



**Mwangi v Mwangi & another (Environment and Land Appeal
E005 of 2020) [2021] KEELC 4747 (KLR) (4 March 2021) (Ruling)**

Neutral citation: [2021] KEELC 4747 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E005 OF 2020**

YM ANGIMA, J

MARCH 4, 2021

BETWEEN

NAOMI MUTHONI MWANGI APPELLANT

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

JOHN MGONYOKU MWANGI 2ND RESPONDENT

*(Being an appeal against the entire judgment delivered by Hon. Daffine Nyaboke Sure SRM on
14th October, 2020 in Engineer Senior Principal Magistrates Court ELC Case No. 30 of 2018)*

RULING

A. Introduction

1. By a notice of motion dated November 11, 2020 based upon sections 1A, 1B & 3A of the [Civil Procedure Act](#) (cap 21), order 42 rule 6 and order 51 rule 1 of the [Civil Procedure Rules, 2010](#) (the Rules), and all enabling provisions of the law, the appellant sought a stay of the judgment and decree of Hon DN Sure (SRM) in Engineer SPMCC No 30 of 2018 –John Ngonyoku Mwangi v Naomi Muthoni Mwangi & Another pending the hearing and determination of the appeal.

B. The Appellant's Case

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the appellant on November 11, 2020. The appellant contended that she was dissatisfied with the judgment and decree of the trial court and that she had an arguable appeal. She further contended that she stood to lose the suit property of which she was the registered owner unless the order of stay of execution was granted. The appellant also contended that the 1st respondent shall not suffer any prejudice should the stay sought be granted pending the hearing and determination of the appeal.



C. The 1st Respondent's Response

3. The 1st respondent filed a replying affidavit sworn on December 21, 2020 in opposition to the said application. He stated that he was the registered proprietor of the suit property and that he had been in continuous possession thereof for more than 30 years.
4. The 1st respondent further contended that the appellant had not made out a case for the grant of stay pending appeal and that the appellant had purported to acquire the suit property through fraudulent means. He further contended that the pending appeal had no chances of success and that the appellant had not given any undertaking to pay damages and costs should she lose in the appeal. He, therefore, urged the court to dismiss the application with costs.

D. Directions On Submissions

5. When the application was listed for inter-partes hearing on January 20, 2020 it was directed that the same shall be canvassed through written submissions. The parties were given 7 days each to file and serve their respective submissions. However, by the time of preparation of the ruling none of the parties had filed any submissions.

E. Issues For Determination

6. The court has considered the appellant's notice of motion dated November 11, 2020 together with supporting affidavit and annexures thereto and the replying affidavit in opposition thereto. The court is of the opinion that the following issues arise for determination:
 - (a) Whether the appellant has made out a case for the grant of stay pending appeal.
 - (b) Who shall bear the costs of the application.

F. Analysis and Determination

(a) Whether The Appellant Has Made Out A Case For Stay Pending Appeal

7. The appellant's application was essentially grounded upon order 42 rule 6(2) of the Rules which stipulates as follows:

“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 the case of Butt v Rent Restriction Tribunal [1979] eKLR where the court was dealing with stay of proceedings pending appeal it was held, *inter alia*, that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way



so as not to prevent the appeal, if successful, from being nugatory. Per Brett LJ in *Wilson v Church* (No 2) 12 Ch D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

9. The court is of the opinion that the main question for consideration is whether the appellant has satisfied the requirements for stay as set out in order 42 rule 6(2) of the *Rules* and whether it is just in the circumstances to grant a stay pending appeal. There is no doubt that the application for stay was filed without undue delay. What has to be considered is whether or not the appellant has demonstrated the element of substantial loss as required by law. Although the appellant did not directly canvass the element of substantial loss in her application and supporting affidavit, she stated that she was apprehensive that she might lose the suit property and that the appeal might be rendered nugatory should the stay not be granted.
10. There was, however, no demonstration of how the pending appeal shall be rendered nugatory if the stay sought is not granted. The material on record shows that the 1st respondent was the registered proprietor of the suit property until December 20, 2017 when the appellant claimed to have purchased it. The 1st respondent appears to have been in possession of the suit property for a very long time. The appellant did not dispute the contents of the replying affidavit that the 1st respondent has been in possession for over 30 years. The material on record further shows that the 1st respondent has always been in possession of the original title deed to the suit property which he produced at the trial of the action.
11. The court is thus unable to appreciate how the pending appeal can be rendered nugatory if the stay sought is not granted. It was not suggested that the suit property shall not be available or recoverable upon conclusion of the appeal. In the premises, the court is not satisfied that the appellant has demonstrated the risk of substantial loss as required by law hence she is not entitled to the order of stay sought.

(b) Who Shall Bear Costs Of The Application

12. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the even in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the 1st respondent shall be awarded costs of application.

G. Conclusion and Disposal Order

13. The upshot of the foregoing is that the court finds no merit in the appellant’s notice of motion dated November 11, 2020. Accordingly, the same is hereby dismissed with costs to the 1st respondent. The parties are at liberty to take steps to list the appeal for directions under order 42 of the *Rules*.

Orders accordingly.

RULING DATED AND SIGNED NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 4TH OF MARCH, 2021.

In the presence of:



Mr Kariuki Mwaniki for the appellant.

Mr Wandaka for the 1st respondent.

Mr Ondieki for the 2nd respondent.

Court Assistant- Carol.

YM ANGIMA

JUDGE

04.03.2021

