



REPUBLIC OF KENYA



**Wambua & 6 others v Muchina & Karanja (Suing as Trustee of Uhuru Welfare Association) & 6 others (Environment and Land Appeal E041 of 2022) [2023] KEELC 16033 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16033 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E041 OF 2022**

**JG KEMEL, J  
MARCH 2, 2023**

**BETWEEN**

**JOHN WAMBUA ..... 1<sup>ST</sup> APPELLANT  
MARY NJERI MAINA ..... 2<sup>ND</sup> APPELLANT  
SAMUEL CHEGE NGARI ..... 3<sup>RD</sup> APPELLANT  
MARGARET WANJIRU KAMANDE ..... 4<sup>TH</sup> APPELLANT  
BETH NGINA MBURU ..... 5<sup>TH</sup> APPELLANT  
PETER CHEGE MWANGI ..... 6<sup>TH</sup> APPELLANT  
FLORA WAMBUI MATHENGE ..... 7<sup>TH</sup> APPELLANT**

**AND**

**GATHERU MUCHINA & BENSON KARANJA (SUING AS TRUSTEE OF UHURU WELFARE ASSOCIATION) ..... 1<sup>ST</sup> RESPONDENT  
JOSEPH NDUNGU GAKUHA (LEGAL REPRESENTATIVE OF THE LATE PAUL GAKUHA NDUNGU) ..... 2<sup>ND</sup> RESPONDENT  
DAMARIS WANGECI WAMBUGU ..... 3<sup>RD</sup> RESPONDENT  
JOHN MWANGI MAINA ..... 4<sup>TH</sup> RESPONDENT  
ANN WAMBUI WAMBURU ..... 5<sup>TH</sup> RESPONDENT  
GRACE WANJIKU NJENGA ..... 6<sup>TH</sup> RESPONDENT  
BENARD MUTURI KAMAU ..... 7<sup>TH</sup> RESPONDENT**



## RULING

1. The Applicants have moved the Court for orders of stay of execution of the decree and Judgement of the trial Court delivered on the 21/4/2022 and all consequential orders.
2. The final orders of the trial Court are set out as follows;
  - a. The 1<sup>st</sup> Defendant is hereby ordered to pay the Plaintiffs Kshs. 232,600/- for Ruiru East/Juja East Block 2/13803 and Kshs. 244,600/- for Plot Ruiru East/Juja East Block 2/13802.
  - b. The 2<sup>nd</sup> Defendant is hereby ordered to pay the Plaintiffs Kshs. 216,900/- for Ruiru East/Juja East Block 2/13782.
  - c. The 3<sup>rd</sup> Defendant is hereby ordered to pay the Plaintiffs Kshs. 211,800/- for Ruiru East/Juja East Block 2/13794.
  - d. The 4<sup>th</sup> Defendant is hereby ordered to pay the Plaintiffs Kshs. 216,300/- for Ruiru East/Juja Block 2/13790.
  - e. The 5<sup>th</sup> and 6<sup>th</sup> Defendants jointly are hereby ordered to pay the Plaintiffs Kshs. 232,600/- for Ruiru East/Juja East Block 2/13805.
  - f. The 7<sup>th</sup> Defendant is hereby ordered to pay the Plaintiffs Kshs. 219,600/- for Ruiru East/Juja East Block 2/13774 and Kshs. 244,600/- for Ruiru East/Juja East Block 2/13760.
  - g. The said amounts be cleared by all the Defendants within 45 days from the date of this Judgment failure to which an eviction order to issue after being paid back the monies so far paid to the association for the suit properties.
  - h. Due to the nature of this claim, each party to bear its own costs of the suit.
    - i. Each party to bear its own cost of the suit.
3. The Application is anchored on the grounds annexed thereto and the Supporting Affidavit of John Wambua, the 1<sup>st</sup> Applicant herein.
4. The Applicants being aggrieved by the said Judgement have proffered an appeal to this Court. The Applicants were ordered to pay various sums of monies to the 1<sup>st</sup> Respondent within 45 days failure to which they would be evicted from their homes. The Respondents have taken steps to enforce the Judgement and the Applicants face an imminent risk of eviction. In this instance, the 1<sup>st</sup> Respondent has issued a bankers cheque in the sum of Kshs 137,800/- in satisfaction of the decree and the next step is to enforce the Judgement by way of eviction of the Applicants. In the event that stay of execution is not granted, the appeal shall be rendered nugatory. That there is likelihood of the properties being disposed to third parties leading to irreparable loss for which damages will not be sufficient compensation. That the appeal has a high chance of success. That the 3<sup>rd</sup> – 7<sup>th</sup> Respondents are also aggrieved by the Judgement and have proffered an appeal against the said decree. Finally, that the Application has been filed without delay.
5. The Application is opposed through the Supporting Affidavit of Benson Karanja sworn on the 22/7/2022. He averred that the Applicants have filed a similar Application before the trial Court, which Application was set for hearing on the 26/7/22. That the Judgement decreed the Applicants to pay various sums to the 1<sup>st</sup> Respondent within 45 days failure to which they would be evicted



subject to refund of the sums already paid by the Applicants. The Applicants have defaulted to settle the said decretal sum within the 45 days prompting the 1<sup>st</sup> Respondent to refund the Applicants the sum of Kshs 137,800/- vide bankers cheque dated the 6/6/2022. The failure by the Applicants to comply with the Judgement of the Court by remitting the monies due is hurting the operations of the 1<sup>st</sup> Respondent. Further that the Applicants have not satisfied the provisions of Order 42 rule 6 (2) (b) of the *Civil Procedure Rules*. There has been inordinate delay in filing the Application. The 1<sup>st</sup> Respondent urged the Court to dismiss the Application with costs.

6. On the 2/11/2022 the parties elected to canvass the Application by way of written submissions. As at the time of writing the ruling none had complied with the said directions.

7. The key issue for determination before me is whether the Application is merited.

8. The legal provisions for stay of execution are anchored in Order 42 rule 6 of the Civil Procedure Rules that;

“ 6. Stay in case of appeal [Order 42, rule 6.]

(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 sub rule (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.”

9. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the Application and the furnishing of security.

1. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -

a. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.



- c. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
  - d. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.
- 11. Flowing from the Judgement of the Court, it is evident that part one of the said Judgment has been satisfied and what remains is the second part which concerns the eviction of the Applicants. The Applicants have explained and led unchallenged evidence that they are facing eviction at this stage and I am satisfied that the Applicants have demonstrated the substantial loss that they stand to suffer if the eviction is allowed.
- 12. It is trite that the provision of security for the due performance of the decree is within the discretionary purview of the Court. In this case I shall make the final orders in the end.
- 13. Final orders;
  - a. The Application is allowed on terms that the Applicants shall each provide the sum of Kshs 100,000/- (Kenya Shillings One Hundred Thousand Only) for the due performance of the decree which sums shall be deposited in Court within 15 days from the date of this Ruling in default the orders shall automatically lapse with no further orders of this Court.
  - b. Costs shall be in the cause.
- 14. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 2<sup>ND</sup> DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

1<sup>st</sup> – 7<sup>th</sup> Appellants – Absent

1<sup>st</sup> Respondent – Absent

Mugo for 2<sup>nd</sup> – 7<sup>th</sup> Respondents

**Court Assistants – Esther / Kevin**

