



REPUBLIC OF KENYA



**Maina v Wanjohi & 3 others (Environment & Land Case 502 of 2017)
[2022] KEELC 14904 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 502 OF 2017
JG KEMEI, J
NOVEMBER 17, 2022
(FORMERLY NAIROBI ELC NO. 1515 OF 2014)**

BETWEEN

JULIUS GATOTO MAINA PLAINTIFF

AND

JOHNSON GAI THO WANJOHI 1ST DEFENDANT

JACKSON MAINA RITHIA 2ND DEFENDANT

THIKA LAND REGISTRAR 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The 1st Defendant/Applicant filed Notice of Motion dated 25/1/2022 seeking the following orders:-
 - a. Spent
 - b. Spent
 - c. That there be a stay of execution of the Judgment delivered on December 16, 2021, the Decree therein and all the consequential orders thereto, pending the hearing and determination of the intended Appeal by the Applicant.
 - d. That the costs of this application be in the cause.
2. The application is premised on the grounds annexed thereto and the Supporting Affidavit of the Applicant, Johnson Gaitho Wanjohi sworn on 26/1/2022. The Applicant deponed that he is dissatisfied with the Judgment delivered on December 16, 2021 and has preferred an appeal against the said Judgment.



3. It was the Applicant's case that he resides on the suit land with his family and if the orders sought are not granted he stands to be evicted from the suit land thus occasioning him loss and irreparable harm.
4. The Applicant further deponed that he is ready and willing to furnish security as the Court may deem fit pending the hearing and determination of the Appeal.
5. In addition that his appeal has high chances of appeal and in the event that the Decree is executed the intended appeal would be rendered nugatory.
6. Finally he urged the Court to preserve the subject matter of the intended appeal and grant the orders sought.
7. In opposing the application the Respondent/1st Plaintiff contended that he was adjudged as the rightful owner of the land and should be allowed to enjoy the fruits of the Judgment. That the 1st Defendant / Applicant has defied orders of the Court granted on 18/3/2015 restraining the 1st Defendant from developing the suit premises pending the hearing of the suit. That the application for stay of execution is intended to deprive him of his property that legally belongs to him. That the continued trespass of the Applicant on the suit land is detrimental to him.
8. The parties canvassed the application by way of written submissions which I have read and considered.
9. The key issue for determination is whether the application is merited.
10. For one to succeed in an application for stay of execution one must satisfy the conditions set out in Order 42 rule 6 which are-

“ 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 Applicants 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 Applicants.

3.

4.

5.

6. Notwithstanding anything contained in subrule (1) of this Rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a Subordinate Court or Tribunal has been complied with.”

11. In this case the Judgment was rendered on December 16, 2021 and this Notice of Motion was filed on 25/1/2022 thus timeously.



12. With respect to proof of substantial loss, it is evident that the Plaintiff was adjudged the rightful owner of the suit land. The Plaintiff has initiated steps to evict the 1st Defendant. I am therefore satisfied that the Applicant has demonstrated substantial loss. If eviction orders are granted the appeal shall be rendered nugatory.
13. With respect to security for the due performance of the Decree, it is trite that the Court has discretion to grant the same and in the circumstances of this case, I order the Applicant to deposit the sum of Kshs. 100,000/- to meet the same.
14. Final orders-
 - a. The application is allowed in terms of prayer (a).
 - b. The Applicant to deposit in Court Kshs 100,000/- being security for the due performance of the Decree within a period of 30 days from the date hereof.
 - c. In default of b above the orders shall be deemed to have lapsed.
 - d. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms Wanjiku HB Gachie for Plaintiff

Wachira HB Kanyi for 1st Defendant

2nd, 3rd and 4th Defendants – Absent

Court Assistant – Kevin

