



REPUBLIC OF KENYA



**Kihara v Kihara & another (Environment & Land Case 159 of 2019)
[2024] KEELC 6997 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 159 OF 2019
A OMBWAYO, J
OCTOBER 16, 2024**

BETWEEN

DANIEL MWANIKI KIHARA APPLICANT

AND

ALFRED MWANIKI KIHARA 1ST RESPONDENT

ROSE WAMBUI KIHARA 2ND RESPONDENT

RULING

Brief Facts

1. The Defendant/Applicant filed the instant application dated 11th December, 2023 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of the appeal this Honourable Court be pleased to stay execution of the judgment delivered on 5th October, 2023 and/or any other orders issues therein and/or incidental therefrom.
 4. That the costs of this application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of ROSE WAMBUI KIHARA the Defendant/Applicant herein sworn on 11th December, 2023.
3. The Defendant/Applicant stated that the Plaintiffs/Respondents filed a suit against her and judgment was delivered on 5th October, 2023 in their favour. She stated that being aggrieved by the judgment, she filed a notice of appeal on 9th October, 2023. She stated that as advised by her advocates, she has an arguable appeal with high chance of success. She also stated that the Plaintiffs/Respondents may



execute the judgment which shall result in her being locked out of her land. She further stated that as advised, the intended appeal would be rendered nugatory if the orders sought are not granted. She stated that she is willing to abide by any reasonable conditions set by this court as a prerequisite to grant the orders sought. In conclusion, she stated that it would be fair and just that the orders sought be granted so as to allow her prosecute her appeal.

Response

4. The Plaintiffs/Respondents filed their Replying Affidavit sworn by the 1st Plaintiff/Respondent on 21st December, 2023. He averred that the present application was presented after inordinate delay with no explanation from the Defendant/Applicant. He averred that the Defendant/Applicant will not suffer any substantial loss if the decree is executed since she did not acquire the suit land for any consideration. He further averred that the court had directed that the suit land revert to the estate of Kihara Thatu Gatu and that the estate is pending distribution. He also averred that the Defendant/Applicant was not in occupation and granting of the said orders would mean that she has been allowed to take possession pending hearing and determination of the appeal. He averred that he is entitled to the fruit of the judgment and added that the Defendant/Applicant has not given good reason for grant of the orders sought. He averred that the Defendant/Applicant has not given any security as required for due performance of the decree. He also averred that execution of the decree would not render the intended appeal nugatory since it will be held within the estate and she can retrieve it after a successful appeal.

Submissions

5. Counsel for the Plaintiffs/Respondents filed their submissions dated 3rd June, 2024 where he submitted that the orders sought are discretionary. He relied on Order 42 Rule 6(1) and Rule 2 of the Civil Procedure Rules and submitted that the current application was brought more than one month with no reason to explain the delay. Counsel cited the case of Jaber Mohsen Ali & Another V Pricillah Boit & another [2014] eKLR and submitted that there was unreasonable delay in presenting the instant application. On substantial loss, counsel submitted that the Defendant/Applicant failed to establish the loss she would suffer if the orders sought are not granted. He argued that there would be no prejudice suffered by the Defendant/Applicant if the orders are not granted since it is only after confirmation of the grant and distribution that the property would be given to the rightful beneficiary. He added that there was no evidence that the said process had been done and therefore the Defendant/Applicant's fear is only speculative.
6. It was counsel's submission that the Defendant/Applicant has not been in occupation of the suit property and therefore there will be no prejudice she will suffer. He cited the Court of Appeal cases of M/S Portreiz Maternity V James Karanga Kabia and Carter & Sons Ltd V Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997 and submitted that there was no evidence of any loss that the Defendant/Applicant would suffer if stay of execution is not granted.
7. On the issue of security, counsel relied on the case of Arun C Sharma V Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 Others [2014] eKLR and submitted that the Defendant/Applicant have not offered any security. He also cited the case of Boniface Kariuki Wahome V Peter Nziki Nyamai & Another [2019] eKLR and submitted that the purpose of any stay was not to prejudice the right of a party upon whom judgment had been entered in favour. In conclusion, counsel submitted that all the three conditions had to be satisfied for the court to exercise its discretion and grant stay of execution. He relied on the case of M.O.M Amin Transporters Limited & Another V Alexander Ndungú Mbugua & 2 Others [2017] eKLR and urged the court to dismiss the application with costs. Analysis and Determination



8. This court has carefully considered the application and the main issue for determination is whether the order for stay of execution pending appeal should issue.
9. This court is alive to the fact that the principles governing the grant of an order for stay of execution pending appeal are now settled. The relevant law is provided for under Order 42 Rule 6 1(2) of the Civil Procedure Rules which states as follows: -
 - “(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.”
10. In *RWW V EKW* (2019) eKLR the court held as follows:

“. 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.”
11. It is noteworthy that grant of an order for stay of execution pending appeal is discretionary in nature whose purpose is to preserve the subject matter of the appeal.
12. In this case, judgment was delivered on 5th October, 2023 and the Defendant/Applicant filed a Notice of Appeal on 9th October, 2023 and the instant application on 11th December, 2023. With regard to the issue of delay, the time from which judgment was delivered to the time this application was brought before court, the same translates to about two (2) months. This court finds that the application has thus been brought without unreasonable delay.
13. On the issue of substantial loss, the Defendant/Applicant averred that she stands to suffer substantial loss if the Plaintiffs/Respondents executes the judgment since she will be locked out of her land. The Plaintiffs/Respondents on the other hand argued that there would be no loss suffered by the Defendant/Applicant since she has not been in occupation of the land. This court however notes that the title deed is currently in the Defendant/Applicant’s name and the trial court ordered that the said title deed be cancelled and be registered in the name of Kihara Thatu Gatu. It is also from this judgment that the Defendant/Applicant has since appealed and the same pending hearing and determination. It is therefore this court’s view that as long as the appeal is still pending, execution of the judgment may cause the Defendant/Applicant to suffer loss due to cancellation of the title.
14. It is not in dispute that the Defendant/Applicant has expressed that she is ready to abide by the terms and conditions that the court shall be inclined to impose. It is therefore this court’s view that they can be directed by the court to do so. This court shall therefore exercise its discretion regarding the security of costs to be offered by the Defendants/Applicants.
15. The Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how such discretion should be exercised as follows:



1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
16. In the upshot, the application is allowed and a stay of execution of the decree of this court issued on 5th October, 2023 is granted on the following conditions:
- a. Orders of Stay of Execution of the decree issued on 5th October, 2023 pending the hearing and determination of the Appeal.
 - b. The Applicant shall deposit a sum of Kshs. 250,000/= the in the court’s account being Security for Costs for the due performance of the decree within 30 days from the date of this Ruling.
 - c. The Applicant to file the Record of Appeal within 30 days from the date of this Ruling.
 - d. Failure to comply with orders (b) and (c) hereinabove, Order (a) hereinabove shall automatically lapse.
 - e. Costs of the Application to abide the Appeal. It is so ordered.

RULING DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 16TH DAY OF OCTOBER 2024.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT**

DATE: 2024-10-16 15:27:36

