



Njihia & 36 others v Urithi Housing Co-operative Society & another (Environment & Land Case 25 of 2019) [2023] KEELC 578 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 578 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 25 OF 2019
LN GACHERU, J
FEBRUARY 9, 2023**

BETWEEN

ANTHONY MBUGUA NJIHIA & 36 OTHERS PLAINTIFF

AND

URITHI HOUSING CO-OPERATIVE SOCIETY 1ST RESPONDENT

FAMILY BANK LTD 2ND RESPONDENT

RULING

1. By a notice of motion application filed on November 18, 2021, the plaintiffs/applicants sought for the following orders:
 - a. Spent
 - b. Spent
 - c. That this honourable court be please to issue stay of execution of the judgement/decree issued herein on October 12, 2021, and any consequential orders therein pending hearing and determination of this application inter-parties;
 - d. That there be a stay of execution of the judgement/decree herein issued on October 12, 2021, and any consequential orders herein pending the hearing and determination of the intended appeal herein lodged.
2. The application was predicated on the eleven grounds stated thereon and the supporting affidavit of Anthony Mbugua Njihia, the 1st plaintiff/applicant, dated November 18, 2021. It is his assertion that the plaintiffs/applicants are aggrieved by the judgement entered in this matter, and they have proffered an appeal at the court of appeal against the judgement of October 12, 2021, that the said appeal has a high chance of success, and that the appeal will be rendered nugatory if judgement is not stayed. The plaintiffs/applicants further averred that they will suffer substantial loss if the orders prayed are not



granted. They deponed that the defendants/respondents are in the process of attaching and selling the suit property which would lead to their eviction.

3. In response and in opposition to the instant application, the 2nd defendant/respondent filed a replying affidavit dated November 30, 2021, through their legal counsel Ms Sylvia Wambani. It was her disposition that the application is fatally defective, and ought to be dismissed. The 2nd respondent deponed that the judgement delivered on October 12, 2021, dismissed the suit and that the applicants now seeks to stay execution of the said judgement, which constitutes a negative order. They further deponed that no proper appeal has been filed to consider whether the same has a proper chance of success. Furthermore, that stay would unjustly curtail the bank's power of sale to recover its monies where due process was followed. The 2nd defendant/respondent prayed that the application be dismissed, with costs.
4. The application was canvassed by way of written submissions. The plaintiffs/applicants did not file any written submissions despite being granted several chances to do so. The court however considered their pleadings.
5. The 2nd defendant/respondent through the law firm of Maina, Onsare, Partners Advocates LLP, filed their written submissions on May 11, 2022, opposing the application. The 2nd respondent reiterated in their submissions that the orders for stay of execution of the judgement cannot be issued against negative orders. they further submitted that it is evident from the judgement, in dismissing the suit, that nothing was ordered to be done or refrain from doing. They relied on the case of *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* (2015), eKLR, wherein it was held that an order for stay of execution must be intended to serve a purpose. They further relied on the case of *Kenya Commercial Bank Ltd v Tamarind Meadows Ltd & 7 others* (2016), where it was held that negative orders are incapable of execution save in respect of costs.
6. Lastly, the 2nd respondent submitted that the plaintiffs/applicants only filed a notice of appeal, which cannot be construed as an actual appeal, because it does not state the grounds under which they contest the decision of the court.
7. This court has now considered the pleadings herein, the filed written submissions and the relevant provisions of law and finds that the main issue for determination is whether the notice of motion application, dated November 18, 2021, for stay of execution is merited?
8. The background of this matter is as follows; -*vide* a plaint dated July 16, 2019, the plaintiffs/applicants sought three main orders: that a declaration be made that they were entitled to assorted plots on land parcel LR No 11486/6 Panorama Estate; an order for specific performance of the various signed sale agreements entered between the plaintiffs and 1st defendant to compel the 1st defendant to transfer plots to the respective buyers and issue them with title deeds, and an injunction restraining the 2nd defendant/respondent or their agents from interfering with the suit property. In its judgement delivered on October 12, 2021, this court dismissed the suit and discharged the interim orders therein.
9. Thereafter, the plaintiffs/applicants filed the instant application for stay of execution of the judgement that was delivered on October 12, 2021.
10. The law on stay of execution is laid down under order 42 rule 6(2) 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 desiring parties.
11. The principles for granting of stay are well laid down in order 42 rule 6(ii) which provides:
 - (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) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
12. Subsection (2) above is couched in mandatory terms. In the first limb, an applicant must demonstrate that substantial loss will occur if stay of execution is denied. The applicants herein have not shown the kind of loss they will suffer since no party was ordered to do anything to the disadvantage of the other. The judgement that was delivered on October 12, 2021, was for dismissal of the plaintiff's case and no other orders were given.
13. Further, section 2 of the *Civil Procedure Act* defines a decree holder as any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order. The definition alludes to an order capable of being executed. In the instant case, neither party can execute the orders issued by the court, save for costs.
14. The judgement which the plaintiffs/applicants intend to stay and appeal, sought that a declaration be made regarding the suit property. This was promptly dismissed for the reasons that the suit property was properly charged to the 2nd defendant/respondent. It is this court's considered view that the orders as made by the trial court, are negative orders. Neither the plaintiffs/applicants nor the defendants/respondents were required to act or refrain from any actions.
15. By the order, the trial court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order, which is incapable of execution save in respect of costs only.
16. This court places reliance on the Court of Appeal decision in *Ndungu Kinyanjui v Kibicho Kugeria Services & another* [2007] eKLR, which relied on its earlier decision in *David Thiong'o T/A Welcome General Stores v Market Fancy Emporium* [2007] eKLR and held as follows: -

“This court has repeatedly stated in previous decisions, among them, *David Thiong'o T/A Welcome General Stores v Market Fancy Emporium*, Civil Application No Nai 47 of 2007.... that in an application under rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to restrain by injunction... the decision of February 9, 2007, in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it.”
17. Having considered the instant application, this court finds that the plaintiffs/applicants have failed to satisfy the first requirement for stay of execution.
18. Consequently, the court proceeds to find and hold that the notice of motion application dated November 18, 2021, is not merited.



19. For the above reasons, the said application is dismissed entirely with costs to the 2nd defendant/respondent.

It is so ordered.

Dated, Signed and Delivered virtually at Murang'a THIS 9TH day of FEBRUARY 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Plaintiffs/Applicants – Absent

1st Defendant/Respondent – Absent

M/s Ngui for the 2nd Defendant/Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

09/02/2023

