



Munuhe (Suing as the legal and personal representative of the Estate of the Late Lucy Wanjiru Munuhe) v Wagacha (Environment and Land Miscellaneous Application 114 of 2017) [2024] KEELC 5276 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 114 OF 2017**

A NYUKURI, J

JULY 10, 2024

(FORMERLY ELC MISC. NO. 44 OF 2015 AT NAIROBI (OS))

**IN THE MATTER OF AN APPLICATION UNDER
SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

AND

IN THE MATTER OF LAND PARCEL NO. L.R. 20604/134 AT MAVOKO MUNICIPALITY

BETWEEN

**CHRISTOPHER MWANGI MUNUHE (SUING AS THE LEGAL AND
PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE LUCY
WANJIRU MUNUHE) PLAINTIFF**

AND

WAMBUI WAGACHA DEFENDANT

RULING

Introduction

1. Before court is a notice of motion dated 24th August 2023 filed by the plaintiff in this matter, seeking orders of stay of execution of the judgment delivered herein pending hearing and determination of Appeal No. E669 of 2023.
2. The application is supported by the affidavit sworn by Christopher Mwangi Munuhe the applicant herein. The applicant's case is that he was dissatisfied with the judgment herein delivered on 5th July 2023 whereof he filed a notice of appeal on 13th July 2023 and filed a Memorandum of Appeal to the Court of Appeal on 22nd August 2023 vide Appeal No. E669 of 2023. He stated that he was



- apprehensive that the defendant shall proceed with eviction during the vacation and he will end up being evicted from the suit property.
3. According to the applicant, the intended appeal will be rendered nugatory if stay of execution is not granted as the same has high chances of success. He stated that he stands to suffer irreparable injury that cannot be compensated with money if stay is not granted because this is a land matter which is emotive and sensitive. He attached a copy of the Notice of Appeal; a Memorandum of Appeal and receipt from court.
 4. The application was opposed. The defendant filed a replying affidavit dated 15th September 2023. She stated that the application herein was defective and incompetent as the decree and judgment sought to be stayed had not been attached to the application; and that the reliefs sought had been comingled as a prayer to be heard during vacation ought to have been sought by way of chamber summons, while the prayer for stay of execution of judgment ought to have been sought vide a notice of motion.
 5. She averred that the applicant had not sought for a prayer capable of being granted and the court cannot grant what was not sought.
 6. Regarding the threshold for grant of stay of execution, she asserted that the application lacked merit for failure to meet the legal test of Order 42 Rule 6 of the *Civil Procedure Rules*. She stated that the applicant had not demonstrated sufficient grounds to disturb the judgment, within the Memorandum of Appeal, as he failed to state issues of fact and law by failing to provide justifications for his assertions that this court was wrong.
 7. It was the defendant's position that the application had not been timeously filed as the applicant waited for 50 days after delivery of judgment to seek stay of execution, without offering any explanation.
 8. She averred that the applicant had not demonstrated that he will suffer substantial loss if the orders sought are denied as his were mere assertions with no empirical evidence. She referred the court to the decisions in the cases of *Kenya Shell Limited v. Benjamin Karuga Kiburu & Another* [1986] eKLR and *Charles Wabome Gethi v. Angella Wairimu Gethi* [2008] eKLR to buttress her position.
 9. She argued that she was the one who stands to suffer substantial loss if the orders sought are granted as she will be precluded from enjoying the fruits of her judgment and that from the supporting affidavit and Memorandum of Appeal, the applicant lacks financial capacity to pay the awarded damages.
 10. The defendant further argued that the applicant did not deserve the orders sought as he had not indicated any readiness to provide security. She stated that the applicant was not entitled to orders sought as he was in contempt of court orders by failing to vacate the suit property.
 11. The application was disposed by way of written submissions. On record are submissions filed by the applicant on 19th October 2023 and submissions filed by the defendant on 12th October 2023 both of which had been duly considered.

Analysis and determination

12. The court has carefully considered the application, the response and rival submissions. The sole issue that arise for determination is whether the applicant has met the threshold for grant of stay of execution pending appeal.
13. The jurisdiction of this court to grant stay of execution pending appeal is provided for in Order 42 Rule 6 of the *Civil Procedure Rules* 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 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 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.
14. Therefore, an applicant seeking stay of execution is under duty to demonstrate to the court's satisfaction that he or she stands to suffer substantial loss if the order of stay is not granted. In addition, an application for stay of execution pending appeal ought to be made without unreasonable delay. Besides, an applicant for stay pending appeal ought to provide security for the due performance of the decree.
15. The mere fact that execution is imminent does not entitle a party to stay of execution pending appeal, as execution is a lawful process in effecting a judgment or order of the court.
16. In this matter, the applicant alleged that he stands to suffer substantial loss if execution is granted because he has a Kshs. 10 million building on the suit property and secondly that he has an arguable appeal. On the issue as to whether the applicant has an arguable appeal, this court has already rendered itself on the issues in the matter and dismissed the applicant's claim and therefore it has no jurisdiction to comment on the merits of the appeal.
17. Whether there is substantial loss, the applicant alleged that he has a building worth Kshs. 10 million on the suit property. No valuation report was produced to support that allegation. In any event, the mere value of the alleged building cannot of itself be proof of substantial loss. The applicant has not suggested that the respondent will be unable to compensate him in the even he succeeds on appeal. Therefore I find and hold that the applicant has failed to demonstrate substantial loss.
18. On whether the application was filed timeously, the record shows that judgment was delivered on 5th July 2023. The application herein was filed on 24th August 2023. That is 50 days after judgment and 10 days before eviction. Can this be said to be without unreasonable delay? The applicant filed Notice of Appeal on 13th July 2023. No reasons were given for waiting until the 50th day to file the application. In my view therefore, the application was not filed timeously.
19. The upshot is that I find no merit in the application dated 24th August 2023 and the same is hereby dismissed with costs.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI



JUDGE

In the presence of:

Mr. Masiga for plaintiff/applicant

Mr. Oloo for the respondent

Court assistant – Josephine

