



**M'Ngatunyi v Manyara (Environment and Land Appeal
E043 of 2024) [2024] KEELC 6452 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E043 OF 2024**

CK YANO, J

OCTOBER 3, 2024

BETWEEN

COSMAS MBAE M'NGATUNYI APPELLANT

AND

JOSECK GATOBU MANYARA RESPONDENT

RULING

1. By a notice of motion dated 1st July, 2024 brought under Order 42 Rule 6 and 7 [Civil Procedure Rules](#) and Section 1A,1B, 3, 3A and 63 of the [Civil Procedure Act](#), the applicant seeks for orders that-;
 1. Spent.
 2. That this Honourable court be pleased to grant an order of execution of the judgement and decree in respect to ELC PMCC No E002 of 2021 at Githongo Law Courts pending the hearing and determination of this application.
 3. That this Honourable court be pleased to grant an order of stay of execution of the judgement and decree in respect to ELC PMCC No E002 of 2021 at Githongo Law courts pending the hearing and determination of this appeal.
 4. That this Honourable court be pleased in the alternative to grant an order of injunction restraining the Respondent in the appeal from evicting or destroying the Appellant's properties on the subject matter herein LR Kiamuri 'A'/3121 and 3122 pending the hearing and determination of this appeal.
 5. That this Honourable Court be pleased to grant any other orders to maintain status quo pending the hearing and determination of this appeal in the interest of justice.
 6. That the costs of this application do abide the outcome of the appeal.



2. The application is based on the ground set out on the face of the application and the supporting affidavit dated 1st July 2024 sworn by Cosmas Mbae M'Ngatunyi. The applicant deponed that the trial court at Githongo Law courts upon trial made its judgement on 31st May, 2024., with the result that the respondent who was the plaintiff was allowed to evict the appellant and remove all his development on the subject property.
3. The Applicant avers that being dissatisfied, he filed the appeal herein which is pending hearing. That unless the orders sought are granted, the appellant, who has immensely developed the suit property where he has settled for over 20 years shall suffer substantial and irreparable loss and damage, and that the appeal may be rendered nugatory. That the application has been brought in good faith and in the interest of justice. The applicant has annexed a copy of the judgment of the lower court marked "CM 1". It is the applicant's contention that his appeal has high chances of succeeding.
4. The respondent filed a replying affidavit dated 9th July, 2024 wherein he avers that he is the lawfully registered owner of the land parcels No LR Kiamuri 'A'/3121 and Kiamuri "A"/3122. The respondent has attached copies of title deeds to the said land parcels marked "JGM-01a" and "JGM-01b".
5. The respondent avers that it is not true that the Applicant has been in occupation of the suit parcels from 2004 as alleged since after the respondent purchased the same from one Duncan Mwebia Kagwaru, he took exclusive occupation and possession of the same and the Applicant only trespassed thereon on diverse dates which include 15th July, 2020, 30th October, 2021 and 11th November, 2021.
6. The respondent also denied that the Applicant has any dwelling house on the suit lands since his acts of trespass were confined to harvesting the mango fruits and growing subsistent crops which he had already harvested before the judgement of the trial court was delivered. That the Applicant does not reside on the suit parcels and all he has thereon is a temporary mabati structure as was noted on the valuation report dated 31st May, 2022. The respondent has attached a copy of the valuation report dated 31st May 2022 marked "JGM-02."
7. The respondent states that the Applicant resides at Isiolo and occasionally visits his children who reside on the neighboring land parcel No Kiamuri "A"/18 from where he has been committing acts of trespass on the suit land and thus he does not stand to lose his home as alleged. The respondent has annexed a copy of the letter marked "JGM-03" from the area chief of Kiagu location.
8. The Respondent avers that since the Applicant has already harvested the subsistence crops that he had illegally planted on the suit lands prior to the delivery of judgement, he has no other interests therein and that neither has he been seen on the suit lands since the delivery of the judgement. That the Applicant is in the habit of illegally and unlawfully trespassing into people's properties and obtaining temporary injunctions thereby allowing him to continue to illegally occupy and utilize property that he does not own.
9. The Respondent further avers that the Applicant had initially trespassed into land parcel Kiamuri "A"/3121 upon which he was reported to the police and was charged in Githongo Criminal case No E075 of 2020 and upon his acquittal he now became emboldened and further trespassed on Kiamuri "A"/3122. The respondent has attached a copy of charge sheet of the said case marked "JGM-04".
10. The respondent contended that the present application is only but a scheme by the Applicant to continue to illegally and unlawfully utilize the respondent's parcels of land through the back door when there is already a judgement confirming that the said properties belong to the respondent. That he is advised by his advocates on record that for the court to grant such an application the applicant, has to provide security for costs which he has not provided. That the Applicant has also not demonstrated



that his appeal has any chances of success. That since the Applicant does not have any developments on the suit land he has not shown how he stands to be prejudiced. The respondent states that he is advised by his counsel on record that there is a process to be followed before any evictions can be carried out which steps are yet to be initiated and thus the application is premature.

11. The respondent further contends that the Applicant is determined to actively prevent him from enjoying the fruits of his judgement by illegally and unlawfully misleading the court that he is in occupation of the suit land and has developments therein when the same is totally unsubstantiated and untrue. That he prays the application dated 1st July 2024 be dismissed with costs. The respondent urged the court to dismiss the application with costs.
12. The court directed parties to file submissions but none of the parties filed submissions.

Analysis & Determination.

13. I have considered the application and the response filed. The issues for determination are:
 - i. Whether the court can grant an order of stay of execution of the judgement and decree in respect to ELC PMCC No E002 of 2021 pending the hearing and determination of the appeal herein.
 - ii. Whether in the alternative, the court can grant an order of injunction restraining the respondent from evicting or destroying the Appellant's properties pending the hearing and determination of the appeal.

Whether the court can grant an order of stay of execution of the judgement and decree in respect to ELC PMCC No E002 of 2021.

14. The law governing the granting 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 or proceedings under a decree or order appealed from except 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 referred 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.”

15. Therefore, an application for stay of execution of a decree or order pending appeal must satisfy the conditions set out in Order 42 Rule 6(2), aforementioned; namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order



as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.

16. In the instant case, the impugned Lower Court judgment was delivered on 31st May, 2024. and the present application filed on 1st July, 2024. That is a period of about one month. I therefore find that the application was filed without unreasonable delay.

17. As to what substantial loss is, it was observed in [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. Regarding substantial loss, the Applicant stated that the said judgement ordered that he be evicted from his lawfully acquired property where he has been in exclusive possession, use and development for over 20 years. That he has developed a home on the subject matter where he has farmed with his family to eke a living for all the said years. That if execution takes place by having him evicted and his properties destroyed then the appeal shall be rendered nugatory. In my view, if the applicant is evicted and his property on the suit land are removed, the applicant shall suffer irreparable loss and the appeal may be rendered nugatory.

19. In [RWW v EKW](#) [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal in the following words:

“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.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

20. In this case, the applicant has filed an appeal which, in my view, raises triable issues. I find that the Applicant has demonstrated that he has sufficient cause for seeking orders of stay of execution pending the appeal. It is therefore my finding that the application is meritorious.

21. In the result the application dated 1st July, 2024 is allowed in terms of prayer 3 thereof.

22. The costs of the application to abide the outcome of the appeal.

23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD OCTOBER, 2024



In the presence of:

Court Assistant – Tupet

Gikunda Anampiu for applicant

Kiogora Nganga for respondent

C.K YANO

ELC JUDGE

