



REPUBLIC OF KENYA



**Kamau v Ruraya & 4 others (Environment & Land Case 530 of 2015)  
[2022] KEELC 13323 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13323 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 530 OF 2015  
LC KOMINGOI, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**HANNAH WANJIRU KAMAU ..... PLAINTIFF**

**AND**

**JANE WANJA RURAYA ..... 1<sup>ST</sup> DEFENDANT**

**LAWRENCE BABU ..... 2<sup>ND</sup> DEFENDANT**

**CHRISTOPHER GACHENE ..... 3<sup>RD</sup> DEFENDANT**

**TERESIA KINYUA ..... 4<sup>TH</sup> DEFENDANT**

**JOYCE WANJA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the notice of motion dated May 30, 2022 brought under section 1A, 1B and 3A of the [Civil Procedure Act](#), order 42(6), 22(22) and 51(1) of the [Civil Procedure Rules](#) and all other enabling provisions of the law.
2. It seeks orders:-
  1. Spent.
  2. Spent.
  3. Spent.
  4. That the honourable court be pleased to issue orders for stay of execution of the judgment/decree in this matter pursuant to the judgment delivered by the honourable court on March 17, 2022, pending the hearing and determination of the intended appeal in the Court of Appeal.
  5. That the costs of this application be provided for.



3. The grounds are on the face of the applicant and are set out in paragraph (a) to (g).
4. The application is supported by the affidavit of Lawrence Babu, the 1<sup>st</sup> defendant/applicant sworn on the March 30, 2022 and a supplementary affidavit sworn on the July 8, 2022.
5. The application is opposed. There is a replying affidavit sworn by Hannah Wanjiru Kamau, the plaintiff/respondent herein on the June 13, 2022.
6. On the June 15, 2022, the court with the consent of the parties directed that the notice of motion be canvassed by written submissions.

### **The Defendants/Applicants submissions**

7. They are dated July 8, 2022. They are said to be in respect of the notice of motion dated May 26, 2022 but the notice of motion dated May 26, 2022 was withdrawn on the application of the Defendants' counsel on the July 20, 2022. They ought to be in respect of the notice of motion dated March 30, 2022.
8. Counsel submits that he is relying on order 42 rule 6 of the *Civil Procedure Rules 2010*. That this application has been brought without unreasonable delay. That the memorandum of appeal and the record of appeal have already been filed in the Court of Appeal.
9. It is further his submission that the Defendants reside on the suit property hence they will be prejudiced should the plaintiff/respondent transfer the same to third parties. He has put forward the cases of *Kiplagat Kotut v Rose Jebor Kipngok* [2015] eKLR; *Jacob Ngumba Kagu & 2 Others vs Intra Africa Assurance Co Ltd* [2014] eKLR.
10. Counsel further submits that the 1<sup>st</sup> defendant/applicant in his affidavit has stated that he is willing to deposit security within such a given time as this court deems fit.
11. He further submits that this Honourable court has to balance the interests of all parties in such matters as it was held in *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR. He has also put forward the cases of *Hosea Kiplagat v John Allan Okemwa* [2012] eKLR; *Ndibiu Gitabi v Warugongo* [1988] KLR 621; 1 KAR 100 [1988-92] 2 KAR 100.
12. He also submits that the intended appeal is arguable. He has put forward the cases of *Safaricom Sacco Ltd v Stephen Chorio Kiai & another* [2019] eKLR; *Regional Institute of Business Management v Lucas Ondong' Otiemo* [2020] eKLR. That the appeal will be rendered nugatory if these orders are not granted as the Plaintiff/Respondent is at the verge of implementing the decree. He has put forward the case of *Consolidated Marine v Nampijja & another*; Civil Application No 93 of 1989 (Nairobi); *Mukuma v Abuoga* [1988] KLR 645.
13. It is his submission that the plaintiff/respondent has not demonstrated her capacity to compensate the defendants/applicants in the event the appeal succeeds. He has put forward the cases of *Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others* [2013] eKLR; *Mohammed Salim t/a Choice Butchery (Supra)*; *Consolidated Marine (Supra)*; *Beth Kaari & another vs M'Nyeri M'rimunya* [2013]; *Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei* [2018] eKLR.
14. He prays that the application be found to be merited and be allowed.
15. On the July 20, 2022 Mr Wachira for the plaintiff/respondent was granted 14 days to put in written submissions. By the time of writing this ruling, the same were not on record. I will thereby rely on the plaintiff/s/respondent's replying affidavit.



16. I have considered the notice of motion the grounds and the affidavit in support. I have considered the response thereto, the written submissions and the authorities cited. The issue for determination is whether the defendant's/applicant's application meets the requirements set out under order 42 rule 6 of the *Civil Procedure Rules*.

Order 42 rule 6 of the *Civil Procedure Rules*, provides that;

- “(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.
- (2) No order for stay of execution shall be made under subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

17. This court delivered judgment on March 17, 2022. Upon delivery of judgment the defendants were given ninety (90) days to vacate the suit property or be lawfully evicted by the plaintiff/respondent.

18. In my view this was sufficient time for the defendants/applicants to move the court of appeal for stay orders. it appears they waited just before the expiry of the ninety (90) days to file this application. I find that the application has been brought after inordinate delay.



19. It is the defendants'/applicant's case that they will suffer substantial loss if these orders are not granted. They claim they reside on the suit land and will suffer immensely should the plaintiff/respondent transfer the same to third parties. In the case of *Feissal Amin Jan Mohammed t/a Dunvia Forwarders v Shami Trading Co Ltd* [2014] eKLR Kasango J stated as follows:-

“It is trite law therefore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security”.

In the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR, Gikonyo J cited the holding in *Andrew Kuria Njuguna v Rose Kuria* (Nairobi Civil Case 224 of 2001 (unreported) where it was held as follows:-

“Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss money wise or other, and therefore grant the stay”.

20. I have gone through the affidavits of 1<sup>st</sup> defendant/applicant and i am not convinced that the defendants/applicants will suffer substantial loss. At the trial they contended that they had acquired title to their respective plots through adverse possession having had uninterrupted possession for over fourteen (14) years. This claim was dismissed by this court. They have no lawful claim to the suit land.

In the case of *Michira t/a Michira & Co Advocates v East African Standards (No 2)* [2002] KLR 63. It was held as follows:-

“In these kind of applications for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no peculiarly or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.....”

21. It is trite law that a litigant must be left to enjoy the fruits of his/her judgment. In the case of *Michira t/a Michira & Co Advocates* (Supra) It was held that:-

“....to be obsessed with the protection of an appellant or intending 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 principle for the exercise of 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 be justice in accordance with the law and to prevent abuse of the process of the court”.

22. The 1<sup>st</sup> defendant/applicant merely stated on his affidavit that he is willing to deposit security as ordered by this court. On the other hand, he claims the plaintiff/respondent has failed to demonstrate her capacity to compensate the defendants in the event the appeal succeeds. The plaintiff/respondent is



not the one to demonstrate compliance with the conditions set out under order 42 rule 6 of the Civil Procedure Rules. The burden never shifts from the applicant.

23. I have considered the circumstances of this case and I find that the instant application does not meet the conditions set out under order 42 rule 6 of the Civil Procedure Rules.

24. In conclusion, I find no merit in this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2022.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Wachira advocate for the Plaintiff

Ms Mbugua for Mr. Mulinge advocate for Defendant

Steve - Court Assistant

