



**Njagi v Thaara (Environment and Land Appeal 14 of 2020)
[2023] KEELC 17266 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 14 OF 2020**

CK NZILI, J

MAY 3, 2023

BETWEEN

BENSON NJAGI APPLICANT

AND

WILSON MIRITI THAARA RESPONDENT

RULING

1. By an application dated March 30, 2023 the court is asked to stay the execution of a warrant of arrest or proclamation and sale in execution of costs by Warleen Auctioneers made on March 24, 2023, pending the hearing of the appeal at the Court of Appeal at Nyeri by the applicant.
2. The grounds as contained on the application and the supporting affidavit by Benson Njagi are that costs were assessed at Kshs 152,933/= livestock and on March 24, 2023, attachment of his livestock was made despite his appeal which was argued on March 13, 2023 pending judgment on June 9, 2023.
3. Further, the applicant averred that he stands to suffer substantial loss prejudice and damages should the animals be disposed off being his only source of income. He attached a copy of the taxation ruling dated November 11, 2022 and the notice of hearing of his appeal from the Court of Appeal as annexure marked BM "1" and 2 respectively.
4. The application is opposed through a replying affidavit sworn by Wilson Miriti on April 11, 2023 on the basis that after the judgment on December 15, 2021, no stay was sought for against the costs hence he was at liberty to execute for his costs.
5. In written submissions dated April 6, 2023, the applicant urged the court to find the timing of the execution suspect, the substantial loss and damage demonstrated and therefore the applicant deserving the orders of stay.



6. Order 42 *Civil Procedure Rules* provides that any party may without delay move the court for a stay of execution, demonstrate substantial loss, offer security for the due satisfaction of the decree should the appeal fail and lastly, demonstrate that it is in the interest of justice to grant the orders sought.
7. This court determined the appeal by a judgment delivered on December 15, 2021 after a notice of appeal was filed on January 14, 2023.
8. The record appear that on November 11, 2023 the costs were taxed and a certificate thereof issued on December 1, 2022.
9. As at the time of a notice of the hearing of the appeal was issued an email dated February 22, 2023 a notice of proclamation had already been signed by the Deputy Registrar together with an application for execution of the decree dated January 31, 2023.
10. While aware of all these developments, the applicant did not move the court at the appellate stage for any interim orders yet he knew of the impending execution. Therefore, I find that the delay to move the court is inordinate and not explained at all.
11. As to substantial loss the court in *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR held that execution process was a lawful exercise which does not in itself amount to substantial loss in absence of other vitiating, factors which must be demonstrated.
12. In *Kenya Shell v Kibiru & another* (1986) KLR 410 the court held that a mere fact that the decretal sum is colossal does not amount to substantial loss.
13. Again the court in *Butt v Rent Restrict Tribunal* (1979) eKLR said that a party must offer security for the due satisfaction of the decree should the appeal fail. In this application no attempt to demonstration of substantial loss has been made and no security for costs of Kshs 152,000 has been offered.
14. In the premises, I find that the court is *functus officio* in view of the pending judgment of the Court of Appeal.
15. In the event the appeal were to be meritorious that the respondent is a man of straw who may not refund the costs. The application is dismissed with costs.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS / OPEN COURT AT MERU
THIS 3RD DAY OF MAY 2023**

In presence of

C.A John Paul

Miss Kimotho for respondent

Mrs. Muia for applicant

HON. C. NZILI

ELC JUDGE

