



Kuyumya & another v Kivuva (Suing as the administrator of Estate of David Kivuva) & 2 others (Environment and Land Appeal E049 of 2021) [2023] KEELC 435 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 435 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E049 OF 2021
A NYUKURI, J
FEBRUARY 1, 2023**

BETWEEN

GREGORY MUSEMBI KUYUMYA 1ST APPELLANT

SAMSON MUNGUTI KUYUMYA 2ND APPELLANT

AND

MONICA MBATHA KIVUVA (SUING AS THE ADMINISTRATOR OF ESTATE OF DAVID KIVUVA) 1ST RESPONDENT

MACHAKOS COUNTY LAND ADJUDICATION OFFICE 2ND RESPONDENT

MACHAKOS COUNTY LAND REGISTRAR 3RD RESPONDENT

(Being an appeal against the judgment of Honourable Martha Opanga, SRM, in Kangundo Environment and Land Case No. 62 of 2020 delivered on 9th November, 2021)

RULING

Introduction

1. Before court is the application dated 8th November 2021 seeking for stay of execution of the judgment delivered on 9th November 2021 by Honourable Martha Opanga (SRM) in Kangundo CM ELC No. 62 of 2020, pending hearing and determination of this appeal.
2. The application is premised on the affidavit of Gregory Musembi Kuyumya, the 1st Appellant sworn on 8th December 2021. The Applicant's case is that the judgment delivered in the trial court ordered for his eviction from Land Parcel No. Machakos/Nguluni/282 (the suit property) and that therefore, if the same is not stayed, he stands to suffer irreparable loss as he has a shop and hotel business on the



suit property, which he has been running since 2000 to date. According to him, the appeal raises triable issues and has high chances of success.

3. The application is opposed. Monica Mbatha Kivuva, the 1st Respondent filed a replying affidavit sworn on 19th January 2022. It was the Respondents' case that the Appellants' mother only purchased part of the suit property. That the shop referred to by the Appellant is not on the suit property as the same is constructed on the access road leading to the Appellants' portion and therefore the application is not merited.
4. The parties were directed to file written submissions in regard to the application. On record are the submissions of the Appellants filed on 4th May 2022, which this court has considered.

Analysis and Determination

5. Having considered the application as well as the response, together with the submissions, it is my view that the only issue that arise for determination is whether the Appellant has met the threshold for grant of stay pending appeal.
6. Order 42 Rule 6 of the *Civil Procedure Rules* provides for the court's jurisdiction to grant stay of execution pending appeal as follows;
 1. No appeal or second appeal shall operate as a stay of execution or 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 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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
7. Essentially, an order for stay of execution pending appeal is a discretionary order which the court may grant upon being satisfied that the Applicant is at risk of substantial loss unless the order is granted and the application ought to be made without delay.
8. The Applicant has deponed that he has a shop and a hotel business on the suit property and that the same may be demolished in execution of the judgment if the stay is not granted. He argues that he is at risk of suffering substantial loss if the orders sought are not granted.
9. The right of appeal is a Constitutional right protected under the law and therefore stay is intended to preserve the subject matter in the suit so that the appeal is not rendered nugatory. In the case of *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.

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.

10. As the Appellant herein has a right of appeal, that right ought to be balanced with the Respondents' right spelt out in the judgment of the trial court, with the aim of ensuring that the subject matter of the dispute is preserved pending the decision. Both parties in this matter concede that there are developments by the Appellant on L.R. No. Machakos/Nguluni/282. The Appellant states that his shop and hotel are on the disputed portion while the Respondent alleges that the same is on the access road. However, as the Respondent sought in the lower court for eviction orders which orders were granted in the judgment sought to be stayed, it follows that if the said judgment is not stayed, then eviction of the Appellant will proceed, and the appeal will be rendered nugatory.
11. I am therefore satisfied that the Appellant deserves orders of stay of execution. It is thus the finding of this court that the application dated 8th November 2021 and filed on 9th December 2021 is merited and the same is allowed as follows;
 - a. That pending the hearing and determination of the appeal herein, this Honourable Court be and is hereby pleased to order stay of execution of the judgment delivered by the Honourable Martha Opanga (SRM) on 9th November 2021 in Kangundo ELC No. 62 of 2020, and any other order arising therefrom.
 - b. The costs of the application shall be in the cause.
12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1ST DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Mwangi holding brief for Mr. Nzaku for the Applicants/Appellants

Mr. Munguti for the Respondents

Josephine – Court Assistant

