



REPUBLIC OF KENYA



KENYA LAW
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**Muchiri v Muchiri & 2 others (Environment and Land Appeal
E002 of 2022) [2022] KEELC 12777 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E002 OF 2022**

JG KEMEI, J

SEPTEMBER 22, 2022

BETWEEN

ANNAH GACHAMBI MUCHIRI APPELLANT

AND

CATHERINE WAIRIMU MUCHIRI 1ST RESPONDENT

NANCY WANJIRU KIMANI 2ND RESPONDENT

JANE NJERI NGETHE 3RD RESPONDENT

RULING

1. The ruling is with respect to the notice of motion dated January 12, 2022 filed by the applicant seeking the following orders;
 - a. Spent
 - b. Spent
 - c. This Hon court be and is hereby pleased to stay execution of the decree emanating from the judgement delivered on the December 16, 2021 in Ruiru ELC No 19 of 2020 pending the hearing and determination of this application/judgement.
 - d. Costs be provided for.
2. The application is supported by the grounds on the face of it and more particularly by the supporting affidavit sworn by the applicant. She avers that she is aggrieved by the judgement of the lower court delivered on the December 16, 2021 for which she has filed an appeal. She is apt that the appeal has high chances of success. She is apprehensive that should the respondents succeed in executing the decree she stands to suffer irreparable loss and damage. In addition, it was her plea that unless the court grants orders of stay of execution, the appeal shall be rendered nugatory. She is persuaded that the application



has been brought without any unreasonable delay and it is only fair that the orders are granted to enable her prosecute the appeal to its logical conclusion. She avers that there is no prejudice that the respondents stand to suffer if the orders are granted.

3. The application is not opposed by the respondents. On the February 14, 2022 Mr Ndungu present for the respondents informed the court that he had filed a replying affidavit on the January 26, 2022 but the record shows that the court brought it to the attention of Mr Ndungu that the said replying affidavit was not on record. Despite undertaking to file the replying affidavit on record none was available on record at the time of writing the ruling. Thereafter parties elected to canvass the application by way of written submissions. It is only the applicant who complied with these directions.
4. I have read and considered the submissions of the applicant filed by the firm of G K Gatere & Co Advocates.
5. The key issue for determination is whether the application is merited.
6. 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.”
7. In the case of [Butt v 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.
8. 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.



9. In the case of *Visbram 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.
10. With the incoming of the new constitutional dispensation and in light of the overriding objectives stipulated in sections 1A and 1B of the *Civil Procedure Act*, the court is now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act*:

“The court shall, in the exercise of its powers under this act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”
11. I shall now analyze the case of the applicant with the above legal and jurisprudential tenets in mind.
12. In the main the judgement of the lower court was delivered on the December 16, 2021 and the applicant moved the court with this application on the January 14, 2022. Taking judicial notice that the high vacation starts from 20th December to the 15th January the next year, I find that the application was filed without unreasonable delay. Nothing shall turn on this ground.
13. Next is whether the applicant has proved that unless the orders of stay of execution are granted she shall suffer substantial loss. The applicant has explained that should the respondents be allowed to execute the decree she shall suffer substantial loss. According to the judgement of the lower court the hon court determined that each of the parties be entitled to their particular portion of the land and consequently ordered that the same be subdivided and thereafter transferred to each of the parties. No doubt if the land is subdivided the very subject of appeal shall have been altered to the likely prejudice to the applicants appeal that is yet to be heard. In my view the applicant has demonstrated substantial loss.
14. As regards the chances of success of the appeal, it is not for the court to at this stage weigh the same as it is best left to the appellate court being seized with the matter to hear and make a determination.
15. Although the applicant has not offered any security for the due performance of the decree, it is not lost on the court that granting an order for the provision of security is at the discretion of the court. In that respect the court orders the applicant to deposit the sum of Kshs 50,000/- being security for the due performance of the decree.
16. I exercise my discretion and grant the application in the following terms;
 - a. The applicant to deposit the sum of Kshs 150,000/- in an interest earning account in the joint names of the advocates of the applicant and the respondents within the next 30 days.
 - b. The applicant to file and serve the record of appeal within the next 60 days.
 - c. In default the application shall stand dismissed with no orders as to costs.
 - d. I make no orders as to costs.

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

