



Guchu & 3 others v Kamau (Suing as the personal representative of the Estate of Antony Kamau Njuguna) (Environment and Land Appeal 10 of 2023) [2023] KEELC 20466 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 10 OF 2023
LN GACHERU, J
OCTOBER 5, 2023**

BETWEEN

PETER GUCHU APPLICANT

AND

KAGAA FARMERS CO-OPERATIVE SOCIETY LTD 1ST APPELLANT

THE LAND REGISTRAR THIKA 2ND APPELLANT

THE HONOURABLE ATTORNEY GENERAL 3RD APPELLANT

AND

SEBASTIAN CHEGE KAMAU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTONY KAMAU NJUGUNA) RESPONDENT

RULING

1. The Respondent herein filed a suit against the Appellants in Kandara SPM MCL& E No. 15, for eviction orders. The trial Court entered judgment in favour of the Respondent against the Appellants vide its judgment delivered on 15th March, 2023. Dissatisfied with the said Judgment of the Court, the 1st Appellant preferred the instant appeal through the Memorandum of Appeal dated 13th April, 2023. The Appeal is anchored on several grounds set out in the Memorandum of Appeal.
2. Contemporaneously, the 1st Appellant filed a Notice of Motion Application dated 12th April 2023, and sought for the following orders; -
 1. That the Law Firm of Chui Karera & Co. Advocates be granted leave to come on record to represent the 1st Appellant



2. That the 1st Appellant/Applicant be granted leave for extension orders, so that he can get certified Court's documents to file Record of Appeal and the annexed Memorandum of Appeal be deemed as filed upon payment of the Court requisite fees
 3. That the Court do make an order of stay of execution of the judgment made on 15/03/2023, and the decree pending the hearing and determination of the intended appeal
 4. That the costs of this application be provided for
 5. That such other orders and/ or further orders be made as this Honourable Court may please
3. The Application is anchored on Seven Grounds set out on the face of the Application and the Supporting Affidavit of the 1st Appellant/Applicant – Peter Guchu. The Applicant contends that the Respondent is in a bid to execute the judgment of the trial Court, and which execution will result in him being evicted from the suit property. He contends that he has been in occupation of the suit property for a period of 34 years, and the appeal has a high chance of success. He also contends that he is ready to abide by any conditions and directions that may be issued.
 4. The Respondent opposed the application vide a Replying Affidavit sworn by Sebastian Chege Kamau on the 16th May 2023, and affirms that the suit property belonged to his deceased father and that, the Applicant trespassed on his parcel of land necessitating the suit that was found in his favour. He further averred that he should be allowed to enjoy the fruits of his judgment and also be allowed to evict the Applicant who has trespassed on the suit property. He further deponed that the 1st Appellant/Applicant has not met the conditions for stay of execution. That if the Court is inclined to grant stay, the Applicant should be directed to deposits Kshs. 1,000,000/= as security for costs.
 5. The Application was dispensed with by way of written submissions. The Applicant filed his submissions on 12th June 2023, through the Law Firm of Chui Karera & Co. Associates Advocate, and raised two issues for determination.
 6. On the first issue, he submitted that striking out the appeal on account of non-payment of security is an impediment on access to justice, and which this Court should not countenance. He urged this Court to consider the reasoning of the Supreme Court in the case of Westmont Holdings SDN BHD vs Central Bank of Kenya (2021), KESC 3(KLR) (8th October 2021), where the Court noted that the issue of costs should not be an impediment to access justice.
 7. It is the Applicant's further submissions that he has established the principles for grant of stay within the provisions of Order 42 Rule 6 of the Civil Procedure Rules. He urged this Court to consider the principles of stay as set out in the case of Butt vs Rent Restriction Tribunal {1979}.
 8. The Respondent on the other hand filed his submissions on 4th July 2023, through the Law Firm of Kanyi Kiruchi & Co. Advocates and raised two issues for determination. He submitted on the legal position on stay of execution and relied on a litany of cases. It is his submissions that the 1st Appellant/Applicant has not demonstrated the substantial loss that he will suffer, which must be demonstrated by production of documentary evidence.
 9. On the issue of costs, he submitted that security for costs must be deposited as a condition. He relied on the case of Okumu Constance & Another vs Annah Moraa {2020} and Arun C Sharma vs Ashana Raukundalia t/a Rairundalia & Co. Advocates, where the Courts emphasized on the importance for security for costs. In the end, he submitted that the stay orders should not be granted.
 10. This matter is pending an appeal. The Respondent filed a suit against the Appellants which was commenced vide a Plaint dated 20th February, 2019. The Respondent claimed proprietary interest over



land parcel no. MITUBIRI THUTHUA/ BLOCK 1(KAGAA-KABUKU)464. He averred that the 1st Appellant had gained illegal ingress into his parcel of land and he sought that the Appellant be evicted from the suit property and a temporary injunction be issued.

11. The 1st Appellant filed a Defence and Counter-claim and claimed to be the owner of the suit property and averred that he had a title to the suit property. It was his claim therein that the Respondent had acquired his title illegally and irregularly and he sought for cancellation of the said title.
12. This Court has not perused a copy of the response of the 2nd- 4th Appellants.
13. The trial Court entered judgment for the Respondent against the Appellants. The effect of it was that the 1st Appellant was to be evicted from the suit property. The 1st Appellant unhappy with the judgment preferred this appeal and filed a Notice of Appeal on 12th April, 2023. On 15th March 2023, the trial Court granted the Appellants herein a Thirty Days stay. It is apparent that the stay orders are spent. It is not clear to this Court whether execution has begun.
14. The 1st Appellant/Applicant has now moved this Court seeking inter alia stay of execution. Having read through the application and the annexures thereto, the response and the annexures thereto and having considered the submissions and guided by the authorities cited, the Court finds the issues for determination are; -
 - i. Whether leave should be granted to the Law Firm of Chui Karera & Co. Advocates to come on record for the Applicant?
 - ii. Whether time for filing the Record of Appeal should be extended?
 - iii. Whether there should be stay of execution of the judgment of the trial Court of 15th March, 2023?
 - iv. Who should bear the costs for this application?

1. Whether leave should be granted to the Law Firm of Chui Karera & Co. Advocates to come on record for the Applicant?

15. The right to legal representation is a Constitutional right, that cannot be wished away and a party has the freedom to choose an advocate of his/ her choice as long as it is within the provisions of the law. This is in a bid to protect the sanctity of Court proceedings. Parties did not submit on this prayer and it appears to this Court that the Respondent is not opposed to the same.
16. Order 9 Rule 9 of the Civil Procedure Rules lays out the practice to be followed when choosing to change advocates. It provides;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
17. The Act contemplates a twofold process which is either through an application to Court for leave or by consent and it carries mandatory tone. The purpose of this is to protect the outgoing advocates from unscrupulous litigant and to notify the Court. While an appeal is a fresh proceedings and parties can choose an advocate of their choice without adherence to the foregoing, there is a limitation as was



well enunciated by the Court of Appeal in the case of Tobias M. Wafubwa V Ben Butali [2017] eKLR, where the Court held

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

18. The Applicant has moved this Court for leave and is thus well within the confines of the law. What is not clear is whether the previous counsel was notified or not. Even though, the previous advocate has the option of invoking the relevant procedure to acquire any costs that may be owed to him by the Applicant. This Court shall exercise the unfettered discretion donated by Article 159 of the Constitution and proceeds to grant the leave to the Law Firm of Chui Karera & Co. Advocates to come on record for the 1st Applicant/Appellant herein.

II. Whether time for filing the Record of Appeal and Memorandum of Appeal should be extended?

19. The Applicant has sought for extension of time to file his Record of Appeal. It is evident from the proceedings that the Applicant has not filed a Record of Appeal and what is on record are some scattered documents which do not qualify to be a Record of Appeal.

20. Order 42 Rule 13(4) of Civil Procedure Rules, requires of this Court to;

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- a. the memorandum of appeal;
- b. the pleadings;
- c. the notes of the trial magistrate made at the hearing;
- d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- i. a translation into English shall be provided of any document not in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).



21. This Court is expected to first ensure that the Record of Appeal is in consonance with the above provisions. This is not a matter of procedural technicality, but it goes to the substance of the case since the Court will be accorded an opportunity to know what happened in trial.
22. Section 79G of the *Civil Procedure Act* and rule contemplates that an appeal should be filed in Court within 30 days from the date of judgment. Ideally, this section provides for the filing of a Memorandum of Appeal. There is no prescribed time limit for filing of Record of Appeal. However, it must be filed before the Appeal is listed for directions under Order 42 Rule 13 of the Civil Procedure Rules. (See the case of Sultan Omar Hudhefa v Ann Muthoni Ngugi [2022] eKLR) This does not however grant parties freedom to file late, and the same should be filed at the soonest. after filing the Memorandum of Appeal, taking into account the provisions of Order 42 rule 13(1).
23. This Court has perused a copy of a Memorandum of Appeal that was filed on 14th April, 2023. Judgment was delivered on 15th March, 2023. This was filed within twenty-nine days of the judgment of the trial Court, and this was well within the required timelines. Therefore, this Court cannot issue any extension of time, as there is nothing to remedy. The Judgment of the trial Court was delivered on 15th March, 2023 and Decree issued on 13th April, 2023.

III. Whether there should be stay of execution of the judgment of the trial Court of 15th March, 2023?

24. The Applicant has sought for stay orders against the judgment of the trial Court and he largely anchored this on the likelihood of eviction. The filing of an Appeal does not stop a judgment debtor from executing the judgment of the Court, unless stay orders are granted. After all, orders of the Court cannot be issued in vain. The Court in the case of RWW VS EKW {2019} eKLR, highlighted the importance of stay execution and held as follows;-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

25. The principles for grant of stay pending appeal are well set out under Order 42 Rule 6. The conditions precedent to grant of orders of stay are set out in Rule 6(2) which provides:
 - (2) No order for stay of execution shall be made under sub-rule (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.
26. An Applicant must demonstrate; -
 - (a) That substantial loss may result unless the order is made,
 - (b) That the application has been made without unreasonable delay, and
 - (c) That the Applicant must be willing to give such security as the court orders for the due performance of such decree or order.



27. A Court must also be alive to the overriding interest principle as espoused under Section 1A and 1B of the *Civil Procedure Act*, which call for inter alia just and expedient disposal of cases.
28. The foregoing principles have been elaborated by many Courts. In the wake of the 2010 Constitution, Supreme Court in Application No 5 of 2014;- Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, when determining an issue of stay of execution held;
29. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
- (i) the appeal or intended appeal is arguable and not frivolous; and that
 - (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
- (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:
- SUBPARA (iii)
- That it is in the public interest that the order of stay be granted.
30. This Court is also guided by the principles set out in the case of Butt vs Rent Restriction Tribunal, supra as has been quoted by the parties herein, basing our minds on the foregoing, the Applicant must demonstrate that:
- i. The application has been made without unreasonable delay
 - ii. Applicant will suffer substantial loss
 - iii. The appeal is not frivolous
 - iv. The appeal will be rendered nugatory
 - v. Security of costs for due performance
31. The Applicant having being dissatisfied with the judgment of the trial Court ought to have moved the Court at the soonest for stay orders. It is clear from the Court record that the stay granted by the trial Court was operational for 30 Days, which meant it was to lapse on 30th April, 2023. The Applicant moved this Court on 14th April, 2023, which was sixteen Days before the lapse of the period granted by the trial Court. The Applicant was within the operation of the stay orders granted by the trial Court and this Court cannot say there was any delay. It appears that the Applicant filed the instant application in full knowledge of the lapse of the stay orders.
32. In the case of Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another [2014] eKLR, the Court held that;
- “There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case”
33. In this case, the Court does not see any delay that was occasioned by the Applicant. The Applicant submitted that he filed the application without delay. It is noteworthy that the Applicant filed the instant application during the pendency of the stay orders granted by the subordinate Court and as such the application was timely.



34. The Applicant contends that he will suffer loss should the stay of execution not be granted. He submitted that he has been in occupation of the suit property for 34 years, and he risks being evicted. A perusal of the judgment of the trial Court informs this Court that the Applicant was indeed occupying the suit property and which he maintained was his and even had a title deed to it.
35. The duty to show to this Court the substantial loss rested with the Applicant, as has been stated by various Courts. The Court in the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* rightly held:
- “It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”
36. Further, *Plat GA J* as he then was in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR* held:
- “Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”
37. The trial Court was faced with two conflicting titles and had in the end after investigating titles entered Judgment for the Respondent. In entering judgment for the Respondent the Court ought to investigate the root of title of the 1st Appellant and the Respondent to establish the authenticity of the titles. The Court noted that while the Respondent’s title deed was in consonance with entry in the registry map, the Appellant’s title did not have a Registry Sheet Map. The Court observed that the 1st Appellant’s title did not have a Registry Sheet Map number and his father’s name doesn’t appear in the Green Card.
38. The effect of this was that the Applicant lost his proprietary rights over the suit land and as a result, his occupation and use of the suit property was open to eviction. While no evidence was placed before this Court to show the substantial loss that the Applicant will suffer, this Court in the interest of justice takes note of the mutual evidence that the Applicant was in occupation of the suit land.
39. Also, this Court appreciates the undisputed allegation by the Applicant that he has been in occupation of the suit land for over 34 years and noting the circumstances that resulted in the filing of the suit and also taking into account that should the Applicant be evicted, he is likely to loose the use and occupation of the suit land which may result in an injustice if the appeal succeeds.
40. Further, there is no prejudice that the Respondent will suffer. After all, he has not been in occupation of the suit land and asking him to hold a bit for the Appeal to be determined may not be a triviality.
41. In considering whether the appeal is frivolous or not, this Court will determine whether the appeal is arguable or not. What constitutes an arguable appeal was determined in *Kiu & another v Khaemba & 3 others (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR)*, where the Court held;
- “In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court’s interrogation on the one hand and the courts invitation to the opposite party to respond thereto”



42. This was reiterated by the Court in the case *University of Nairobi Vs Ricatti Business of East Africa* [2020] eKLR, when it held:

“An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous”

43. There is a copy of Memorandum of Appeal filed on 14th April, 2023, which raised several grounds of appeal. The said Memorandum of Appeal within the meaning of an arguable appeal above, raises bona fide issues which negates a pronouncement by this Court. Will this appeal be rendered nugatory if orders for stay are not grant then?

44. Preserving the subject matter of the intended appeal is important so as not to render an appeal nugatory. The onus is on the Applicant to demonstrate that the appeal will be rendered nugatory. The Court of Appeal in the case of *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others* [2018] eKLR, when considering whether to allow an application for injunction and stay pending appeal looked at the definition of “nugatory” as was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232. The court opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence.

45. As to whether the Appeal will be rendered nugatory varies from case to case as it depends on what is to be stayed. In the instant case, it is land. As already stated above, the Applicant has been in occupation and use of the said land. There is no evidence that eviction has already happened. This Court is alive to the fact that if the Applicant has been in occupation of the suit property for a period of 34 years, substantive developments have been done. While there is nothing to show that the Respondent will interfere with the substratum of the appeal, it is in the interest of justice that the subject matter of the appeal be preserved.

46. On the issue of cost the Respondent proposes that the Applicant deposits a sum of Kshs. 1,000,000/= which the Applicant claims will be an impediment to justice. The Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR extensively discussed issues of security for costs. The Court held:-

“The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In *Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another* (1962) E.A. 448, it was held:-

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties..”

It is therefore imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs”



47. Further in the case of Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR, the Court held,

“My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

48. This Court has the discretion to make such orders as to security of costs, but must balance the rights of both parties, and it must not be an impediment to justice. This Court has to prevent the Appeal from being rendered nugatory as well as consider the right of the Respondent to enjoy the fruits of his judgment. There is nothing to show that the Applicant will not be able to remedy the Respondent should the appeal not succeed. While it is commendable that the Respondent suggested a sum for security, this Court notes that the amount is relatively high.

49. In the case of Pamela Awuor Ochieng & another v Elisha Odari Ogonny [2021] Eklr, the Court awarded costs of Kshs. 100,000/= as security in an application for stay. While in the case of Peter Onditi Otieno v Juliana Akinyi Minyama [2022] eKLR, the Court varied the amount awarded as security for costs from Kshs. 300,00/= to 50,000/=. Borrowing from the foregoing, this Court directs that the Applicant shall deposit Kshs. 50,000/= and then surrender the title deed of the suit land to this Court (To deposit the certificate of title to Court).

50. The Applicant has satisfied the conditions for grant of stay of execution and this Court proceeds to grant stay of execution on condition that the Applicant shall undertake the terms of security for costs. The foregoing stay of execution is conditional on the fact that the 1st Appellant/Applicant shall file his Record of Appeal within thirty days from the date hereof and set down the appeal for hearing expeditiously.

IV. Who should bear the costs for this application?

51. It is trite law that the successful party is entitled to costs. While the Application succeeds, this Court takes cognizance of the fact that the Respondent was a successful party at the trial. As such this Court in exercise of its discretion directs that the costs of this application shall abide the outcome of the Appeal.

52. Having carefully considered the Instant Notice of Motion dated 12th April 2023, the Court finds it merited and the said Application is allowed in terms of prayers No. 2 and No. 5 on the condition that the 1st Appellant/Applicant deposits 50,000/= as security and also to surrender the title of the suit property to Court. In regard to prayer No. 4, the Applicant to file his Record of Appeal within a period of 30 Days from the date hereof.

53. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF OCTOBER, 2023.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of;

Ms Wafula for the 1st Appellant/Applicant



2nd Appellant-Absent

3rd Appellant - Absent

4th Appellant -Absent

Mr Wachira H/B for Mr Kanyi Kiruchi for the Respondent

Joel Njonjo Court Assistant

L. GACHERU

JUDGE

5/10/2023

