



REPUBLIC OF KENYA



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**Njiru v Muriungi & 4 others (Environment & Land Case 28 of 2020)
[2023] KEELC 19964 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 28 OF 2020
CK NZILI, J
SEPTEMBER 20, 2023**

BETWEEN

PATRICK KATHURIMA NJIRU PLAINTIFF

AND

RICHARD KIRIINYA MURIUNGI 1ST DEFENDANT

DORIS KATHAMBI MURIUNGI 2ND DEFENDANT

PETER MARETE 3RD DEFENDANT

FAITH MUTHINI NJIRU 4TH DEFENDANT

LAND REGISTRAR, MERU DISTRICT LAND REGISTRY 5TH DEFENDANT

RULING

1. The court, by an application dated 8.6.2023, is asked to stay the execution of the judgment delivered on 24.5.2023 on the basis that an appeal has been preferred against it, the applicant lives on the suit premises with a young family; the defendants are neither in occupation nor in use of the suit premises except on occasional visits which they can freely access; that the transfers were to be effected within 30 days by the Deputy Registrar and that unless an order of stay is granted the title deeds will be canceled, rendering the appeal moot, occasioning substantial loss and anguish to the young family and lastly violating the children rights and those of appeal. Further, the applicant avers that no prejudice would be visited upon the respondents, with their properties and homes elsewhere, until their stake is determined after the appeal's conclusion. Regarding security, the applicant avers that he was willing to execute an undertaking to sign the transfers upon the appeal's conclusion. All these reasons and grounds are contained on the face of the application and the supporting affidavit sworn on 8.6.2023 by Patrick Kathurima Njiru.



2. The application is opposed through a replying affidavit by Richard Kiriinya Muriungi, the 1st respondent, on behalf of the respondent sworn on 4.7.2023 for being vexatious and unmerited. It is averred that the applicant has not demonstrated substantial loss, especially since his mother, the 4th respondent, confirmed that the applicant has another home in Embu; hence, it was not true that he would be rendered destitute, otherwise to grant the orders sought would amount to perpetuating the fraud already committed by the applicant.
3. The respondents further averred that the substratum of the appeal would not be taken away since the subject land was immutable, and had no intention of alienating it. The respondents averred that the applicant was out to continue occupying the suit land to derive rental income or benefits from there, yet the right of appeal should not take away their rights to realize the fruits of the judgment, and in the absence of any reasonable security, the application should be rejected.
4. Additionally, the respondents averred that the suit land formed part of their ancestral land, with immense sentimental value and, therefore, the application fails to satisfy the requirements for the grant of stay of execution.
5. A party seeking a stay of execution has to meet the critical requirements under order 42 rule 6 of the Civil Procedure Rules, namely; apply on time; demonstrate substantial loss; offer security for the due realization of the decree should the appeal fail, and lastly, establish that it is in the interest of justice for the orders sought to be granted.
6. The purpose of an application for a stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant exercising his undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. See *Consolidated Marine vs. Nampijja and another Civil Application (NRB) No. 93 of (1989)*. In *Mukuma vs. Abuoga* (1988) KLR 645, the court said that substantial loss must be prevented by preserving the status quo because such a loss would render the appeal nugatory.
7. On the demonstration of substantial loss, in *Gethi vs. Gethi* (2008) eKLR, the court said that it was not enough for the applicant to say that they live or reside on the suit land and will suffer substantial loss. Instead, the court observed that an applicant must go further and show the considerable loss they stand to suffer if the respondent executed the decree in the suit against them. In *Machira t/a Machira and Co. Advocates vs East African Standard* (2002) eKLR, Kuloba J, said that a successful party was entitled to the fruits of his judgment.
8. Regarding security in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates* (2014) eKLR, it was held that security was not aimed at punishing a judgment debtor but would be a guarantee for the due performance of a decree, which was like a debt. Additionally, in *Butt vs. Rent Restrictions Tribunal* (1992) KLR 417, the court said that stay was discretionally and should not be refused if there were reasonable grounds for granting it, especially if exceptional circumstances were evident.
9. In the case of the *Commissioner of Domestic Taxes vs. Panalpina Airflo Ltd* (2019) eKLR, the court observed nugatory would denote whether or not what was sought to be stayed, if allowed to happen was reversible or if not reversible, whether damages will reasonably compensate the party aggrieved.
10. A party seeking a stay of execution must, therefore, establish what the substratum of the appeal is and how it was likely to be changed if the execution process was to occur. The execution process has been termed a lawful process since it was a legal consequence of a decision. See *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR.



11. In *NIC Bank Ltd & others vs. Mombasa Water Products Ltd* (2021) eKLR, the court cited *Stanley Kangethe Kinyanjui vs Tony Keter & others* (2013) eKLR that an arguable appeal ought to be argued fully before the court and one which was not frivolous. Further, the court said nugatory would mean worthless, futile or invalid, and trifling. The court cited with approval *Housing Finance Corporation of Kenya vs. Sharok Kher Mohamed Ali Hirji and another* (2015) eKLR, that the applicant must demonstrate undue hardship. As held in *Reliance Bank (in liquidation) Ltd vs Norlake Investment Ltd* (2002) E. A 227, the court must determine if refusing to grant an order of stay to the applicant would cause it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined.
12. In this application, the applicant has merely said he has been staying on the suit premises with his young family, while the respondents occasionally access the same, which they are at liberty to do as he pursues his appeal. He does not specify which of the suit properties he resides in. The applicant does not state the nature of developments he has undertaken therein. The applicant does not say what threat or loss would occur to him more than the suffering or hardships the respondents would be exposed to by being denied the fruits of judgment as successful litigants.
13. The applicant does not offer to surrender the title deeds to the court as a condition precedent and as a sign of good faith should his appeal not succeed. The applicant has not provided any security of the costs imposed on him in favor of the respondents.
14. The respondents have raised issues that the applicants want to stay on the suit premises due to the accruing rental income. Further, the applicant has not addressed the issue raised that he has an alternative residence in Embu; hence, it was not true that he would be rendered destitute should the execution ensue. See *Nyaboke vs. NCBA Bank Kenya PLC & another* (Civil Application E 308 of 2021) (2021) KECA 323 (KLB) 20th December 2021) (ruling).
15. In *RWW vs. EKW* (2019) eKLR, the court observed that the rights of a successful party who should not be deprived of the fruits of his judgment, should be considered to ensure that he is not prejudiced, which exercise was a balancing act and is not left worse off as held in *Absalom Dora vs Turbo Transporters* (2013) eKLR.
16. In *Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui & another* (2018) eKLR, the court said it was insufficient for an applicant to state that he was ready to offer security without proposing the kind of security.
17. The court observes that the suit parcels were occupied by and continue to be under the respondents' use. There has been an order in favor of the respondents, and the applicant's alleged eviction notice has not been served upon the applicant in line with sections 152A, B, C and D, E & F of the *Land Act*. It is not enough to allege an impending eviction. Even if the transfers of the suit land were to be effected in favor of the respondents, the same is reversible.
18. The upshot is that I find the application lacking merits. The same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 20TH DAY OF SEPTEMBER 2023**

In presence of

C.A Kananu/Mukami

Bosibori for Kiplagat for applicant



Mr. Kaiuki for the 1st – 4th respondents

Maina for Mbaikyatta for 5th defendant

HON. CK NZILI

ELC JUDGE

