



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mai Mahiu Kijabe Longonot Co Ltd v Kariuki & 6 others (Environment & Land Case 36 of 2017) [2023] KEELC 17979 (KLR) (7 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17979 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 36 OF 2017**

**FM NJOROGE, J**

**JUNE 7, 2023**

**BETWEEN**

**MAI MAHIU KIJABE LONGONOT CO LTD ..... PLAINTIFF**

**AND**

**WINFRED MUTHONI KARIUKI ..... 1<sup>ST</sup> DEFENDANT**

**BENSON IRUNGU KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**ALICE WANGUI KARIUKI ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH KIMANI KABAUKU ..... 4<sup>TH</sup> DEFENDANT**

**SAMMY MWICIGI ..... 5<sup>TH</sup> DEFENDANT**

**HANNAH NJERI ..... 6<sup>TH</sup> DEFENDANT**

**GATERE KARIUKI ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the defendants Notice of Motion application dated February 27, 2023 expressed to be brought under order 40 rule 1, order 42 rule 6(1) of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) which sought the following orders:
  - a. Spent
  - b. Spent
  - c. That there be a stay of execution of the judgement of Justice Mwangi Njoroge delivered on 9<sup>th</sup> February 2023 pending hearing and determination of the applicant's intended appeal against the whole of the judgement.
  - d. That costs of this application be provided for.



2. The application is supported by the affidavit of Mary Muthoni Kariuki sworn on February 27, 2023. The grounds on the face of the application and the supporting affidavit are that the defendants had filed an originating summons seeking to be declared the owners of LR No 1144/17/XXIV through adverse possession; that the plaintiff on the other hand filed a claim against the defendants seeking that they be evicted from the suit property; that the matters were consolidated, heard and judgement delivered on February 9, 2023; that the court in its judgement dismissed the defendants originating summons, allowed the respondent's suit and issued orders of eviction against them; that the defendants were dissatisfied with the judgement of the court and lodged a Notice of Appeal and also requested for typed proceedings; that the defendants are intent on appealing the said judgement and should the plaintiff execute the judgement, their appeal will be rendered nugatory; that the defendants stand to suffer great financial loss as they have made financial inputs in order to maintain the building located on the suit property; that the intended appeal is arguable and will be rendered nugatory if the orders sought are not granted; that the plaintiff will not suffer prejudice if the orders sought are granted and that it is fair and just that the application be allowed.
3. In response to the said application, the plaintiff filed grounds of opposition dated 7/03/2023 and a replying affidavit sworn by Patrick Ndungu Kuria on the same date. Both the grounds of opposition and the replying affidavit were filed on 9/03/2023.
4. The grounds of opposition are as follows:
  - a. That the applicants have not either in the application or in the affidavit shown that they will suffer a substantial loss unless the order of stay is granted.
  - b. That no decree has been extracted and none was attached to the application.
  - c. That the ultimate decree requires the applicants to vacate the suit property on the basis that they are trespassers and in the event that they succeed in the appeal, the land shall still be available. In other words, the appeal shall not be rendered nugatory.
  - d. That the second part of the ultimate decree is payment of Kshs 1,000,000/= and costs to the respondent. It has not been demonstrated that the respondent shall not be able to refund the said sum in the event that the applicants succeed in the intended appeal.
  - e. That the applicants have not offered any security in terms of costs and the judgement sum to the respondent.
  - f. That it has not been demonstrated that the applicants have any arguable appeal. No memorandum of appeal was attached and mere statement that there is an arguable appeal is not sufficient.
  - g. That the justice of the case demands that the respondent should reap the fruits of its judgement and should not be denied from doing so without demonstrable and cogent reasons.
5. In the replying affidavit filed by the respondent, Patrick Ndung'u Kuria reiterated the grounds in the grounds of opposition and averred that the orders intended to be appealed from relate to LR No 1144/17/XXIV; that the defendants had testified that they do not live on the suit property; that the suit premises on the suit property is rented out; that no substantial loss can arise from a business premises as they can be compensated if they succeed in the intended appeal; that the defendants have not offered any security for costs and since they have not annexed their Memorandum of Appeal they have not demonstrated that they have an arguable appeal.



## Submissions

6. The defendants filed their submissions dated 4/04/2023 and filed on April 11, 2023 while the plaintiff filed its submissions dated April 20, 2023 on the same date.
7. The defendants in their submissions set out the background and submitted on whether stay of execution should be granted pending the hearing and determination of their intended appeal. The defendants relied on Order 46 Rule 6 of the [Civil Procedure Rules](#) and submitted that they need only demonstrate that their application has been made without unreasonable delay, whether they will suffer substantial loss unless the stay order is made and readiness to deposit security for the due performance of the decree of the court in order to succeed in their application.
8. The defendants relied on the cases of [Peter Ondande T/A Spreawett Chemis vs Josephine Wangari Karanja](#) [2006] eKLR, [Kisiang'ani Tulienge and 2 others vs Paul Wafula and 2 others](#) [1998] eKLR and submitted that their application was filed without unreasonable delay as judgement in the matter was delivered on February 9, 2023 and they filed their application on February 28, 2023. On whether they are likely to suffer substantial loss if the stay orders are not granted, the defendants submitted that they are likely to be evicted from the suit property which would render their appeal nugatory. They relied on the cases of [Ann Wanjiru Waigwa & Another vs Joseph Kiragu Kibarua](#) [2009] eKLR, [James Wangalwa and another vs Agnes Naliaka Cheseto](#) [2012] eKLR in support of their arguments.
9. On the issue of security, the defendants submitted that they are ready and willing to comply with any conditions that this court may set in issuance of orders of stay of execution orders. In response to the plaintiff's grounds of opposition and replying affidavit, the defendants submitted that Article 159(2) (d) of the [Constitution of Kenya](#) mandates the court to ensure that justice is administered without undue regard to technicalities and this was in response to the contention that their application is bad in law for failure to attach a copy of the extracted decree. They concluded their submissions by seeking that their application be allowed as prayed.
10. The plaintiff in its submissions relied on Order 42 Rule 1(1) and (2) of the [Civil Procedure Rules](#) and submitted that the defendants have not demonstrated that they will suffer substantial loss if the orders sought are not granted. The Plaintiff also relied on the case of [Kenya Shell Limited versus Benjamin Karuga Kibiru, Ruth Wairimu Karuga](#) Nairobi Court of Appeal Civil Application No 97 of 1986 reiterated that the defendants have not attached a draft Memorandum of Appeal to enable the court determine if they have an arguable appeal even though it is not a requirement under Order 42 Rule 6(2) of the [Civil Procedure Rules](#). The plaintiff then sought that the defendant's application be dismissed with costs.

## Analysis and determination

11. After considering the application, the responses thereto and the submissions, the only issue that arises for determination is whether the court should grant orders of stay of execution pending appeal.
12. Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) provides as follows:
  - (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 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.
13. The court in the case of Civil Appeal No107 of 2015, *Masisi Mwita v Damaris Wanjiku Njeri* (2016) eKLR held as follows:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another v Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.”

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo v Straman EA Ltd* (2013) as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other.”

14. On whether the application was filed without unreasonable delay, the plaintiff filed the present application on February 28, 2023 while judgement was delivered on February 9, 2023. There is a Notice of Appeal annexed to the defendant’s application dated February 14, 2023 and lodged on the same day. It is therefore my view that that for the purposes of this application, there is an appeal in place and the application was filed without unreasonable delay.
15. On whether the defendants will stand to suffer substantial loss, the defendants argued that the court in its judgement issued orders for eviction and that since they have spent money in maintaining the building that is standing on the suit property, they stand to suffer great financial loss if their application is not granted. The plaintiff on the other hand argued that during the hearing of the case, the defendants testified that they did not live on the suit property as the building on the land is rented out and therefore they cannot suffer any substantial loss that cannot be compensated if their intended appeal succeeded.
16. The court in the case of *Elishaphan Omollo Nyasita v Gradus Atieno Othim & another* [2019] eKLR held as follows:

“ 11. It is trite law that it is not merely sufficient for the applicant to state that he or rather she is likely to suffer substantial loss if the application for stay of execution sought is not allowed. The applicant has not shown the damage or loss that he is likely to suffer if the order sought in the application is not granted. Moreover, to grant the order aforesaid would



deny a successful litigant (respondent) the fruits of his judgment as held in Kenya Shell Ltd case (*supra*).”

17. It is my view that the defendants in this matter have not demonstrated the substantial loss that they are likely to suffer if the orders sought are not granted. Consequently, their application dated February 27, 2023 lacks merit and it is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 7<sup>TH</sup> DAY OF JUNE, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

