



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Kihara & 4 others (Environment & Land Case E039 of 2022)
[2022] KEELC 12613 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12613 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E039 OF 2022**

JG KEMEI, J

SEPTEMBER 22, 2022

BETWEEN

KAMAU MAINA APPELLANT

AND

GICHURI KIHARA 1ST RESPONDENT

GRACE WANJIRU 2ND RESPONDENT

TABITHA WAIRIMU KIMOTHO KIHARA 3RD RESPONDENT

PETER GICHURI KIMOTHO 4TH RESPONDENT

SIMON NDUNG’U KIARIE 5TH RESPONDENT

*(Being an appeal from the Ruling of the Hon. M. W. Wanjala
(SRM) delivered on the 21/4/2022 at Thika in MCCC/395/2022)*

RULING

1. The ruling is related to the motion filed by the applicant on the May 13, 2022 wherein he sought stay of execution of the decree issued on the 31/3/2021 pending the hearing and determination of the appeal of the ruling of the Hon M W Wanjala (SRM) delivered on the April 21, 2022 in MCCC/395/2002.
2. The application is premised on the grounds annexed on the face of it and the supporting affidavit of the applicant sworn on the May 10, 2021.
3. The deponent avers that the Respondents sued him in MCCC No 395/2002 seeking for orders of eviction inter alia from the suit land Ngenda/kahunguini/T309. That he filed a defence in the suit and attended court to testify but the same was adjourned before completing his testimony and a further hearing date was given for the November 12, 2019. It was his evidence by way of affidavit that his then advocate on record refused to inform him of the hearing dates and later neglected to pick his calls.



4. That subsequently judgment was entered in favour of the respondents on the April 21, 2022 and being aggrieved by the said judgement, he applied for stay of execution in the trial court but the application was declined hence the filing of an appeal against the said ruling.
5. That he has been in continuous occupation of the suit land since 1959 as the suit land belonged to his father Samuel Gichuru and that the respondents are his relatives and that the 1st respondent is deceased yet he has not been substituted in the suit. He states that he has not been afforded a fair hearing for reasons not of his own making but for the mistake of his former advocate which mistake should not be visited upon him.
6. The application is opposed by the respondents through the replying affidavit of the 1st respondent who deposed on his own behalf and on behalf of the co-respondents.
7. He contended that the applicant's application is an abuse of the process of the court since the applicant has vacated the suit land and what remains on the ground is a semi-permanent house. That they have taken possession of the suit land and so the application has been overtaken by events. No prejudice has been demonstrated by the applicant if the orders of stay are not granted. The appeal has no chances of success as grounds relate to the Judgment delivered on the November 11, 2021 and not the notice of motion dismissed on the April 21, 2022. On a without prejudice basis the respondents urged that the applicant be ordered to pay the decretal amount and deposit the security of costs of appeal as a condition of granting stay orders.
8. Parties elected to file written submissions which I have read and considered. The firm of Kamau Kinga & Co Advocates filed submissions on behalf of the applicant while the respondents failed to file any.
9. The key issue is whether the application is merited.
10. The provisions governing stay of execution are found in order 42 rule 6 which states as follows;
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”
11. In the case of *Butt vs. Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
 - a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



- b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
 - d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
12. In determining an application for grant of orders of stay of execution, the court is being called upon to establish whether the application was made timeously, the applicant has established substantial loss that is likely to be suffered should the application be denied and whether security for the due performance of the decree has been adequately been provided.
 13. In the case of *Vishram Ravji Halai v Thornton & Turpin* Civil Application No Nai 15 of 1990 [1990] KLR 365, it was held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under order 41 rule 6 of the *Civil Procedure Rules* (then) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
 14. Going by the provisions of Order 42 Rule 6 it is clear that an applicant for stay has two chances to secure stay of execution. The first one is at the trial court and the second one is the appellate court. It is not in dispute that after the judgement, the applicant submitted to the jurisdiction of the trial court and sought stay of execution pending the filing of an appeal. The applicant lost the application in the trial court and hence the instant application.
 15. As to whether the application was made timeously, the record shows that the ruling of the court was delivered on the April 21, 2022 and the application was filed on the May 13, 2022 thus without undue delay.
 16. The second requirement that the court is being called upon to inquire is whether the applicant has demonstrated the substantial loss that he stands to suffer if the application is denied. in the case of *Machira T/A Machira & Company Advocates v East African Standard* (No 2) 2002 2 KLR the court held that substantial loss must be specified, details or particulars thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further.
 17. In this case the applicant has averred that he is aggrieved by the decision of the court which was delivered before he was afforded the right to be heard for reasons which he blames his then advocate for non-attendance at the hearing date leading to the closure of his defence and the court proceeding to deliver its judgment. The applicant avers that the suit land belonged to his father and he has occupied it from 1958. he has also stated that the 1st respondent is deceased and substitution is yet to take place.
 18. The 1st respondent, (who is alleged to be deceased) deponed that execution has been done with the applicant having vacated the suit land except for the house that is still on the land. This is a sign that execution is not complete and if that be so then the application cannot be said to have been overtaken by events.



19. I find that the substantial loss has been demonstrated by the applicant and if the orders of stay are not granted then the appeal is likely to be rendered nugatory.
20. As suggested by the respondents, i find that this court has the power to order for the provision of appropriate security for the due performance of the decree.
21. In the end the application is allowed on the following terms;
 - a. The applicant to deposit kshs 150,000/- being security for the due performance of the decree in a joint interest account in the names of the two firms representing the parties within a period of 30 days from the date hereof.
 - b. The applicant to file the record of appeal and take steps for expedite prosecution of the appeal within the next 45 days from the date hereof.
 - c. In default of any of the above the application shall stand dismissed with no further orders for this court.
22. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 22ND DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Applicant / Appellant – Absent

Respondents 1, 2 and 3 – Absent

Court Assistant – Phyllis Mwangi

