreparable and immeasurable loss.
- 5 The applicant further deposed that there exists a real likelihood that he will suffer substantial loss should the stay not be granted as the respondent may dispose of the suit land in order to defeat justice. The applicant also contends that he has an arguable appeal which will be rendered nugatory if the stay orders are not granted. In conclusion, the applicant stated that this application has been brought without unreasonable delay and that it will be in the interest of justice to allow the application in order to preserve the status quo so that the intended appeal is not rendered nugatory.
- 6 In her submissions, counsel for the applicant urged the court to exercise its discretion in such a way as not to prevent an appeal and so that the appeal is not rendered nugatory. She submitted that a court should not refuse a stay if there are good grounds for granting if merely because a better remedy may become available to the applicant herein at the end of the proceedings. No authorities were cited.

### **Respondent's/defendant's summary of facts and submissions**

- 7 The respondent in his replying affidavit stated that the application for stay by the applicant is only meant to delay the execution of the decree issued in his favour by this honourable court. He stated that he has developed the suit land and that he has no intention of disposing the same as alleged.
- 8 The respondent stated that the applicant has not satisfied the conditions for the grant of the orders of stay pending appeal under Order 42 Rule 6 CPR. He further submitted that the mere fact that a party has filed an appeal does not in itself operate as a stay but must establish and satisfy the conditions set out thereunder. He relied on the following cases; *Butt v Rent Restriction Tribunal* (1979) KLR, *Joshua Kamoing v Simon Barchok & 3 Others* (2021) KLR, Global Tours & Travel Limited; Nairobi HC Winding Up Cause NO. 43 of 2000(UR), *Zipporah Karigu & 5 Others Sabera Gakundi Mwithi & 10 Others* (2021) eKLR, *Charles Mwangi Kiiru v Boniface Maina Gichomo & Joseph Mwangi Thuo* (2021) eKLR.

### **Analysis and Decision**

- 9 I have considered the affidavits, both in support and in opposition to the said application, the rival submissions and 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.
- 10 It is trite that an applicant seeking an order for stay pending appeal must bring such an application within a reasonable time from the date the decree or order is issued. Secondly and more important, the applicant must show that he/she will suffer substantial loss unless the order is granted and finally, the



applicant must be ready to provide such security as the court may order for the due performance of the decree as may ultimately be binding on him/her.

- 11 The superior courts have defined what constitutes substantial loss to mean anything that would defeat or render the right of the applicant in the intended appeal superfluous or nugatory as the successful party. The court in determining such an application must weigh between the rights of the decree holder which have crystallized and the undoubted right of the applicant at the appellate court which are futuristic in nature. In an attempt to balance the two competing rights, the court must be satisfied that the decree holder as the successful party is not denied the fruits of the judgments which has crystallized, unless the right of the applicant, if he/she ultimately succeeds in the intended appeal, will be rendered nugatory.
- 12 The applicant in the current application has stated in the supporting affidavit that the respondent is in the process of executing the decree and that he may dispose of the suit land L.R No. Kabare/Mikarara/589 in order to defeat justice. It is important to note that execution is a lawful process and cannot amount to substantial loss. The applicant must show how execution as a lawful process, may create a state of affairs that would render the appeal nugatory.
- 13 First, there is no iota of evidence that the respondent is likely to dispose of the suit property. In fact, the respondent in his replying affidavit has deposed that he has no intention of disposing of the same as he has fully developed it. The applicant has not also annexed a sale agreement showing that the respondent intends to dispose of the same. In the absence of any empirical evidence that the respondent intends to sale or dispose of the suit property, I find that the applicant has not established how the intended appeal would be rendered nugatory.
- 14 The entirety of my evaluation and analysis is that the notice of motion application dated January 17, 2022 is without merit and the same is hereby dismissed with costs. Orders accordingly.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 22<sup>ND</sup> JULY, 2022.**

.....  
**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of;

Mr. Igati Mwai holding brief for Agnes Maina for the Applicant

Respondent – present

Kabuta, Court Assistant – present.

