



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Muniu & 9 others (Environment and Land Appeal
E011 of 2022) [2022] KEELC 14811 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14811 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E011 OF 2022**

JG KEMEI, J

NOVEMBER 10, 2022

BETWEEN

PETER MBUGUA KAMAU APPELLANT

AND

IRENE NJERI MUNIU 1ST RESPONDENT

**PATRICK NYOTA NJOROGE (SUING ON BEHALF OF THE ESTATE OF BETH
MUTHONI KABIRU) 2ND RESPONDENT**

ANTHONY WAMUTU KIARIE 3RD RESPONDENT

DANIEL KARIMI NDUNGU 4TH RESPONDENT

JOHN WANJAU MAGUTA 5TH RESPONDENT

GABRIEL KAMAU GITAU 6TH RESPONDENT

MULTIPLE GLOBAL (K) LTD 7TH RESPONDENT

OLIVIA NYAKERARIO 8TH RESPONDENT

CHIEF LAND REGISTRAR, THIKA 9TH RESPONDENT

ATTORNEY GENERAL 10TH RESPONDENT

RULING

1. The appellant/applicant filed the instant Motion dated 30/5/2022 primarily under sections 79G and 3A *Civil Procedure Act* and Order 42 Rule 6 *Civil Procedure Rules* seeking an Order That;
 - a. Spent.
 - b. Spent.



- c. An order of stay of implementation of the decree of 07/04/2022 issued by Hon. C.a. Otieno-omondi at Ruiru in the Magistrate's Court in MCLE No. E022 of 2020 do issue pending the hearing and determination of the Appeal herein.
 - d. Spent.
 - e. A temporary injunction do issue restraining the Respondents whether by themselves, their agents, auctioneers, servants and/or employees from evicting, selling or offering for sale, transferring, charging, leasing or pledging or in other way alienating or disposing off the property known as L.R Ruiru/ruiru East Block 2/841 & 842 (now subdivided into 2/32365 – 32380 & 34654 – 34669) pending inter partes hearing of the Appeal.
 - f. The Judgment and consequential orders delivered on the January 14, 2022 by Hon. C.a Otieno-omondi at Ruiru in the Magistrate's Court in MCLE No. E022 of 2020 be stayed and/or set aside until this Appeal is heard and determined.
 - g. Any other relief that the honorable court deems fit in the interest of justice.
 - h. Costs of this Application be provided for.
2. The Application is based on the grounds on the face of it and supporting affidavit of even date of the applicant, Peter Mbugua Kamau. He deposed that he is aggrieved with the trial Court Judgment delivered on 14/1/2022 against him that revoked the title deeds for property known as L.R Ruiru/ruiru East Block 2/841 & 842 now subdivided into 2/32365 – 32380 & 34654 – 34669 (hereinafter the suit properties). That his Advocates, Musa Boaz and Thomas Advocates promptly filed PMK6, a Memorandum of Appeal and now awaiting certified copies of typed proceedings to file Record of Appeal - See PMK 3 copies of the request and receipt for payment. That the deponent sold to the 4th respondent some parcel of the suit properties and have built their homes thereon as demonstrated by photographs marked PMK4 and evicting them would render them destitute and homeless. That unless his Application is allowed, he and his family stand to suffer irreparable harm and his appeal will be rendered nugatory.
 3. The Application is opposed. The 1st respondent Irene Njeri Muniu swore an undated Replying Affidavit on behalf of the 2nd respondent as well. She denied any knowledge of the applicant's appeal since she was not served with any Notice of Appeal (sic) within the prescribed time. That PMK3 shows that the applicant applied for typed proceedings on 16/5/2021 (sic) and therefore the applicant's intention is to deny the respondents fruits of their Judgment. That it is not true that the applicant lives on the suit land as pleaded and the photographs annexed as PMK4 belong to the 4th respondent's house who participated in the trial case. She denied any irreparable loss that the applicant claims and added that any loss he might suffer can be adequately compensated by way of damages. She beseeched the court to dismiss the Application with costs.
 4. In a rejoinder, the applicant filed a further affidavit dated 13/7/2022. He reiterated that he sold some of the suit properties to various respondents herein and indeed he lives on the suit land. That he timeously filed his appeal and served the respondent's counsel herein contrary to the 1st respondent's allegation that she has never been served.
 5. The 3rd – 10th respondents did not file any responses.
 6. The Application was canvassed by way of written submissions. The applicant through the firm of Musa Boaz and Thomas Advocates filed submissions dated 13/7/2022. He submitted that the principles for



granting stay of execution were established in the Court of Appeal case of *Kenya Shell Limited v Kibiru & another* [1986] eKLR and Order 42 Rule 6(2) *Civil Procedure Rules*.

7. On the issue of substantial loss, he reiterated that he stands to suffer grave loss if he is evicted from his home on the suit land. That in the event his appeal succeeds without an order of stay of execution, he would have suffered irreparable loss that cannot be compensated by way of damages.
8. On whether the Application was filed without undue delay, the Applicant maintained that it was so filed on 30/5/2022 since the interim stay of execution of sixty days by the trial Court had lapsed. On the issue of security for costs, the applicant relied on the Court of Appeal case of *Ndubiu Gitari vs Warugongo* [1988] KLR 621 that security can take any form as long as it is adequate and to that end, the Applicant is ready and willing to abide by any conditions for security as the Court may deem fit.
9. The firm of Kamau Mwangi & Co. Advocates filed the 1st and 2nd respondents' submissions dated 26/7/2022. They rehashed the background of the case and trial court proceedings. Highlighting the provisions of Order 42 Rule 6 *Civil Procedure Rules*, the Respondents accused the applicant of inordinate delay in filing the instant Application and for failing to give any plausible explanation. That he has not demonstrated arguable grounds in his intended appeal and how he stands to suffer substantial loss. That execution itself does not amount to substantial loss because it is a lawful exercise and an applicant must establish other factors to show that execution will create a state of affairs that will irreparably negate the essential core of the Applicant as the successful party in the appeal. The case of *James Wangalwa & anor v Agnes Naliaka Cheseto* [2012] eKLR was cited in support of that proposition. The upshot of the submissions was that the applicant has not met the threshold to grant the prayers sought and thus the Application should be dismissed with costs.
10. The main issue for determination is whether the Application is merited.
11. The legal provisions for stay of execution are anchored in Order 42 Rule 6 of the *Civil Procedure Rules* that;

“6. Stay in case of appeal [Order 42, Rule 6.]

- (1) 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 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 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.”



12. It is trite that for an applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the Application and the furnishing of security.
1. 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.
14. With respect to substantial loss, it is trite that an applicant must lead evidence to demonstrate the substantial loss that s/he is likely to suffer if the Application is not granted. The applicant submitted that the danger of his appeal being rendered nugatory constitutes substantial loss on his part. The courts have been consistent that execution alone does not constitute substantial loss. See the case of *James Wangalwa supra* and *Machira T/A Machira & Company Advocates v East African Standard (No 2)* 2002 2 KLR where 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. In this case, the suit was dismissed with costs to the respondents and the trial court judgment upheld.
15. The applicant wishes to appeal against the Judgment of the trial court delivered on 14/1/2022. Copy of the Judgment was not attached but a decree dated 7/4/2022 was annexed as PMK2. On the issue of substantial loss, the applicant submitted that the interim stay of execution of sixty days already lapsed and the 1st and 2nd respondents will carry out evictions any time now and render him homeless.
16. I am satisfied that the applicant has demonstrated the substantial loss that he stands to suffer if the eviction is allowed.
17. The application was filed after about 2 months after the expiry of the stay of execution orders issued by the lower court. I find the delay in filing the application was not inordinate. I say so because the circumstances of each case must be looked into in assessing whether or not delay was inordinate. In this case the applicant has stated that the court had issued him with 60 days and he filed the application after the 60 days as he was awaiting the typed proceedings. I do not share the applicants reasons for delay in obtaining typed proceedings because he did not require the same to file the application. That said despite the inadequacy in the explanation, I still hold that the delay in the circumstances was not



inordinate. I am fortified in so saying by the decision of the court in In the case of *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR the Court held thus;

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

18. It is trite that the provision of security for the due performance of the decree is within the discretionary purview of the court. In this case I shall make the final orders in the end.
19. Final orders;
 - a. The application is allowed on terms that the applicant shall provide the sum of Kshs 150,000/- (Kenya Shillings One Hundred and Fifty Thousand Only) for the due performance of the decree which sums shall be deposited in an interest earning account in the joint names of the appellant and the 1st and 2nd respondents counsel within 30 days in default the orders shall automatically lapse with no further orders of this court.
 - b. Costs shall be in favour of the 1st and 2nd Respondents.
20. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 10TH DAY OF NOVEMBER,
2022 VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Mathenge HB Tumu for Appellant

1st and 2nd Respondents – Absent

3rd – 10th Respondents – Absent

Court Assistants – Phyllis / Kevin

