



**Njoki & 3 others v Kamau (Environment and Land Appeal E020 of 2021)
[2022] KEELC 15542 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E020 OF 2021
LN GACHERU, J
DECEMBER 20, 2022**

BETWEEN

**NANCY NJOKI 1ST APPLICANT
ANTHONY IRUNGU 2ND APPLICANT
ALEXANDER IRUNGU KIRAGU 3RD APPLICANT
MWANGI MACHARIA 4TH APPLICANT**

AND

PHILIS WAIRIMU KAMAU RESPONDENT

RULING

1. The matter for determination is an application dated May 12, 2022 seeking stay of proceedings pending the hearing and determination of the appeal. The application was made on the grounds that the applicant occupies LOC13/Gakoe/901 (the suit property) and that the respondent has removed a caution on the suit property with the intention of selling it. Lastly, that the respondent had issued an eviction notice to the applicant. The applicant states that should the stay not be allowed, the appeal will be rendered nugatory.
2. The application was supported by the affidavit of the 1st appellant who averred that she resides on the suit property and has a corresponding green-card for the said land. She states that the respondent intends to defeat the appeal by selling the suit property.
3. The application was opposed by Philis Wairimu Kamau *vide* a replying affidavit dated May 30, 2022 wherein she avers that the application lacks merit and has been overtaken by events since the suit property no longer exists following its sub-division. She states that judgement was entered on November 9, 2021, and a decree issued on November 19, 2021, directing the Land Registrar-Murang'a to remove the caution lodged by the applicants against the suit property. That the caution was



later removed on November 12, 2021 . Following the removal, the suit property was sub-divided on February 17, 2022, into three parcels namely LOC13/Gakoe/2052, LOC13/Gakoe/2053, and LOC13/Gakoe/2054.

4. The respondent states that in March 2022, she gifted LOC13/Gakoe/2052, to Leah Kariuki and sold LOC13/Gakoe/2053 to Peter Kariuki, while she occupies LOC13/Gakoe/2054. The respondent further avers that she has not issued an eviction notice to the appellants nor is she planning to sell the suit property. The respondent completely dissociates herself with the claims in the applicant's affidavit. She prays that the application be dismissed with costs. In its judgment delivered on November 9, 2021, the trial magistrate ordered the removal of the cautions lodged on the suit property.

5. The matter was canvassed through written submissions. The applicant through R M Njiraini & Co Advocates, filed their submissions in support of the application on July 26, 2022. They relied on the following authorities:

a. On the issue of whether this court ought to grant stay of execution, the applicants relied on the case of [Peter Nakupang Lowar v Nautu Lowar \(2022\) eKLR](#) where the court held:

“The purpose of an order of stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject is not maintained before the determination of the appeal, then it would render the appeal nugatory or an academic exercise. I agree with the decision of the court in [RWW v EKW \(2019\) eKLR](#) where it was held:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded in the event the appeal is successful, is not rendered nugatory. However, in doing so, the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his or her judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

6. The respondent through Githiga Kimani Advocates filed her submissions opposing the application on July 8, 2022. Having considered the pleadings and submissions, this court finds that the issues for determination is;

1. Whether the applicants have met the threshold for the grant of stay of execution pending appeal?

In an application for stay of execution pending an appeal, courts are guided by order 42 rule 6 of the [Civil Procedure Rules](#), which provides the principles to be considered before a court may grant such stay of execution. It states as follows:

(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 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 reading the dictum in the case of *Global Tours & Travel Ltd Vs Five Continents Travel Ltd* Ringera, J (as he then was) held that in determining whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay or not, the court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not, but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.
8. This court is further guided by the case of *RWW v EKW (2019) eKLR*, where the court held that the purpose of an application for stay of execution pending an appeal, is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. The appellants/applicants need to satisfy the court they have fulfilled all the following conditions before they can be granted the stay orders they are seeking. These are:-
 - a. Sufficient cause of action;
 - b. Substantial loss may result to the applicant unless the order is made,
 - c. The application has been made without unreasonable delay, and
 - d. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.(See the ELC Case at Mombasa *Mohamed Alwy & another v En Group (K) International Limited [2022] eKLR*).
9. In granting the orders of stay of execution, the court is called to strike a balance between the right of the appellant to appeal and the respondent right to enjoy the fruits of this judgement. Furthermore, these four (4) conditions set out above must all be present. In the case of *Tabro Transporters Ltd v Absalom Dova Lumbasi (2012)eKLR* it was held:

“These conditions are the essence of order 42 rule 6 of the *CPR*. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution.”
10. In the instant application, the appellants/applicants have argued that the justification for grant of stay of proceedings is that they stand to lose the suit property despite the deputy registrar having already removed a caution on the property and signing documents permitting the suit property’s eventual sub-division. Undisputedly, execution is a process of law and itself being in motion is not a ground for granting stay. The sufficient cause and substantial loss elements raised by the applicants have been



defeated through the applicants' unreasonable delay. This paints a picture of applicants who have brought this application as merely an afterthought, meant to delay and/or frustrate the respondent. The length of delay between the ruling and the applicants filing of the instant application for stay, is five months within which period execution commenced. Furthermore, the delay has not been explained. The applicants having failed to discharge the burden of satisfactorily explaining the delay, are therefore not entitled to exercise of discretion (See [Edgar Namusende Likono v Isaac Khalisia Bubishi \[2021\] eKLR](#)).

11. Having carefully considered the instant notice of motion dated May 12, 2022, the court finds it not merited and the said application is dismissed entirely with costs to the respondent. Let the applicant prepare the record of appeal as earlier directed by the court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 20TH DAY OF DECEMBER 2022.

L GACHERU

JUDGE

Delivered virtually;

In the presence of

Mr Njiraini for the appellant/applicant

No appearance for the respondent

Joel Njonjo Court Assistant

L GACHERU

JUDGE

