



**Nyanjui & another (Suing on their own behalf and as the legal representatives  
of Arthur Nyanjui Gichuhi) v Gitau (Environment & Land Case  
103 of 2012) [2021] KEELC 4612 (KLR) (28 January 2021) (Ruling)**

*Joyce Wanjiru Nyanjui & another (Suing on their own behalf and as the legal  
representatives of Arthur Nyanjui Gichuhi) v Joseph Chege Gitau [2021] eKLR*

Neutral citation: [2021] KEELC 4612 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 103 OF 2012  
DO OHUNGO, J  
JANUARY 28, 2021**

**BETWEEN**

**JOYCE WANJIRU NYANJUI AND SERAH WAMBUI NYANJUI (SUING  
ON THEIR OWN BEHALF AND AS THE LEGAL REPRESENTATIVES OF  
ARTHUR NYANJUI GICHUHI) ..... PLAINTIFF**

**AND**

**JOSEPH CHEGE GITAU ..... DEFENDANT**

**RULING**

1. Judgment was delivered herein on 24<sup>th</sup> September 2020 as follows:
  - a) The plaintiff's suit is dismissed.
  - b) It is hereby declared that as between himself and the plaintiffs, the defendant is the proprietor of the parcel of land known as Subukia/Subukia Block 12/372 (Arash).
  - c) The plaintiffs, their children, agents and servants to vacate the parcel of land known as Subukia/Subukia Block 12/372 (Arash) within 45 (forty five) days from the date of delivery of this judgment. In default, the defendant to evict them.
  - d) A permanent injunction is hereby issued restraining the plaintiffs by themselves, their children, agents or servants from entering into, remaining in, cultivating, leasing or in any other way interfering with the parcel of land known as Subukia/Subukia Block 12/372 (Arash). The injunction shall become operational on the 46<sup>th</sup> (forty sixth) day from the date of delivery of this judgment or upon the plaintiffs vacating the property, whichever is earlier.



- e) The defendant shall have costs and interest thereon in respect of both the suit and the counterclaim.
2. Being dissatisfied with the judgment, the plaintiffs lodged Notice of Appeal on 7<sup>th</sup> October 2020 followed by Notice of Motion dated 15<sup>th</sup> October 2020, which is the subject of this ruling. The plaintiffs seek stay of execution pending the hearing and determination of their appeal to the Court of Appeal.
  3. The application is supported by an affidavit sworn by Joyce Wanjiru Nyanjui. She deposed that if the orders of stay are not granted, then they stand to be evicted from the suit property and that they shall suffer irreparable loss and damage.
  4. The defendant opposed the application through a replying affidavit in which he deposed that the plaintiffs have not put up any physical developments on the suit land and that they don't cultivate it and so they would not suffer any substantial loss if an order of stay of execution is not granted.
  5. The application was canvassed through written submissions which both sides duly filed and exchanged. The plaintiffs submitted on two issues. One, that they should be granted stay of execution pending an intended appeal on the ground that they have lived on the suit property uninterrupted for a long time and have built permanent houses as well as other developments. They further submitted that if the judgment is executed, they will be evicted and will suffer substantial loss. The second issue is whether the application was filed without undue delay. They submitted that they filed the present application without undue delay adding that they were vigilant and moved the court with speed.
  6. The respondent submitted on two issues. Firstly, on the criteria to be applied in granting an order for stay pending appeal, he argued that the plaintiffs addressed the court on the criteria used in the Court of Appeal under Rule 5(2)(b) of the rules of that court instead of the test applicable before this court. Arguing that the application was based on a wrong foundation, the respondent contended that it must crumble. Secondly, the respondent argued that the applicants failed to satisfy the three mandatory conditions for grant of stay pending appeal under Order 42 rule 6 of the Civil Procedure Rules.
  7. I have considered the application, the affidavit and the submissions. This court's jurisdiction to grant stay of execution pending appeal is guided by Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which provides as follows:
    - 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.



8. In other words, an applicant seeking stay of execution pending hearing and determination of an appeal must demonstrate that substantial loss will result to her if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted. Further, the applicant is required to give such security as the court may order for the due performance of the decree.
9. There is no dispute that the applicants have been in occupation of the suit property. Indeed, the respondent stated in his counterclaim that they have been occupying the suit property since 1990. It is for that reason that he sought their eviction. I agree with the applicants that their eviction from the suit property will constitute substantial loss.
10. The second condition to be fulfilled by the applicants is that the application be brought without unreasonable delay. The judgment in this matter was delivered on 24<sup>th</sup> September 2020 and the present application was filed on 21<sup>st</sup> October 2020. The respondent has conceded in his submissions that the applicants brought the application was made without unreasonable delay.
11. The third issue is security for due performance of the decree. While it is true that the applicants have not offered any security, the court can impose such security as is appropriate. Save for the aspect of costs, the decree herein is not a money decree. I have no intention to monetarize it beyond the issue of costs. I will therefore impose a condition that the applicants deposit in court as security, such sum as will be determined as the party and party costs of this suit. Further, to ensure that the appeal is prosecuted timeously, I will limit the life of the stay orders which I will make.
12. In view of the foregoing, I am persuaded that the applicants are deserving of the order of stay pending appeal. I therefore make the following orders:
  - a) I grant stay of execution of the judgment and decree herein pending hearing and determination of the plaintiffs' appeal to the Court of Appeal.
  - b) Costs of this application are awarded to the defendant.
  - c) The stay is conditional on the plaintiffs depositing in court such sum as will be determined to be the party and party costs of this suit.
  - d) The deposit to be made within 21 (twenty one) days of the costs being taxed. In default, the stay orders shall automatically lapse and Notice of Motion dated 15<sup>th</sup> October 2020 shall stand dismissed with costs to the defendant.
  - e) The stay orders shall, if the applicants comply with the conditions in (c) and (d) above, remain in force for a period of only 2 (two) years from the date of delivery of this ruling, unless otherwise extended.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF JANUARY 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Koome for the plaintiffs/applicants



Mr Mbiyu holding brief for Mr Mutonyi for the defendant/respondent

Court Assistants: B. Jelimo & J. Lotkomoi

