



**Musau v Seme & another (Miscellaneous Application 39 of 2021)
[2022] KEELC 14974 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14974 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 39 OF 2021
A NYUKURI, J
NOVEMBER 23, 2022**

BETWEEN

BENJAMIN MUSYOKI MUSAU APPLICANT

AND

REBECCA NYABIYA SEME 1ST RESPONDENT

TIMOTHY MUTHIANI MUSAU 2ND RESPONDENT

(Being an application for stay of execution of the judgement and orders of the SPM Kangundo in ELC Case Number 76 of 2020 delivered on June 2, 2021 .)

RULING

Introduction

1. On June 18, 2021, the applicant approached this court by way of a Miscellaneous Application seeking for stay of execution of the judgement and orders of the SPM Kangundo in ELC Case Number 76 of 2020 dated June 2, 2021 pending hearing and determination of “the appeal”.
2. The application is premised on the supporting affidavit of Benjamin Musyoki Musau the Applicant sworn on June 16, 2021. The applicant’s case is that he is aggrieved with the judgment of the SPM Kangundo in ELC Case Number 76 of 2020 delivered on June 2, 2021 and intends to appeal against the same. His position is that the intended appeal has high chances of success and if execution proceeds the intended appeal will be rendered nugatory.
3. He further averred that although he had filed witness statements in the lower court, he was never given opportunity to give his evidence as the court directed that the suit was to proceed by way of submissions. That the suit proceeded by way of written submissions and judgment was entered on consideration of the same, in favour of the 1st Respondent. The Applicant argues that land is a precious



commodity and that there is a likelihood of change of title to his detriment. He also stated that no prejudice will be suffered by the 1st Respondent as she was in occupation of the suit property.

4. The application was opposed. Rebecca Nyabiya Seme, the 1st Respondent filed a replying affidavit on July 8, 2021 in opposition to the application. It was the 1st Respondents case that she proved her claim for adverse possession before the trial court by producing the land sale agreement and evidence of her occupation of the suit land from 2009 to date. She also stated that the applicant's advocate fully participated in the proceedings before the lower court including the proceedings allowing the hearing of the suit by written submissions and the same was made by consent. Her position was that the application was defective and a delaying tactic intended to delay the 1st Respondent from enjoying the fruits of her Judgement. She was of the view that if the application is allowed, the applicant be ordered to deposit the title of the suit property in court and deposit Kshs 500,000/- as security for costs.
5. In a rejoinder, the Applicant filed a supplementary affidavit on September 20, 2021. She stated that as the court did not allow parties to be cross examined on their evidence, the judgment was flawed. His position was that an order for costs is discretionary.
6. The application was disposed of by way of written submissions. On record are the Applicants submissions dated November 10, 2021 and the Respondents submissions dated December 16, 2021, both of which this court has considered.

Analysis and Determination

7. I have carefully considered the application, the supporting and supplementary affidavits together with replying affidavit and the submissions. The issue that falls for determination is whether the applicant has met the threshold for grant of stay pending appeal.
8. The power of the court to grant stay of execution pending appeal is provided for in order 42 rule 6 of the *Civil Procedure Rules* which provides as follows;
 - i. In 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 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.**
 - ii. No order of stay of execution shall be made under sub-rule (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.
9. Essentially, for an order of stay of execution pending appeal to be granted an applicant must demonstrate that he has an appeal and that if stay is not granted, the applicant may suffer substantial loss. The application must be filed without unreasonable delay.



10. I have perused the application and there is no evidence that the applicant, who also referred to himself as the appellant, had filed any appeal. Indeed, his prayer is for stay pending “the appeal” which he also refers to as intended appeal.
11. My understanding of the provisions of order 42 rule 6 is that before the court grants stay of execution pending appeal, the Applicant must show that he has a pending appeal. In the instant case, the lower court delivered Judgment on June 2, 2021. Instead of filing an appeal and seeking within the appeal, prayers for stay of execution pending appeal, the Applicant filed the Miscellaneous application herein on June 18, 2021, seeking stay without filing an appeal. Clearly the route the applicant chose will not achieve anything as he is yet to file the appeal although he insists that he is aggrieved with the lower court judgement and intends to appeal against it. An intention however good, remains just that; until the intention is actualized, it is merely a dream and nothing more.
12. As there is no appeal upon which the application herein can be predicted, the same remains ungrounded, built on quicksand therefore incompetent.
13. In the premises, I strike out the application dated June 2, 2021 with costs to the 1st respondent.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Odhiambo for the 1st Respondent

Mr. Ndeto for the Applicant

Court Assistant – Josephine

