



**Musa & 3 others v Ndegwa (Environment & Land Case
E014 of 2022) [2024] KEELC 5055 (KLR) (3 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E014 OF 2022**

JO OLOLA, J

JULY 3, 2024

BETWEEN

FATUMA MUFTA ALI MUSA 1ST APPELLANT

ISMAEL MAFUTA 2ND APPELLANT

RUTH NJERI 3RD APPELLANT

TITUS MUTI 4TH APPELLANT

AND

HENRY MAINA NDEGWA RESPONDENT

RULING

1. By the Notice of Motion dated 26th July 2023, the four (4) Appellants urge the court to be pleased to grant a stay of execution of the Judgment/decree delivered on 12th April 2022 in Nyeri MELC Case No. 52 of 2019 pending the hearing and determination of the Appeal filed herein.
2. The application which is supported by an Affidavit sworn by the 1st Appellant – Fatuma Mufta Musa is based on the grounds that:-
 - a). On 12th April 2022, it was directed that the Appellants who were the Defendants be evicted from LR No. Nyeri Municipality/Block II/349;
 - b). The Judgment further issued a permanent injunction restraining the Appellants from dealing in any manner with the suit property;
 - c). The Appellants being aggrieved and/or dissatisfied with the said Judgment have lodged an Appeal which may be rendered nugatory;
 - d). The Appellants stand to suffer substantial loss if no stay of execution is granted; and



- e). There is need to preserve the substratum of the suit property which may change in terms of the Judgment appealed against pending the hearing and determination of the Appeal.
3. Henry Maina Ndegwa (the Respondent) is however, opposed to the application. In his Replying Affidavit sworn and filed herein on 18th September 2023, the Respondent avers that the application before the court is bad in law, a non-starter, incompetent and devoid of merit.
 4. The Respondent avers further that he is not aware of the existence of any Appeal as the Memorandum and Record of Appeal were never served upon him. It is further the Respondent's case that despite the Appellant's claim that they filed an Appeal on 11th May 2022, nothing had been brought forth as to any efforts they have taken to prosecute the same more than one (1) year down the line.
 5. The Respondent further avers that the Appellants have failed to explain why it has taken them over one year to bring the application seeking for stay of execution of the Judgment and asserts the application is merely an afterthought aimed at denying him the fruits of his Judgment.
 6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the parties herein.
 7. By their application before the court, the four (4) Appellants pray for an order of stay of execution of the Judgment delivered on 12th April 2022 in Nyeri MELC Case No. 52 of 2019 pending the hearing and determination of their Appeal.
 8. The law governing the issuance of orders for stay of execution pending Appeal is codified under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* which stipulates as follows:
 - “6
 - (1) No appeal or second appeal shall operate as a stay of execution of 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.”
 9. The above provision required an applicant seeking orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he/she stands to suffer substantial loss if the orders are not granted and lastly, that he/she is willing to furnish security for the due performance of the decree.



In addition, to the above conditions, an application for stay of execution pending an appeal must be made without unreasonable delay.

10. In the matter before me, it is not in dispute that the Appellants have been residing on a portion of the disputed parcel of land for quite some time and that the orders of eviction obtained by the Respondent in the Judgment obtained from the Lower Court shall uproot them completely from the land before the Appeal is heard and determined.

11. As was stated in *RWW - vs- EKW (2019)* eKLR:

“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.”

12. In the circumstances herein and balancing the interests of the Appellant with those of the Respondent, I am persuaded that it is in the interest of justice that a conditional order for stay of execution be granted herein.

13. Accordingly, I hereby allow the Motion dated 26th July 2023 on condition that the Appellants do deposit the sum of Kshs. 150,000/= as security in a joint interest earning account in the names of the Learned Advocates presently representing the parties with 45 days from today.

14. In default of the provision for security within the said 45 days, the Motion dated 26th July 2023 shall stand dismissed.

15. The costs of this application shall be in the Appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS WEDNESDAY 3RD DAY OF JULY, 2024.

In the presence of:

Ms. Maina holding brief for Muhoho for the appellant.

Mr. Gichuki for the Respondent.

Court Assistant: Michael

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J. O. OLOLA

JUDGE

