



**Mwangi (Suing as the administrator of the Estate of Joseph Mwangi Gathiari) v
Mwangi (Sued as the administrator of the Estate of Susan Njeri Mwangi (Environment
& Land Case 22 of 2021) [2023] KEELC 544 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 22 OF 2021
LN GACHERU, J
FEBRUARY 2, 2023**

BETWEEN

**PETER KIBUGI MWANGI (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF JOSEPH MWANGI GATHIARI) APPLICANT**

AND

**NAHASHON CHEGE MWANGI (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF SUSAN NJERI MWANGI) RESPONDENT**

RULING

1. The Respondent/Applicant moved this Court by an Application dated 31st August 2022, and filed on the even date for Orders:
 1. Spent
 2. That the Honorable Court do grant leave to M/S Kebuka Wachira & Company Advocates to come on record for the Applicant in place of R.M Kimani & Company Advocates
 3. That pending the hearing and determination of the Applicant's intended appeal, this Honorable Court be pleased to grant stay of execution of the judgment/ decree or any other resultant orders made by this Court on 21st July, 2022.
 4. That the Honorable Court be pleased to grant the Applicant such orders it deems fit to grant to meet the ends of justice.
 5. That the costs of this application be provided for
2. The application is premised on eight grounds stated on the face of the said Application and the Supporting Affidavit of the Applicant herein Nahashon Chege Mwangi.



3. The Applicant contends that being dissatisfied with the Judgment of this Court of 21st July 2021, he intends to prefer an Appeal against the said judgment. It is his case that despite serving the Respondent with a Notice of Appeal, the Respondent started the process of execution by gaining ingress into the suit land and threatening to evict him. He urges this Court to grant stay orders pending the filing of intended appeal. It is his disposition that he has an arguable appeal with great chances of appeal.
4. In response to the application, the Respondent filed a Replying Affidavit sworn on the 12th September, 2022. It is his case that the intended appeal did not operate as stay of execution and that having issued the Applicant with an eviction notice, it was proof enough that he intends to comply with the law in the process of enjoying the fruits of his judgment. He posits that the Applicant has not demonstrated what loss he stands to suffer in the event the judgment of this Court is executed. Further that there was an unexplained inordinate delay in the filing of the instant application. He urged this Court to dismiss the instant application.
5. The application was canvassed by way of written submissions. The Applicant filed his written submissions on the 29th September 2022, giving accounts leading to the filing of the instant application, and added that the notice of vacation issued by the Respondent was a means of covering up for his illegal eviction. He submitted that if stay is not granted, the Respondent will continue to destroy his crops. He urged this Court to consider the application, and he puts forward the grounds on which he is appealing against the judgment of this Court.
6. Conversely, the Respondent filed his written submissions on the 26th October 2022, citing the relevant provisions of the law that guide the Court in granting of stay orders. He invited this Court to the pronouncement in the case of *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. 15 of 1990, where the Court held that the High Court has jurisdiction to grant stay based on three conditions to wit;- establishment of a sufficient cause, satisfaction of substantial loss, the furnishing of security.
7. These conditions were reiterated in the case of *Samvir Trustee Limited v Guardian Bank Limited* (2017) eKLR, as cited by the Respondent. It was his submissions that a successful party ought not to be denied the fruits of his judgment, except in exceptional circumstances. Reliance was placed on the case of *M/S Portreitz Maternity v James Karanja Kabia*, - Mbsa HC Civil Appeal No.63 of 1997, as was cited in the case of *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR, where the Court opined that the right of appeal must be balance with the Plaintiff's right to enjoy the fruits of the judgment. In the end, he submitted that the Applicant has not met the threshold for the grant of the orders sought.
8. The Respondent herein instituted the instant suit against the Applicant vide Originating Summons dated 15th July, 2021. Upon hearing the parties, this Court delivered its judgment on the 21st July 2022, in favour of the Respondent herein. Being dissatisfied with the judgment of this Court, the Applicant herein is desirous of appealing and has moved this Court for stay orders pending the intended appeal.
9. This Court has perused a copy of a Notice of Appeal lodged on the 27th July 2022, and which was filed at least six days from the date of the judgment. The Applicant now wants this Court to grant stay orders against execution of the said judgment. Additionally, and based on the Applicants prayer No 2 of the said application, the Court notes that the Applicant was previously represented by the Law Firm of R.M Kimani & Co. Advocates, and has now sought Leave to have the Law Firm of M/S Kebuka Wachira & Co. Advocates, come on record on his behalf.
10. Having analyzed the application together with the annexures thereto, the response, the rival written submissions by parties and the authorities cited thereto, the issues for determination are:-



- i. Whether leave should be granted to the Law Firm of M/S Kebuka Wachira & Company Advocates to come on record for the Applicant in place of R.M Kimani & Company Advocates
- ii. Whether an order for stay of execution can issue
- iii. Who should pay costs.

i. Whether leave should be granted to the Law Firm of M/S Kebuka Wachira & Company Advocates to come on record for the Applicant in place of R.M Kimani & Company Advocates.

11. The right to Legal Representation is guaranteed under the Constitution and thus the Respondent/Applicant has a right to choose an advocate of his choice. However, rules of procedure must be adhered to as set out in Order 9 of [Civil Procedure Rules](#). Presently, Order 9 Rule 9 of [Civil Procedure Rules](#) lays out the practice to be followed being;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

12. The Act contemplates a twofold process which is either through an application to Court for leave or by consent, and it carries mandatory tone. The purpose of this is to protect the outgoing advocates from unscrupulous litigant and to notify the Court. While an Appeal is a fresh proceeding and parties can choose an advocate of their choice without adherence to the foregoing, there is a limitation as was well enunciated by the Court of Appeal in [Tobias M. Wafubwa v Ben Butali](#) [2017] eKLR, where the Court held

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an Appeal to an appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court, where different rules may be applicable, for instance, the *Court of Appeal Rules*, 2010 or the *Supreme Court Rules*, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on Appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate.”

13. This being an application for stay, there ought to be compliance as contemplated in the foregoing case. The Applicant has moved this Court for leave, and is thus well within the confines of the law. What is not clear is whether the previous counsel was notified or not. Be that as it may, this Court lends credence to the Applicant and exercise the unfettered discretion donated by Article 159 of the [Constitution](#) and proceeds to grant the leave to the Law Firm of Ms Kebuka Wachira & Company Advocates to come on record for the Applicant herein.



ii. Whether an order for stay of execution can issue?

14. The law on stay of execution pending appeal is laid down in Order 42 Rule 6 of the [Civil Procedure Rules](#). It is trite that no appeal can operate as stay, hence an application for stay shall be made to Court by a desiring parties. Order 42 Rule 6 of the [Civil Procedure Rules](#) provides;

“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except Appeal case of 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.

(3) ...

(4) For the purposes of this rule an Appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given.

15. The Supreme Court in the case of [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR, held that the Applicant must satisfy the Court that; -

i. the Appeal or intended Appeal is arguable and not frivolous; and that.

ii. unless the order of stay sought is granted,

iii. the Appeal or intended Appeal, were it to eventually succeed, would be rendered nugatory. The principles were also echoed in the Court of Appeal Case of *Butt v Rent Restriction Tribunal* [1982] KLR 417

16. What the foregoing requires of the Applicant is to demonstrate that;

i. The application has been made without unreasonable delay

ii. She will suffer substantial loss

iii. The appeal is not frivolous

iv. The appeal will be rendered nugatory

v. She is willing and ready to deposit such security as may be directed.



a. Unreasonable Delay

17. Instantly, judgment was entered into on the 21st July, 2022, while the application was filed on 31st August 2022. That is over a month from the date of judgment. There is no measure as to what constitutes delay, but it is common occurrence that once judgment is entered, there is anticipation that execution can issue at any time and hence the need to approach Court at the soonest. This Court agrees with the pronouncement of the Court in *JMN v ZWG (The Guardian Of P K G)* [2016] eKLR, where the Court held:

“Our jurisprudence is clear: grant of stay is a discretionary remedy which is given upon demonstration that there was no inordinate delay. No supremely wise court has ever come up with a categorical test for inordinateness of delay -- and none is capable of doing so given the context-specificity of the inquiry”*

18. What then should guide this Court in determining whether the filing of the application over a month amounts to inordinate delay or not can be found in the case of *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR, where the court in considering what amounted to inordinate delay had this to say

“Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”

19. The Applicant did not address this Court on why he had to wait for a month before filing the instant application. What this Court notes from his application is the contention that he filed a Notice of Appeal on 27th July 2022, and thereafter applied for certified copies of the proceedings. Undeniably, the foregoing documents have no significant forbearance in the filing of the instant application, if any a Notice of Appeal could not have operated as stay. The Applicant was bound by law to file the application on time.
20. This Court has perused a copy of an eviction letter dated 22nd August 2022, by the Respondent’s counsel to the Applicant, and it is safe to conclude that the Applicant was jolted to action by this letter. Delay even for a day can be delay, and it matters therefore to take into consideration that the Applicant delayed in the filing of the instant application. Whether the delay was inordinate or not is a subject to be demonstrated to this Court. The Respondent contends that the filing of the application was inordinate. This Court takes into consideration the Applicant’s action of filing the Notice of Appeal and even though the same did not amount to stay, as a matter of law, it lends some credence to the Applicant and finds that the delay for one month did not amount to inordinate delay.
21. The Court in *G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR when considering whether a delay of 9 months was inordinate or not had this to say;

“Notably, delay must not only be inordinate, it must also cause prejudice to the opposing party. The delay herein appeared to have been inordinate but did not cause the Respondents to suffer prejudice or injustice.



20. This court came to the aforesaid conclusion because there was no evidence that was adduced before this court to demonstrate that the Respondents had obtained the Certificate of Costs and Decree or made an application for execution of the decree that would have been thwarted midstream by the filing of the present application. In addition, a perusal of the lower court file showed that the proceedings were only certified as a true copy of the original on 14th June 2017.”
22. This Court has not been persuaded that the delay of one month had any unjust effect on the Respondent who as a matter of evidence had not moved this Court for execution of the decree. Additionally, the Court in *John Barasa Matifari v Simon Wanjala Mabonga Substituted with Amos Wandabwa Mabonga* [2021] eKLR, found that delay for one month was not inordinate. Having established so, this Court finds and holds that there was no inordinate delay.

b. Substantial Loss

23. Substantial loss was defined by the Court in *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) EALR 331 to mean
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
24. Further, Plat GA J as he then was in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR held
- “Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”
25. This was echoed in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* {2012},
26. The Applicant must therefore establish the substantial loss he is likely to suffer. The Applicant attached photographs demonstrating that his crops have been destroyed, an allegation the Respondent has refuted. As per the eviction notice attached to the Applicant’s application, it is evident that the Applicant is in occupation of the suit property. It was the judgment of this Court that the Respondent was entitled to a portion of the Applicant’s land. The effect of the Judgment of the Court is that the Applicant’s title will be cancelled and such cancellation will interfere with the substratum of the Appeal, which is the suit land and will also have ripple effect of interfering with the Applicant’s use and occupation of the suit property.
27. The essence of stay is to preserve the subject matter pending the hearing and determination of the Appeal. The Respondent does not dispute that the Applicant is in occupation of the suit land and that the crops alleged to have been cut down belonged to the Applicant. Undoubtedly, such acts are likely to cause great valuable loss. Cancellation of title will have such far reaching effects in the end. It is thus the finding of this Court that the Applicant has demonstrated that he is likely to suffer substantial loss.

c. The appeal is not frivolous and the appeal will be rendered nugatory

28. It is imperative to first appreciate that this Court has not perused any copy of a Memorandum of Appeal and it is not clear whether the appeal has since been filed or not. The tone of the application was that



there was an intention to file an appeal. What constitutes frivolous was determined by the Court in *Jinnab Mwangi Gichanga v Secretary TSC* [2018] eKLR where the Court held:

As stated in the Karatina Municipal Council case:

“frivolous or vexatious proceedings are understood to be synonymous with or aspects of what is deemed to be an abuse of the process of the court, and therefore these concepts may not necessarily be distinct from each other; where one exists, the other will certainly be lurking around.”

CJ’s Dictionary of *Legal Words and Phrases* 1 ed (Butttherworths Durban) 1977 Vol. 2 & 4 also weighs in stating thus:-

“The concept of ‘frivolous and vexatious’ has one established legal meaning. It refers to a claim or legal proceeding which is pursued where there is plainly no prospect of success and the motive of the claimant or plaintiff is to harass the defendant.”

29. The Applicant did not attach a Memorandum of Appeal for this Court to peruse. What the Applicant has done is to submit on the intended grounds of appeal in its submission. Noting that submissions are marketing skills, it would be difficult for this Court to determine whether the Appeal is frivolous or not.
30. On the aspect of nugatory, the Court of Appeal in the case of *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others* [2018] eKLR, when considering whether to allow an application for injunction and stay pending appeal looked at the definition of “nugatory” as was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 and opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence.
31. As to whether the appeal will be rendered nugatory varies from case to case, as it depends on what is to be stayed.
32. In the instant case, it is land. There is uncontroverted evidence that the Applicant is in current occupation of the suit land. As stated hereinabove, the effect of the judgment of this Court will be the cancellation of title which means the Applicant’s title will be surrendered for cancellation. Should the appeal succeed, it is no doubt that the title will be subjected to another cancellation. Even though the outcome of execution of the judgment of this Court may not render the appeal nugatory out rightly, the execution of such appeal decree may complicate the execution of the appeal and will thus render a trifle. It is thus safe for this Court to conclude that the appeal will be rendered nugatory within the holding of the Court in *Reliance Bank Ltd*, supra.

d. Applicant is willing and ready to deposit such security as may be directed.

33. The Applicant submits that he is ready to offer security as may be imposed by this Court. The purpose of security was enunciated by the Court in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the Court stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the



respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

34. Similarly, the Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, held,

“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

35. Even though the Respondent has not been in occupation of the suit property, he is the Decree holder and he should be allowed to enjoy the fruits of his judgment. In the interest of justice, it is prudent that the Applicant be compelled to deposit such security for due performance and ensure he does not sit on his right of appeal denying the Respondent an opportunity to enjoy the fruits of the judgment. This Court enjoys the discretion of determining the security it will impose. In exercise of such discretion this Court directs that the title deed for Loc. 18/ Gachochi/4070, be deposited as security.

36. The net effect of the foregoing findings is that the Applicant has satisfied the conditions for granting of stay orders. However, on account of the unclear status of Appeal, the stay shall be conditional to the filing of Appeal.

iii. Who should pay costs of the Application?

37. While it is trite law that costs shall follow the events, this Court has the discretion to make such orders as to costs. Thus this Court directs that each party to bear its own costs.

38. Having now carefully considered the instant application, the Court finds it merited and it is allowed in terms of prayers No. 2 and 4 on conditions that the Applicant do furnish a security by depositing in Court the title deed for Loc. 18/ Gachochi/4070, as security within the next 14 days from the date hereof.

39. Further, the Applicant is directed to file his Intended Appeal within the next 30 days from the date hereof, Failure to do so, the Stay order will lapse automatically. Failure to deposit the Security in Court as directed will mean that the Stay Order shall not be issued.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2ND DAY OF FEBRUARY, 2023.

L. GACHERU

JUDGE

In the presence of;

Ms Maina H/B Mr. Wachira for the Defendant/Applicant

Ms Waititu for the Plaintiff/Respondent

