



REPUBLIC OF KENYA



**Manyara v Mbwe (Environment & Land Case 232 of 2013)
[2022] KEELC 15114 (KLR) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 232 OF 2013
CK NZILI, J
NOVEMBER 30, 2022**

BETWEEN

HONESTY KANYUA MANYARA PLAINTIFF

AND

SILAS MURIGE MBWE DEFENDANT

RULING

1. By a notice of motion dated August 3, 2022 the court is asked to stay execution of its decree following the judgment made on July 13, 2022, pending the hearing and determination of an intended appeal or in the alternative, status quo before the judgment be maintained.
2. In support of the application, is a sworn affidavit of Silas Mu Murige Mbwe on the even date. The grounds upon which the application is made are that the appeal is arguable; if execution ensues the same would be rendered nugatory and that the land needs to be preserved pending the hearing of the intended appeal.
3. The respondent was served with the application but has not filed any response to the same.
4. Following directions, parties canvassed the application by written submissions dated September 8, 2022 and September 26, 2022 respectively
5. The applicant submitted that the parameters to be met for stay of execution as set out in *Halai & another v Thornton & Turpin (1963) Ltd* 1990 KLR 365 are substantial loss, timeous filing of the application, security and sufficient cause. On substantial loss the applicant submitted that if stay of execution was not granted, he was likely to be evicted together with his family and had nowhere to live.
6. Further, relying on *Peter Nkupang Lowar v Nautu Lowa* (2022) eKLR, he submitted that since he was in occupation, he could be evicted and hence had demonstrated substantial loss.



7. On unreasonable delay, the applicant submitted that he filed the application just 23 days after the judgment. Reliance was placed on [*Kariuki Njuri v Francis Kimaru Rwara*](#) (2020) eKLR on the proposition that there was no unreasonable delay.
8. On security the applicant submitted that he was aged over 70 years, a man of no means and relied on the upkeep from the occupation to feed his family and since he had no title to the land, he undertakes to maintain the *status quo* of the suit land in the same way it was before judgment.
9. Further, he submitted that since he had no title to the land, he could not transfer or deal with the land in a manner prejudicial to the respondent. Reliance was placed on [*Kariuki Njeri v Rwara*](#) (supra) which cited with approval [*Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates*](#).
10. On sufficient cause, the applicant submitted that it would be in the interest of justice to allow him an opportunity to pursue his appeal which was a constitutional right as held in [*Edward Kamau & another vs Hannah Mukui Gichuki & another*](#) (2015) eKLR.
11. The respondent submitted that the application before court was inept and an abuse of the court process since the applicant had not shown any damage or loss likely to be suffered should the application be dismissed.
12. The respondent submitted that an assertion of suffering by virtue of possession of the suit land was a lazy argument given the finding of the court that the occupation had been illegal. Relying on [*Century Oil Trading Co Ltd v Kenya Shell Ltd*](#) (NRB) Milimani HCMCA No1561 of 2007 the respondents submitted that substantial loss did not mean ordinary loss but something in addition to that.
13. Similarly, relying on [*Machira t/a Machira & Co. Advocates v E A Standard*](#) (2002) KLR 63, the respondent submitted that a party must prove specific details and particulars of the alleged loss. In the instant case, it was therefore submitted that the applicant had not produced any documentary or empirical evidence to support his allegations on substantial loss.
14. The respondent further submitted that the suit property did not form part of the applicant's matrimonial home since he had other properties where he resided hence any loss could be attained by an award of damages. The respondents submitted the applicant was simply asking the court to aid him in perpetuating an illegality or trespass more so when he had offered no security as a show of good faith otherwise he was out to delay the realization of the respondent's fruit of his judgment.
15. A party seeking for stay of execution under Order 42 Rule 6 of the [*Civil Procedure Rules*](#) has to demonstrate that he is likely to suffer substantial loss, the application was filed on time or without reasonable delay, that he is willing to offer security for the due realization of the decree should his appeal not succeed and that it is also in the interest of justice that the application be allowed. See [*Halai & another vs Thornton & another*](#) (supra) [*Peter Nakupang Lowar*](#) (supra) [*Kariuki Njuri v Francis Kimaru Rwara*](#) (supra) [*Edward Kamau & another v Hannah Mukui Gichuki & another*](#) (supra).
16. In [*Century Oil Trading Co Ltd v Kenya Shell Ltd*](#) (supra) the court held that in every judgment a judgment debtor is exposed to loss since it was a natural consequence and that substantial loss must mean more than ordinary loss.
17. In [*Charles Gethir v Angela Wairimu Gethi*](#) (2008) eKLR, the Court of Appeal held that it was not enough for the applicant to say that they live or reside on the suit land and they will suffer substantial loss but must go further and show the substantial loss likely to be occasioned.
18. In [*James Wangalwa & another v Agnes Naliaka Cheseto*](#) (2012) eKLR, the court said that the fact that the process of execution had been put in motion itself did not amount to substantial loss and that an



- applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.
19. An applicant must also show special circumstances so as to sway the court to exercise discretion in his favour considering that a successful party has an equal right to enjoy fruits as his judgment as held in *ANM v VN* (2019) eKLR.
 20. On the aspect of nugatory the court in *Morijo Loita Residents Association & 558 others v Narok Southland Adjudication & Settlement Office and 2 others* (Civil Application 184 of 2022) (2022) KECA 1143 (KLR) October 21, 2022 (Ruling), held that nugatory means worthless, futile, invalid and trifling. The court held an appeal cannot be rendered nugatory simply in the absence of the injunctive relief or stay as sought.
 21. Applying the above case law, can the applicant be said to have met the threshold? The supporting affidavit did not mention the nature of his occupation and or developments in the suit land.
 22. The applicant did not attach any cogent and tangible evidence of the character, value and status of the alleged occupation. There were no photographic or valuation report of the alleged developments the applicant was likely to loses should be disallowed. The nature of the investment to the land was not been defined or demonstrated.
 23. The applicant has to demonstrate why a title holder with rights under Article 40 of the *Constitution* and Sections 25 of the *Land Registration Act*, now successful in this matter should be once more be prevented from enjoying the proprietary rights thereto.
 24. In *Karogo M’Nkoroi v Nkirote M’Arai & Another* (2022) eKLR, this court held that it is the duty of an applicant to make an offer for security for the due enforcement of the decree should the appeal be unsuccessful.
 25. In this application, the applicant has downplayed the same and instead has alleged that he has nowhere to move to yet his evidence during the trial was otherwise. At the very least one would have expected the applicant to offer security on the costs payable as ordered. See *Giafranco Manenti & another v AMACO Ltd* (2019) eKLR, *Arun Sharma* (supra).
 26. Concerning the interest of justice, the applicant’s affidavit was scanty on details. Written submissions however forceful cannot replace evidence. An affidavit is sworn testimony. A party who omits factual details cannot purport to fill in the gaps through written submissions.
 27. In *RWW v EKW* (2019) eKLR, the court held that the two competing rights by the parties should be weighed so that none is prejudiced as it exercises its discretion on whether or not to grant the stay of execution.
 28. In considering whether or not to grant a stay, this court is also mandated to ensure the aims and intendment of the overriding objective under Sections 1A & 1B of the *Civil Procedure Act* are attained and the likely effects the stay would have on those objectives. See *John Gathauja Mundia v Francis Muriira alias Francis Mithika & another* (2016) eKLR, *Victory Construction v BM (a minor suing through next friend one PMM)* (2019) eKLR.
 29. As much as the application was filed within reasonable time, I still find the same filed by a law firm improperly before court. It is not enough to file a notice of change of advocates and attach a purported consent without an application for leave as provided under Order 9 Rule 9 *Civil Procedure Rules*. That notwithstanding the application still lacks merits and is hereby dismissed with costs.



**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF
NOVEMBER, 2022**

In presence of:

C/A: Kananu

Mrs. Mutegi for plaintiff

Mwiti for defendant

HON. C.K. NZILI

ELC JUDGE

