



**Mwangi v Wachira (Environment and Land Appeal E002 of 2023)
[2023] KEELC 17862 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

YM ANGIMA, J

JUNE 8, 2023

BETWEEN

JANE WANJIRU MWANGI APPELLANT

AND

CATHERINE WAIRIMU WACHIRA RESPONDENT

*(Being an appeal against the Judgment and Decree of Honourable S.
Mogute (PM) dated 13.12.2022 in Nyahururu MC ELC No. 390 of 2018)*

RULING

A. The Appellant's Application

1. By a notice of motion dated January 26, 2023 brought under Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) (the Rules) Sections 1A, 3A of the [Civil Procedure Act](#), (Cap 21) and all other enabling provisions of the law the Appellant sought a stay of execution of the judgment and decree of Hon S Mogute (PM) dated December 13, 2022 in Nyahururu CM ELC No 390 of 2018 and in particular his eviction from the suit property, that is, Title No Nyandarua/Kaimbaga/587 (the suit property) pending the hearing and determination of the appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on January 26, 2023 and the exhibits thereto. It was stated that the Appellant shall suffer severe prejudice if she were evicted from the suit property since it was her source of livelihood. It was contended that she had mature crops on the suit property and that if they were to be destroyed she would suffer from hunger and starvation for the rest of the year. It was further contended that unless the stay sought was granted, the Appellant stood to suffer substantial and irreparable loss and that the pending appeal might be rendered nugatory.



B. The respondent's response

3. The Respondent filed a replying affidavit sworn on February 2, 2023 in opposition to the application. It was contended that the Appellant was not residing on the suit property as she was merely cultivating crops thereon. It was further contended that the Appellant stood no risk of starvation at all since the court had already granted her an order to harvest her crops upon maturity hence there was no evidence that she stood to suffer any irreparable and substantial loss as alleged or at all.
4. The Respondent further stated that the Appellant had failed to demonstrate that her pending appeal stood the risk of being rendered nugatory in the absence of a stay order. The Respondent contended that the Appellant had failed to offer security for due performance of the decree which may ultimately be binding upon her. As a result, the court was urged to dismiss the application with costs.

C. Directions on submissions

5. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed her submissions on April 14, 2023 whereas the Respondent's submissions were filed on April 24, 2023.

D. Issue for determination

6. The court has considered the Appellant's notice of motion dated January 26, 2023 and the replying affidavit in opposition thereto. The court is of the opinion that the main question for determination herein is whether the Appellant has made out a case for stay of execution pending appeal.

E. Analysis and determination

7. The Appellant submitted that she had a strong appeal with a high probability of success and that she stood to suffer substantial loss unless the stay sought was granted. She further submitted that her pending appeal stood the risk of being rendered nugatory, if ultimately successful, in the absence of a stay. It was further contended that there was a risk of the Respondent alienating the suit property with the consequence that it may not be available upon conclusion of the appeal.
8. The Appellant cited the cases of *Hassan Guyo Wakulo v Straman EA Ltd* [2013] eKLR; *RWW v EKW* [2019] eKLR; and *Republic v Rent Restriction Tribunal* [1979] eKLR in support of her application and submitted that she had satisfied the legal requirements for the grant of a stay pending appeal.
9. On the other hand, the Respondent submitted that the Appellant had failed to satisfy the requirements for granting stay as stipulated under Order 42 rule 6(2) of the Rules. It was submitted that there was no evidence of the Appellant suffering substantial or irreparable loss in the absence of a stay since she was merely cultivating the suit property and not residing thereon. It was also submitted that there was no evidence to demonstrate that the pending appeal might be rendered nugatory should it be successful since the Appellant may still recover the same should she be successful in the appeal. It was further contended that the Appellant had not disclosed the nature of the security she was willing to give for due performance of the decree should the appeal be unsuccessful.
10. The Respondent relied upon the cases of *James Wangalwa & Another v Agnes Naliaka Chesoto* [2012] eKLR and *Wellington Lusweti Baraza & 47 Others v Lands Limited and Another* [2015] eKLR in opposition to the application and urged the court to dismiss it with costs.



11. Order 42 rule 6(2) of the Rules on stay of execution stipulates as follows:

- “(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.”

12. The court has fully considered the material and submissions on record on the principles for the grant of a stay of execution pending appeal. The Appellant contended that she would suffer substantial loss because the suit property was her only source of food and livelihood and that she stood the risk of starving for the rest of the year 2023 unless the stay sought was granted. The Appellant did not contest the Respondent’s assertion that she was not residing on the suit property but was merely cultivating crops thereon.

13. The material on record shows that vide an order made on February 8, 2023 the Appellant was allowed to harvest her crops on the suit property upon maturity but was prohibited from cultivating additional crops. In the circumstances, the court is not satisfied that the Appellant shall suffer from hunger or starvation in the absence of a stay. It shall be the duty of the Appellant to take steps to file her record of appeal and to prosecute the pending appeal expeditiously before the next planting season.

14. The court has also considered the Appellant’s submission that there was a risk of the suit property being alienated during the pendency of the appeal. The court has noted that the issue of alienation or disposal of the suit property was raised belatedly in the Appellant’s submissions. It was not raised in her supporting affidavit at all.

15. The court is unable to find any indication on record to the effect that the suit property may be alienated during the pendency of the appeal. There is no evidence to demonstrate that the Appellant shall not be able to recover the suit property from the Respondent should the pending appeal ultimately succeed. Registration of property is a reversible process and so is the gaining and losing of possession of property. In the circumstances, the court is not satisfied that the appeal may be rendered nugatory should the Appellant ultimately succeed on appeal.

F. Conclusion and disposal order

16. The upshot of the foregoing is that the court is not satisfied that the Appellant has satisfied the principal requirement for the grant of an order of stay pending appeal in the circumstances. It is not enough to demonstrate that the application for stay was filed without unreasonable delay if the requirement of substantial loss is not satisfied. Consequently, the Appellant’s notice of motion dated January 26, 2023 is hereby dismissed. Costs of the application shall be costs in the appeal.

17 It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 8TH DAY OF JUNE, 2023.

In the presence of:

Mr. Ojare for the Appellant



Ms. Wanjiru Muriithi for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

