



**Mogote v Kamau (Environment & Land Case 203 of 2013)
[2023] KEELC 17971 (KLR) (6 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 203 OF 2013
FM NJOROGE, J
JUNE 6, 2023**

BETWEEN

PETER CHEGE MOGOTE PLAINTIFF

AND

FAITH WANGECHI KAMAU DEFENDANT

RULING

1. The plaintiff through a Notice of Motion dated October 24, 2022 seeks the following orders:
 - a. ... spent.
 - b. ...spent.
 - c. ...spent.
 - d. That pending the hearing and determination of the Appeal serialized as Nakuru Court of Appeal No E086 of 2022, this Honourable Court be pleased to stay execution of the Judgment and/or incidentals therefrom.
 - e. That costs of this application be awarded to the applicant.
2. The application is based on the grounds at its foot and in the affidavit of the plaintiff dated October 24, 2022. They are that upon the dismissal of the plaintiff's suit the defendant is in a position to enter the suit premises; that the applicant has already filed an appeal, being Nakuru Court of Appeal No E086 of 2022 which is yet to be heard; that the appeal has high chances of success; that the applicant needs to be allowed to ventilate his appeal without the threat of being kicked out before it is concluded; that the respondent has misappropriated the applicant's developments on the suit land on the strength of the dismissal of the applicant's suit; that the developments on the suit land stand to be demolished unless orders of stay of execution ought to be granted.



3. The application is opposed by the respondent vide her replying affidavit dated November 10, 2023 in which she states that the applicant proceeded with the hearing of the suit in her absence but nevertheless failed to persuade the court that his case had any merit; that long before the judgment the applicant had already vacated the property and she found it vacant and started cultivating it; that the judgment has been executed and there is nothing to stay.
4. The applicant foiled written submissions on November 24, 2022 and the respondent on November 22, 2022. I have considered those submissions.
5. 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.
6. The court in the case of *Masisi Mwita vs Damaris Wanjiku Njeri* (2016) eKLR (Civil Appeal No 107 of 2015) 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 Wakala Vs 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.”
7. There must be an appeal in place for orders of stay pending appeal to be issued. Though nothing is exhibited in the application to show that there is an appeal and this court has to rely solely on the bare statements in the affidavit in support thereof, there is also no denial by the respondent that such an appeal exists and the court will allow the applicant a margin and presume that the respondent’s silence on the issue is due to the knowledge that the appeal exists.



8. I must consider whether the application has been brought without undue delay. Judgment was delivered on 25/5/2022. The application was filed on October 25, 2022 after a period of four months. No explanation has been offered for the delay in filing of the application. If the applicant was in the suit premises and was in the process of appealing the judgment, there is no good reason given as to why he could not file the application promptly. I find the delay in lodging the application to be unreasonable in the circumstances of this case.
9. Besides there is no denial by way of a supplementary affidavit that the respondent already has taken possession of the premises and the applicant's own supporting affidavit appears to cement the fact when it exhibits the developments that the respondent has erected on the premises. Consequently, I find that the judgment has already been executed and there is nothing to stay. No further loss or damage beyond that which occurred upon effecting of the judgment, if any, is likely to occur to the applicant.
10. The upshot of the foregoing is that the application dated October 24, 2022 lacks merit and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 6TH DAY OF JUNE 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

