



**Gacheri v Gatobu (Environment and Land Appeal E040 of 2023)
[2024] KEELC 7437 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E040 OF 2023**

CK NZILI, J

NOVEMBER 6, 2024

BETWEEN

JOYCE GACHERI APPELLANT

AND

STANLEY GATOBU RESPONDENT

RULING

1. The court is asked to stay the execution of a decree of this court dated 26.7.2024 pursuant to a judgment delivered on 17.7.2024 pending a hearing and determination of an appeal at the Court of Appeal. The reasons are contained on the face of the application dated 16.9.2024 and in a supporting affidavit of Stanley Gatobu sworn on 30.7.2024. It is averred that a notice of appeal has been filed; the outcome of the appeal will be rendered nugatory; he stands to suffer great prejudice and loss if the execution proceeds; there will be no prejudice to the respondent and lastly; that he was willing to deposit the original title deed as security in court.
2. By way of an affidavit the applicant avers that among the things that were decreed was to transfer 0.50 acres out of L.R No. Nyaki/Kithoka/Mwanika/524, within 30 days, out of the suit land measuring $\frac{3}{4}$ of an acre. In this case, the applicant avers that if the decreed portion is taken away, he shall be rendered destitute as his family and himself depend on the suit land for sustenance. He said that the application had been made without unreasonable delay.
3. Order 42 Rule 6 (1) Civil Procedure Rules provides that a court from which an appeal is filed against its order or decree may, for sufficient cause, grant a stay of execution. The parameters to consider are whether there is an arguable appeal, if the same will be rendered nugatory and whether there are exceptional circumstances to grant the orders sought. In the case of *Chepkeres & 3 others vs Kipugochoch Farm Co. Ltd & others* (Civil Application E061 of 2023 (2024) KECA 799 (KLR) (12th July 2024 (Ruling)), the court held that an applicant must demonstrate that he has an arguable appeal,



which is not frivolous or a mere judicial expedition and unless an order of stay is granted, the intended appeal will be rendered nugatory.

4. The court, on the first limb, said that an arguable appeal means one that has a sufficient, bona fide, arguable ground; that need not necessarily succeed, but was one which is not frivolous and ought to be fully argued before the court as held in *Stanley Kang'ethe Kinyanjui vs Tony Keter* (2013) eKLR.
5. In this application, the proposed memorandum of appeal has not been attached. The supporting affidavit is equally silent on what the arguable grounds of appeal are. In the absence of the two, this court cannot speculate without any such demonstration by the applicant.
6. On the intended appeal being rendered nugatory, if there are no stay orders, the case of *Permanent Secretary Ministry of Roads and another vs Fleur Investment Ltd* (2014), eKLR, the court painted a picture of an appeal that could be rendered nugatory. The court held that a frivolous appeal was one of very little importance, one whose determination is of little or no legal consequence because of past events or an earlier finding by a court of law.
7. In *Stanley Kang'ethe Kinyanjui vs Tony Keter* (supra), the court observed that whether or not an appeal will be rendered nugatory, depends on whether or not what is sought to have stayed, if allowed to happen, was irreversible or if it is not reversible, whether damages will reasonably compensate the party aggrieved.
8. In this application, it has not been averred of oath as to whether the applicant and his family have a residence or meaningful developments on the suit land, such that if $\frac{1}{2}$ of an acre of the land is taken away, the applicant and his family will be rendered homeless. There is no valuation report showing the nature and the value of the said developments. The nature of developments or agricultural activities said to be the only source of sustainability has not been particularized. The court is left to speculate or imagine what could be the source of sustenance. Substantial loss or damage must be demonstrated through tangible and cogent evidence. It is not enough to say that execution will bring a substantial loss.
9. Execution is a legal process following a successful upholding of a right in favor of the respondent, who has no undoubted right to enjoy the fruits of his judgment. See *RWW vs EKW* (2019) eKLR, *James Wangalwa vs Agnes Naliaka Cheseto* (2012) eKLR. The applicant has come to court almost one and a half months after the decree was signed and almost three months after the judgment was rendered. The law has not defined what maxim or minimum delay is. It all depends on the circumstances of each case. The inordinate delay has not been explained. The court has not been told whether the execution has taken place. It has been left to the court to speculate or assume.
10. The appeal before this court was out of the sale agreement dated 9.8.2010, where the respondent had pleaded that she had taken vacant possession of the land after payment of KShs.350,000/= and caused developments on the land. The record of the court shows that the respondent had fenced off the portion sold to her and a preservation order by way of consent was entered in the succession cause pending the determination of the respondent's claim.
11. The applicant, who is aware of the preceding facts, has averred on oath that he relies together with the family on the suit land for sustenance, as the basis of seeking for stay of execution. He has also averred that the suit land is barely $\frac{3}{4}$ of an acre. There is no official search attached to substantiate that assertion. The applicant forgets that the court has in its record an official search dated 12.9.2022, showing that the suit land is 0.38 ha. Therefore, the applicant is misleading the court to grant him a stay.
12. The other parameter is on security for the due realization of the decree, should the appeal fail. Other than offering the title deed, the applicant is silent on the costs of the appeal, the consideration that he received from the respondents, and the costs of the intended appeal. In my considered view, changes



to the register are reversible, if the applicant were to succeed in the appeal. Given the circumstances of this case, I find no risk at all. Failing to stay the execution will not pose a danger, loss, or damage to the applicant.

13. The applicant has since 9.8.2010, allowed the respondent to take vacant possession and develop the land as if it were hers. An award of damages if he succeeds in the intended appeal will be adequate to compensate the applicant. The prejudice to the respondent would be more if the stay orders were allowed. It follows that the applicant is not entitled to the orders sought. The application is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6TH DAY OF NOVEMBER, 2024

In presence of

C.A Kananu

Mokua for the applicant

HON. C K NZILI

JUDGE

