



**Orero v Housing Finance Company of Kenya (HFCK) & another (Environment and Land Appeal E024 of 2024) [2024] KEELC 13629 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13629 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E024 OF 2024  
LC KOMINGOI, J  
DECEMBER 5, 2024**

**BETWEEN**

**SAMSON LUSI ORERO ..... APPELLANT**

**AND**

**HOUSING FINANCE COMPANY OF KENYA (HFCK) ..... 1<sup>ST</sup> RESPONDENT**

**BARNABAS OMOLLO OKOMO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is Notice of Motion Application date 1<sup>st</sup> July 2024 brought under Article 40(1) and 159 of the Constitution of Kenya; Section 3A of the Civil Procedure Act; Order 42 Rule 6 and order 51 Rule 3 of the Civil Procedure Rules; and all other enabling provisions seeks that:
  - a. Spent
  - b. The Court be pleased to grant stay of execution of the decree and certificate of costs given by the trial court on 19<sup>th</sup> June 2024 in Ngong MCELC E006 of 2022 pending the hearing and determination of this Application.
  - c. The Court be pleased to grant stay of execution of the decree and certificate of costs given by the trial court on 19<sup>th</sup> June 2024 in Ngong MCELC E006 of 2022 pending the hearing and determination of this Appeal.
2. The application supported by the Appellant's Affidavit is premised on the grounds that he is the owner of property Ngong/Ngong/43016 and has been residing thereon together with his family from the year 2009. However, the Lower Court in the judgement dated 16<sup>th</sup> May 2024 issued a 60 days eviction order to the Applicant. The Respondents extracted a Decree and Certificate of Costs dated 19<sup>th</sup> June 2024. He therefore seeks a stay of the Decree pending the hearing of the Appeal, which if executed



- would leave him and his family homeless. He averred that the Application had been brought timeously and that no prejudice would be suffered by the Respondents if the orders are granted.
3. It appears the 1<sup>st</sup> Respondent's did not file any response. However, their submissions are in the file.
  4. The 2<sup>nd</sup> Respondent in his Replying Affidavit dated 25<sup>th</sup> July 2024 deponed that the application was bad in law because on 16<sup>th</sup> May 2024, Hon. P. Achieng' in Ngong' MCELC E006 of 2022 dismissed the Applicant's case, declared the 2<sup>nd</sup> Respondent was the legal owner of property Ngong/Ngong/43016 having purchased it through a public auction on 15<sup>th</sup> October 2021 and ordered the Applicant to vacate the property within 60 days of the judgement. Despite the judgement and decree the Applicant has failed to give vacant possession of the property to him. He therefore prayed that the Application be dismissed and costs of the application be borne by the Applicant.
  5. The 2<sup>nd</sup> Respondent also filed Grounds of Opposition dated 25<sup>th</sup> July 2024 opposing the application on grounds that it had concealed material facts and had not met the threshold for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules claiming that the Applicant had been in occupation of the suit property from 2021 despite the 2<sup>nd</sup> Respondent having acquired it legally. Therefore, the 2<sup>nd</sup> Respondent being the legal owner of the suit property was incurring substantial loss which could not be cured by way of damages. He also prayed that the Applicant be compelled to deposit Kshs. 7,000,000 as security in a joint interest earning account, or in the alternative, the suit to be dismissed.
  6. This application was canvassed by way of written submissions.

#### **The Appellant/Applicant's Submissions**

7. On whether the Stay of execution should be granted, counsel submitted that the purpose of stay is to preserve the subject matter of the appeal as was held in RWW v EKW [2019] eKLR. It was therefore important to stay execution of the lower court's decree which put the Applicant and his family at the risk of being evicted and the Appeal would be rendered nugatory. The applicant had thus satisfied the principles for grant of stay with reference to Multimedia University & another v Gitile N. Naituli [2014] eKLR.
8. On the issue of payment of security of costs, counsel submitted that as per Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR the Court held that security was to guarantee due performance and not to punish the judgement debtor. Therefore security of Kshs. 7,000,000 as prayed by the 2<sup>nd</sup> Respondent was unreasonable and unsubstantiated.
9. On whether the Appeal was arguable and if stay is not granted it would be rendered nugatory, counsel submitted that the Appeal was not frivolous and was worthy of judicial determination citing Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR and RFS vs JDS [2013] eKLR. And if the stay is not granted, the Appeal would not only be rendered nugatory but the Applicant together with his family would be rendered homeless.

#### **The 1st Respondent's submissions**

10. On Whether The Application was merited, Counsel submitted that the Applicant had not met the threshold for stay outlined under Order 42 Rule 6(2) of the Civil Procedure Rules as he had not evidenced that he would suffer substantial loss if the execution ensues with reference to Jessikay Enterprises Ltd vs George Kaboto Muiruri [2022] eKLR. On the issue of security for costs counsel submitted that the Applicant should be compelled to deposit security and if not, then the application should be dismissed citing Charles Kariuki Njuri vs Francis Kimaru Rwara [2020] eKLR, Peter



### **Analysis and Determination**

11. I have considered the application, the affidavits in support to the response thereto, the rival submissions and the authorities cited, I find that the issues for determination are:
  - i. Whether the Appellant's/Applicant's application has satisfied the principle of stay of execution of judgement and decree pending appeal;
  - ii. Who should bear costs of the application?
12. The Applicant has approached this Court seeking that the Decree dated 19<sup>th</sup> July 2024 be stayed. The said Decree declared the 2<sup>nd</sup> Respondent as the legal owner of property LR No. Ngong/Ngong/43016 and ordered the Applicant to vacate within 60 days.
13. Order 42 of rule 6(2) of the *Civil Procedure Rules* provides that;

“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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
14. It is not in contention that the Application has been brought without delay.
15. Has the Applicant demonstrated that he would suffer substantial loss if stay of execution of the decree is not granted? The Applicant states that if the Decree is executed, he together with his family will not only be left homeless, but the Appeal would be rendered nugatory. The 1<sup>st</sup> respondent has contested this stating that he should be allowed to enjoy the fruits of the judgement since he ought to have been in possession of the suit property from the year 2021.
16. It is not in doubt that the 2<sup>nd</sup> Respondent bought the suit property in a public auction on the 15<sup>th</sup> October 2021. This is three years ago and yet he is yet to get vacant possession.

The Court of Appeal in *Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 Others* (2013) eKLR as affirmed recently by the same Court in *Mwaura Vs. EACC & Another* (2024) KECA 307 KLR stated thus;

“each case must be determined on its own facts and circumstances; that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous; and that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
17. It is the Appellant's case that he will suffer substantial loss if the decree is executed. I rely on the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* (2012) eKLR in finding that the Appellant has not demonstrated substantial loss as the suit property was sold by public auction in 2021.
18. On this ground alone, I find that the Notice of Motion herein is not merited and the same is dismissed with costs to the Respondents.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Mr. Namude for the Appellant.

Mr. Werunga for Mr. Gekonge for the 1<sup>st</sup> Respondent.

Mr. Kipkirui for the 2<sup>nd</sup> Respondent.

Court Assistant – Mutisya.

