



**Kiritu v Mureithi (Environment and Land Appeal E005 of 2023)
[2023] KEELC 18449 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

YM ANGIMA, J

JULY 3, 2023

BETWEEN

DANIEL NJUGUNA KIRITU APPELLANT

AND

CHARLES MUHURI MUREITHI RESPONDENT

RULING

A. Appellant's Application

1. Vide a notice of motion dated February 10, 2023 brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, (Cap. 21) and Order 42 Rule 6(1) and (2) and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 (the Rules) and all other enabling provisions of the law the Appellant sought a stay of execution of the judgment and decree of the trial court in Nyahururu CM ELC No 179 of 2018 – Charity Gathoni Muhuri (Suing as the legal representative of the Estate of Charles Muhuri Mureithi) v Daniel Njuguna Kiritu. By the said judgment, the trial court dismissed the appellant's counterclaim and allowed the respondent's suit for an eviction order from Title No. Nyandarua/ Mawingo Salient/29 (the suit property).
2. The said 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 February 10, 2023 together with the exhibits thereto. The appellant contended that he and his family members and his siblings stood to suffer substantial loss if they were to be evicted from the suit property during the pendency of the instant appeal. He contended that he and his family members had been residing on the suit property for over 18 years and that they had developed the same by constructing houses and cultivating crops thereon.
3. The appellant also stated that the appeal had high chances of success and that he was willing to provide security for due performance of any decree which may ultimately be binding upon him. He further stated that the application had been filed without unreasonable delay and that the respondent shall not suffer any prejudice if the stay sought was granted.



B. Respondent's Response

4. The respondent filed a replying affidavit sworn on February 28, 2023 in opposition to the application. It was denied that the appellant's siblings and other family members were residing on the suit property. It was also denied that the appellant had undertaken any extensive developments on the suit property. The respondent asserted that the appellant had only temporary structures on the suit property.
5. The respondent asserted that she had been denied the use of the suit property for over 30 years hence it was in order to allow her to enjoy the fruits of her judgment. It was contended that the appellant had failed to demonstrate what substantial loss he stood to suffer in the event of his eviction. It was contended that the appellant and his family members had several other properties to which they could relocate in the event of an eviction. The respondent further stated that the appellant was not forthright on what security was being offered for due performance of the decree hence the court was urged to dismiss the application.

C. Appellant's Rejoinder

6. The appellant filed a supplementary affidavit sworn on March 1, 2023 in response to the respondent's replying affidavit. It was contended that the alternative properties referred to in the replying affidavit were sold some years ago hence not available for settlement. The appellant further stated that he had both temporary and permanent structures on the suit property hence he and his siblings stood to suffer substantial loss if they were to be evicted before the hearing and determination of the appeal.

D. Directions on Submissions

7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the appellant's submissions were filed on April 13, 2023 whereas the respondent's submissions were filed on May 2, 2023.

E. Issues for Determination

8. The court has considered the appellant's notice of motion dated February 10, 2023, the respondent's replying in opposition thereto as well as the appellant's supplementary affidavit. The court is of the opinion that the main question for determination herein is whether or not the appellant has made out a case for the grant of an order of stay of execution pending appeal.

F. Analysis and Determination

9. The appellant submitted that he had satisfied the requirements for the grant of a stay pending appeal. It was submitted that the application had been filed expeditiously and without undue delay and that an eviction during the pendency of the appeal would result in substantial loss since he and his siblings had been in occupation of the suit property for a very long time and had developed it extensively.
10. The appellant relied upon the cases of *Antoine Ndiaye v African Virtual University* [2015] eKLR; *Kimutai Lelei v Hosea Bitok* [2020] eKLR; *Peter Nakupang Lowar v Nautu Lowar* [2022] eKLR; and *Focin Motorcycle Co Ltd v Ann Wambui Wangui & another* [2018] eKLR in support of his application and urged the court to allow it.
11. The respondent, on the other hand, submitted that the appellant had not demonstrated sufficient cause to warrant a stay of execution pending appeal. It was contended that the appellant had not



- demonstrated the elements of substantial loss and that since the suit before the trial court had taken a long time to determine she ought to be allowed to enjoy the fruits of her judgment.
12. The respondent relied, *inter alia*, upon the cases of *Halai & another v Thornton & Turpin [1963] Ltd* Nairobi Civil Application No 15 of 1990, *Hon Attorney General v Law Society of Kenya & another* [2013] eKLR; and *Jessikay Enterprises Ltd v George Kaboto Muiruri* [2022] eKLR in opposition to the application and urged the court to disallow the same.
 13. Order 42 rule 6(2) of the Rules on stay of execution stipulates as follows:
 - “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.
 14. In the case of *Butt v Rent Restriction Tribunal* [1979] eKLR it was held, *inter alia*, that the court should exercise its judicial discretion under Order 42 of the Rules in such manner as to prevent a successful appeal from being rendered nugatory. It was further held that whether or not a stay order should be granted depended on the particular circumstances of each case.
 15. There is no doubt from the material on record that the appellant, his siblings and other family members have been in occupation of the suit property for a very long period of time. It is also evident from the material on record that the appellant and his co-occupants have undertaken some developments on the suit property which includes the construction of some permanent and temporary structures.
 16. The court is satisfied that if the appellant and his siblings were to be evicted and their houses demolished and removed from the suit property, they shall suffer substantial loss within the meaning of Order 42 rule 6 of the Rules. Even if the appellant had alternative land to relocate to that would require construction of new buildings which would take some time to construct. Such an eviction would cause a serious socio-economic disruption to the Appellant and his siblings during the pendency of the appeal.
 17. The court is further satisfied that the instant application was filed expeditiously and without unreasonable delay. The record shows that the impugned judgment dated December 1, 2022 was delivered on January 25, 2023 whereas the instant application was filed on February 10, 2023.
 18. Since the main prayer granted by the trial court was an eviction order the court is of the view that no security would be required from the appellant for due performance or enforcement of the eviction order. There was no award of costs by the trial court since it was directed that each party shall bear his own costs.

G. Conclusion and Disposal Orders

19. The upshot of the foregoing is that the court finds merit in the appellant’s application for stay of execution of the decree pending appeal. Accordingly, the court makes the following orders for disposal thereof:
 - a. There shall be a stay of execution of the judgment and decree of the trial court in Nyahururu CM ELC No. 179 of 2018 for a period of 2 years from the date hereof or until conclusion of the appeal, whichever comes first.



- b. The appellant shall file and serve his record of appeal within 60 days from the date hereof and fix the appeal for directions.
- c. The appeal shall be mentioned on September 21, 2023 to confirm the appellant's compliance.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 3RD DAY OF JULY, 2023.

In the presence of:

Ms. Wanjiru Muriithi for the Appellant

Ms. Nancy Njoroge for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

