



REPUBLIC OF KENYA



KENYA LAW
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**Githae & another v Wambutu (Environment & Land Case 198 of 2015)
[2022] KEELC 12747 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12747 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 198 OF 2015
JO OLOLA, J
SEPTEMBER 28, 2022**

BETWEEN

PHILLIP MURIITHI GITHAE 1ST APPLICANT

ANNAH MUMBI MURIITHI 2ND APPLICANT

AND

JOSEPH MAINA WAMBUTU RESPONDENT

RULING

1. By the notice of motion dated January 18, 2022, Phillip Muriithi Githae (the 1st defendant/applicant) prays for a stay of execution of the judgment delivered herein on December 2, 2021 pending the hearing and determination of an intended appeal to the Court of Appeal.
2. The application which is supported by an affidavit sworn by the 1st defendant is premised on the grounds that:
 - (i) The 1st defendant is aggrieved by the decision made and has lodged a notice of appeal against the judgment;
 - (ii) The appeal raises serious, weighty and triable issues of both fact and law and hence ought to be heard on merit;
 - (iii) The appeal may be rendered nugatory if stay of execution is not granted pending the appeal;
 - (iv) The plaintiff may proceed and execute the said judgment thereby subjecting the 1st defendant to substantial loss and damage; and
 - (v) It is in the interest of justice that this application be allowed.



3. Joseph Maina Wambutu (the plaintiff) is opposed to the application. In a replying affidavit sworn on February 3, 2022, the plaintiff avers that the 1st defendant has not shown the substantial loss that may result if an order of stay is not granted.
4. The plaintiff further avers that the 1st defendant has not offered any security for the due performance of the decree and that the averment that the intended appeal raised serious weighty and triable issues has not been supported by a memorandum of appeal for the court's consideration.
5. I have carefully perused and considered the 1st defendant's application and the response thereto by the plaintiff. I have similarly perused and considered the rival submissions and authorities placed before me by the learned advocates representing the parties herein.
6. By his application before me, the 1st defendant prays for a stay of execution of the judgment delivered herein on December 2, 2021 pending the hearing and determination of an intended appeal that he has lodged in the Court of Appeal.
7. Order 42 rule 6(2) of the *Civil Procedure Rules* sets out the principles guiding the grant of stay of execution pending appeal and provides thus:

“No order of 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;

8. As was stated in *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR:

“No doubt in law, the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold as in the case here, does not in itself amount to substantial loss under Order 42 rule 6 of the *Civil Procedure Rules*. This is so because execution is a lawful process. 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 the applicant as the successful party in the appeal. The issue of substantial loss is cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

9. Considering the same issue in *Victory Construction v PMM* (2019) eKLR, Odunga J echoed the decision in *Century Oil Trading Company Limited v Kenya Shell Limited* (Nairobi Milimani HCMCA No 156 of 2007) where the court observed thus:

“The word “substantial” cannot mean the ordinary loss to which every Judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all and different from that The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so



that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

10. In the matter before me, it is submitted that unless a stay of execution is granted herein, the applicant will suffer substantial loss as the suit property Plot No Karatina Township Block II/440 will be transferred to the plaintiff/respondent thereby rendering the appeal nugatory.
11. From the record herein, the plaintiff/respondent had instituted this suit in the year 2015 seeking a declaration that he is the rightful owner of the said property. Accordingly he urged the court to cancel the names of the defendants as the registered proprietors thereof. From the material placed before the court, it was clear that the plaintiff had occupied and developed the suit property since the year 1997 and that he had entrusted the 1st defendant/applicant to pursue registration of the land which was held in equal shares by the two of them.
12. Instead of pursuing the registration as proposed, the 1st defendant chose instead to have the land registered in his name and that of his wife (the 2nd defendant). At the trial herein, the 1st defendant conceded that he was aware the plaintiff had purchased the half share of the property from one Wamae Muriithi and he had no problem sharing the same with him.
13. By the judgment delivered herein on December 2, 2021, this court merely affirmed the rights of the joint holders of the land to continue occupying and utilizing their respective portions of land and I am therefore not persuaded that the 1st defendant shall suffer any loss, substantial or otherwise, where the plaintiff were given title to the portion of land he has occupied and developed since the year 1997.
14. It follows that I am not persuaded that there is any merit in the motion dated January 18, 2022. It is dismissed with costs to the plaintiff.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF SEPTEMBER, 2022.

In the presence of:

Mr. Kebuka Wachira for the Applicant

Ms Lucy Mwai for the 1st Respondent

Mr. H. K. Ndung’u for the 2nd Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

